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THE

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OF

LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.

VOLUME XIV.



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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

MAIM.—See MAYHEM.

MAIN.—See note 1.

MAINE LAW.—See INTOXICATING LIQUORS.

MAINER.—See note 2.

MAINPRISE.—It is an undertaking by one's friends for him, before certain persons for that purpose authorized, that he shall appear at a certain day and answer whatever shall be objected to him in a legal way. Thus to save him from imprisonment in the common jail. It has been used synonymously by many law writers with the word bail.³ The term is now seldom used.

1. **Main Sea.**—The common law definition of the *main sea* was that part of the sea lying outside of the *terre fauces*, or points on the opposite shore sufficiently near to enable persons standing on one shore to distinctly see and discern with the naked eye what is doing on the opposite shore. The water within the *terre fauces*, although properly called the sea, or an arm of the sea, is not the *main sea* within the common law definition. 2 East P. C., ch. 17, § 10, p. 804; U. S. v. Grush, 5 Mason (U. S.) 290; People *Ex rel Morris v. Supervisors*, 73 N. Y. 393; Angell on Tide Waters 4. Baker v. Hoag, 7 N. Y. 555; U. S. v. Millberger, 5 Wheat. (U. S.) 76; Hamilton v. Frazer, Stuart's Canada Rep. 27.

Main Channel.—The *main* channel of a river, within the meaning of the act of Congress authorizing the building of a drawbridge over the Mississippi river at Keokuk, Iowa, and requiring that the draw shall be over the main channel of the river and at an accessible and navigable point, is that bed over which the principal volume of water flows. St. Louis & St. Paul Packet Co. v. Keokuk & Hamilton Bridge Co., 31 Fed. Rep. 755.

Main River.—Where a river is a boundary between states, it is the *main* or permanent river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times.

Middle of Main Channel.—The phrase "middle of the river," when employed to designate the boundary between states, signifies the mean center line of the main channel—or, as it is more frequently expressed, the "thread of the stream," the space within which vessels may and usually do pass. Battenuth v. St. Louis Bridge Co., 5 Am. St. Rep. (Ill.) 553.

From Main Wall of a House.—24 Q. B. Div. 170.

2. In *Rex v. Beare*, 1 Raym. 417, the court held that when a libel is produced written by a man's own hand, and the author of it is unknown, he is taken in the *mainer*, and that throws the proof upon him; and if he cannot produce the composer the verdict will be against him. See also *Heard, Ld. Cr. Cas.*, 440 n.

3. Bacon's Abr. 530.

The chief difference is that a man's mainpernors are barely his sureties and cannot imprison him themselves to com-

Definition. *MAINSWORN—MAINTAIN—ED—ING.* **Definition.**

MAINSWORN.—See note 1.

MAINTAIN—ED—ING.—To keep up; sustain; preserve; to hold or keep in any particular state or condition;² used as a verb, it does not mean to provide or construct.

pel his appearance, as his bail may. 6 Mod. 231; 7 Mod. 77, 85, 98; Ld. Raym. 706; 12 Mod. 275, 348, 606, 607, 667. Bail are sureties that the parties be answerable for the special matters only for which they stipulate. Mainpernors are bound to produce him to answer all charges whatsoever. 3 Bl. Com. 128; Bouv. L. Dict., tit. Mainpernors.

1. Foresworn, by making false oath with hand on book. Brownl. 4; Slater v. Franks, Hob. 125; Bacon's Abr. IX, 62.

2. Louisville R. Co. v. Godman (Ind. 1886), 2 West. Rep. 327.

To Maintain.—In Com. v. Kimball, 105 Mass. 467, WELLS, J., observes in his opinion: "The nuisance, in this case, consists in the illegal use of the building or place. Section 7, ch. 87, of the Gen. Stat. *Massachusetts*, makes anyone who 'keeps or maintains such common nuisance' liable to punishment. This phraseology is adapted to the idea of a nuisance resulting from the perversion of the building or place to an illegal use. To 'keep' may, in its ordinary and more obvious sense, apply only to one who exercises control or proprietorship of the building or place used. But to 'maintain' has no such limited application. The building is not *maintained* by the occupant, but the nuisance is maintained by prosecuting therein the illegal traffic. The alternative, 'whoever keeps or maintains' will apply therefore either to the one who controls the occupation and procures or permits the illegal use, or to one who engages in the illegal use, and thus *maintains* or aids in *maintaining* the public nuisance." See also State v. Main, 31 Conn. 574.

The statute 1 G. & H. 343, § 15, *Indiana*, providing that partition fences "shall be *maintained* throughout the year, equally by both parties," is not limited to repairs simply, but applies as well to the rebuilding of a fence destroyed by fire. Rhodes v. Mummary, 48 Ind. 216.

In Moorhead v. Little Miami R. Co., 17 Ohio 340, 353, the court held that to *maintain* a railroad implies no power to change the location after construction. BIRCHARD, C. J., observes in the opinion of the court: "To build or con-

struct a railroad is one thing; to *maintain* the structure after it is erected or built, is another. The word maintenance has reference to the powers to be exercised after the completion. This is the natural force of the expression.

Maintain in Substantial Repair.—An agreement that the working company shall maintain the railway of the worked company in substantial repair and good working order and condition, the worked company being bound to provide at a certain station proper terminal accommodations to enable the working company to carry on and convey the traffic, and being bound to pay to the working company such toll rent or other consideration for the use of a third company's line and station as the working company might have to pay to such third company; it was held that the word "*maintain*" was limited to the railway of the worked company, and did not extend to the station or any portion of the railway of the third company. Clonmel Traders v. The Waterford & Limerick Railway Co., 4 Ry. & Can. Cas. 92.

"Maintain an Action."—The auditor of State alone is authorized to *maintain an action* against officers and trustees of savings banks for violation of their statutory duties. Ryan v. Ray, 2 West. Rep. 323.

In Boutiller, Admr. v. The Steamboat Milwaukee, 8 Minn. 97, an action was brought against the steamboat Milwaukee, by name, to recover damages for the killing of Francis Boutiller, by wrongfully running him down while in a small boat in the Mississippi river. The action is brought under the act concerning boats and vessels, found on page 647 of the compiled statutes, and the act concerning actions by and concerning executors, administrators, etc., page 610 of the same book. In delivering the opinion of the court, FLANDRAN, J., observes: "The argument of the counsel for no action can be commenced or originated by the personal representatives, but that they can only carry on one which had been commenced by the injured party before his death, is founded upon the peculiar language used in the statute, which provides that the personal representatives

MAINTENANCE.—See CHAMPERTY AND MAINTENANCE; HUSBAND AND WIFE; PARENT AND CHILD; POOR AND POOR LAWS.

MAJORITY.—(See ELECTIONS, vol. 6, 445; INFANTS, vol. 10, 614).—The greater number—more than all the opponents.¹

may "*maintain*" an action, contending that the word "*maintain*" means "to hold, preserve, or keep in any particular state or condition; to support; to sustain; not to suffer to fail or decline," etc. Now, without in any manner controverting this definition of the word "*maintain*" in its ordinary and general use, we very much doubt whether its legal signification is so restricted. There is no expression more common at the bar among the legal profession than in speaking of the existence of a cause of action to say, "Can an action be maintained upon these facts?" "Can an action be maintained upon this instrument?" Using the word "*maintain*" as synonymous with the existence of a cause of action. But, aside from this, we think the statute furnishes its own answer to the argument of the counsel. Whatever may be the ordinary signification of the word "*legal*," or otherwise, its particular sense cannot be doubted in reference to this act. The language is that the personal representative "*may maintain an action*" if the deceased "*might have maintained an action*." It cannot be seriously urged that the word "*maintain*," as used in speaking of the deceased having his action against the wrongdoer, can mean other than commence, institute or begin an action; and the same expression occurring in the same sentence, in reference to the same subject, to wit, the suit against the trespasser, cannot reasonably be held to have two different significations.

"Maintain the Buildings."—A covenant to "maintain the buildings" binds the lessee to keep them in proper repair at all times during the term, and the lessor may maintain an action upon the covenant at any time, either before or after the term has expired. Wood's *Lard. and Ten.* (2nd ed.), p. 807, citing *Buck v. Pike*, 27 Vt. 529.

"Maintaining and Sustaining."—The words "*maintaining and sustaining*" a railroad have reference to keeping the road in repair, supplying it with machinery and such like acts, and not to projects for extending its business by schemes and enterprises not contemplated and expressed in clear, unambigu-

ous terms by the charter itself. *The Central R. Co. v. Collins*, 3 Am. Corp. Cas. 224 (40 Ga. 582).

"Maintained" in Pleading.—A technical word indispensable in an indictment in pleading for maintenance. *Bouv. Law Dict.* It also signifies to support what has already been brought into existence. *Louisville R. Co. v. Godman* (Ind. 1886), 2 West. Rep. 327; *Moon v. Durden*, 2 Exch. Rep. 21.

1. **"Majority of Shareholders."**—The words "majority of shareholders," as used in the act of March 21st, 1872, *California*, mean a majority of the persons holding shares, and not "the holders of a majority of the stock," and a petition signed by less than a majority of the shareholders, though the signers held a majority of the stock, is therefore insufficient. Act held unconstitutional and void. *Challar Mining Co. v. Wilson*, 5 Pac. Rep. (Cal.) 670.

In *Walker v. Oswald*, 11 Cent. Rep. (Md.) 123, the court held that under § 8, ch. 248, Maryland acts of 1886, in reference to licensing the sale of liquor in Washington county, the words "a majority of voters of said county," mean "*a majority of the voters of the county voting on that subject*." See also *Taylor v. Taylor*, 10 Minn. 107; *Gillespie v. Palmer*, 20 Wis. 554; *Bayard v. Klinger*, 16 Minn. 249; *Everett v. Smith*, 22 Minn. 53.

Majority in Bankruptcy Act.—In the expressions "in calculating a majority," and "the majority in value" and "the majority in number in the statute," (National Bankrupt act), the word "*majority*" refers to and embraces everything previously spoken of in the section as a result to be arrived at by calculation. *In re Gilday*, 11 Bank Reg. 108.

"Majority in Value of the Creditors."—Upon a motion for an injunction it was held that in estimating the "majority in value of the creditors," under 50 V., ch. 8, § 1 (*Manitoba*), the question of security held by any creditor should not be taken into account. Creditors must be taken to be such for the full amount of what the debtor owes them. *Fraser v. Darroch*, 9 Can. L. T. 238.

MAKE.—See note 1.

MAKER.—See note 2.

MAKING.—See note 3.

1. **Make.**—1. To prepare, subscribe, verify and file; as, *to make answer*; 2. To transfer for the benefit of creditors; as, *to make an assignment*; 3. To sign, seal and deliver; to execute; as *to make a bill, deed or note*; 4. To agree to, or to execute; as *to make a contract*; 5. To fail to do a thing required in the conduct of legal proceedings; as, *to make default*; 6. To produce, create; as, *to make an issue*; 7. To collect or procure under an execution; as, *to make the money*; 8. To swear or affirm to, in due form; as, *to make oath or affirmation*; 9. To transfer; as, *to make over*; 10. To prepare and read in open court; as, *to make a presentment*; 11. To certify what was done under the mandate of a writ; as, *to make a return*. Anderson's Law Dict.

The word "make," as it is used in § 26, ch. 12, of the Gen. Stat. *Vermont*, means to form, or compose, and the manual act of writing out a complaint, even though by the dictation of another, by a sheriff or deputy sheriff, is prohibited by the statute. *State v. Drew*, 51 Vt. 58. See also *Winchell v. Pond*, 19 Vt. 198; *Hunt v. Vial*, 20 Vt. 291; *Walworth v. Farwell*, 41 Vt. 212.

The word "*making*" is equally applicable to machines as to compositions of matter; and we see no difficulty in holding that the using or vending of a patented composition is a violation of the right of the proprietor. *Fessenden Law of Patents* 287.

● **"Make Over" in a Deed.**—The words "*make over and grant*" in a deed are sufficiently operative to convey lands, by way of a use, under the statute of uses. *Jackson v. Alexander*, 3 Johns. (N. Y.) 484.

Makes Over and Confirms.—In *Jackson v. Root*, 16 Johns. (N. Y.) 60-79, the court held, that where the grantor, for value received, "*makes over and confirms*" unto the grantees, their heirs, etc., forever, the intention is clear and manifest, and the words denote a present contract of sale.

2. **Maker.**—A term applied to one who makes a promissory note and promises to pay it when due. *Bouv. Law Dict.*

A *law-maker* means a legislator; and "the law-maker," the individual, or body

that enacts a law or laws. *Anderson's Law Dict.*

3. **Making His Law.**—A phrase used to denote the act of a person who wages his law. *Bouv. Law Dict.*

Making.—In *In re Debaum*, 11 Crim. L. Mag. 48, the court say: "Forgery at common law is the fraudulent making of a writing to the prejudice of another man's right," "or, a false making of any writing for the purpose of fraud or deceit. "*Making*" means every alteration of or addition to a true instrument.

"**Make.**"—In *In re 163rd Starr-Bowkett Building Society's Contract*, 38 W. R. 2, *COTTON, L. J.*, observes: "This is an appeal from a decision of *CHITTY, J.*, by which he held that a contract for sale had been duly annulled by the vendors. The sale was by public auction, subject to certain conditions of sale, one of which, after providing for the time within which requisitions and objections to title were to be sent in, continued: 'And in case the purchaser shall, etc., make any objection or requisition on the title which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty at any time thereafter, etc.; by notice in writing, etc., to annul the contract and to return the purchaser his deposit.' Now, it has been said that the time to exercise the power of rescinding had not arisen, and that the word '*make*' in the condition, must be taken to mean '*insist*,' and that the '*making* of a requisition' referred to in the condition was equivalent to '*insisting* on a requisition,' and that no requisition had been insisted on. But I am not one to twist the words used so as to make them fit in with what might be considered to be the proper construction. The word '*make*' means something different from '*insist on*,' and that this is so is evident by the words used in the clause after the word '*make*.'"

Making Distress.—The bailiff of the county court who actually levies a distress is the person "*making any distress*" within the meaning of section 49 of the Agricultural Holdings act, 1883 (46 & 47 Vict., ch. 61). The words "*making any distress*" refer to the person who actually goes on the premises and real-

MALE.—Of the masculine sex; of the sex that begets young; the sex opposed to the female.¹

MALFEASANCE.—The unjust performance of some act which the party had no right, or which he had contracted not to do.²

MALICE.—(See CRIMINAL LAW; HOMICIDE; MALICIOUS PROSECUTION; MALICIOUS MISCHIEF; LIBEL AND SLANDER; CORPORATIONS; TORTS; FRAUD; INTENT; DRUNKENNESS; INSANITY).—The doing a wrongful act intentionally without just cause or excuse.³

1. **Malice in Law.**—Malice in the legal acceptance of the word is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.⁴

izes the rent in arrear. *Phillipps v. Rees*, L. J. R., 59 Q. B. 1.

1. *Bouv. Law Dict.*

Male Children.—A testator having made a provision for the necessitous "male children" of his nephews, and having shown his intention of making it a perpetual charity: *Held*, that "male children" meant "male descendants." *Held also*, that under these expressions male descendants, through the male line, were alone entitled, and that those males who claimed through a female were excluded. *Bernal v. Bernal*, 7 L. J., N. S. 115.

Male Heirs.—A devise of lands to "my grandson, Stephen Cooper, to come into possession at twenty-one years of age, and to have and to hold the above named bequest to him during his natural life; and after his decease I give the premises unto his male heirs, equally between them; and, for want of heirs male, then to go in equal shares to his daughters, vests an estate tail in Stephen, the grandson, under the rule in *Shelley's case*; the clause of the statute of wills in relation to the creation and continuance of estates tail not being applicable to such a case. *Cooper v. Cooper*, 6 R. I. 261.

2. *Bouv. Law Dict.* See also the various titles in which malfeasance occurs.

By "malfeasance" under all definitions, is meant the doing of things which one ought not to do, or the doing of illegal acts. *State v. Lazarus*, 39 La. An. 161.

Malfeasance is the doing of an act wholly wrongful and unlawful, and non-feasance is an omission to perform a required duty at all, or total neglect of duty. The term misfeasance is often carelessly used to describe a malfeasance. *Coite v. Lynes*, 33 Conn. 115.

3. *Bouv. Law Dict.*; *Willis v. Miller*, 29 Fed. Rep. 238. See also the various cross references above mentioned.

Malice may be implied from the intentional commission of a trespass, as from one's shooting another's hound, although claiming to aim at a fox. *Wright v. Clark*, 50 Vt. 130.

Malice Construed as Malevolence.—*Rideout v. Knox*, 148 Mass. 368; *Smith v. Morse*, 148 Mass. 407.

Malice Implies Wilfulness.—Where the word "wilfully" is used in the statute (R. S. 1871, ch. 129, § 2, *Maine*), it will be sufficient if the word "maliciously" is employed in the indictment. *State v. Robbins*, 66 Me. 324.

4. *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 321.

Malice as an Element of Damage.—Malice means a want of legal excuse. This is the sense in which the term is most frequently employed, and it is probably the only sense in which it is properly employed. Substitute "absence of legal excuse" for "malice" in many opinions in the reports which are difficult to be understood, and they will become easily intelligible. The bad intent or malice with which an act is done is material on the question of damages, and it is an important element for the consideration of the jury. The absence of a bad intent will mitigate the damages; the presence of a bad intent will aggravate them. And here must be noted the difference between "malice in law" and "malice in fact." Malice in law does not mean malice or ill will towards the individual affected by libel or slander in the ordinary sense of the term. Malice in law, or absence of legal excuse, is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill will towards the individual,

2. Malice in Fact¹—(a) Express Malice.—When the party evinces an intention to commit the crime.²

(b) *Implied Malice.*—Inferred by law from the facts proved.³

MALICIOUS.—Characterizes an act not only when it arises from personal spite, but when it is a wanton and intentional injury, when it is wilful.⁴

frequently given in evidence to enhance the damages. *Terwilliger v. Woods*, 72 Am. Dec. (N. Y.) 420-426; *King v. Root*, 4 Wend. (N. Y.) 113; *Littlejohn v. Greeley*, 13 Abb. Pr. (N. Y.) 41; *Pennington v. Meeks*, 46 Mo. 217; *Tresca v. Maddox*, 66 Am. Dec. 198; *Jellison v. Goodwin*, 43 Me. 287.

Malice in law, or absence of legal excuse, is not necessarily inconsistent with an honest or even a laudable purpose. *Jellison v. Goodwin*, 43 Me. 287.

1. Malice in Fact Not Malice in Law. It is clear that the supposed distinction between the different kinds of malice never rested on any good foundation. "Malice in law" is "malice in fact;" but "malice in fact" is not "malice in law." The true distinction is not in the malice itself, but simply in the evidence by which it is to be established. It is actual malice in either case; the proof only is different. This view will weed out "much indifferent and bad law scattered up and down in the books," and harmonizes the better decisions. *Lewis v. Chapman*, 16 N. Y. 372; *Wilson v. Noonan*, 35 Wis. 352. See also *Ake v. State*, 30 Tex. 473; *Farrar v. State*, 42 Tex. 271; *Duebbe v. State*, 1 Tex. App. 165; *Plasters v. State*, 1 Tex. App. 681; *Summers v. State*, 5 Tex. App. 381; *Holden v. State*, 1 Tex. App. 238; *Pocket v. State*, 5 Tex. App. 567; *McKinney v. State*, 8 Tex. App. 639; *Wright v. State*, 41 Tex. 248; *Singleton v. State*, 1 Tex. App. 507; *Primus v. State*, 2 Tex. App. 375; *Jones v. State*, 3 Tex. App. 155; *Roberts v. State*, 5 Tex. App. 151; *Harris v. State*, 8 Tex. App. 109; *Rye v. State*, 8 Tex. App. 166; *Moore v. State*, 31 Tex. 573; *Sanders v. State*, 41 Tex. 309; *Taylor v. State*, 3 Tex. App. 398.

2. Anthony v. State, 21 Miss. 264; *People v. Clark*, 7 N. Y. 393; 4 Bl. Com. 199.

Express Malice Rarely Proven Upon Trial of a Cause.—In reference to malice it is said by eminent judges that it is rarely if ever the case that express malice is proven upon the trial of a cause. Its existence lies in the heart of the slayer, and he alone knows its

secrets. He is the only possible direct witness to that; and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. It is said that malice may be implied from the fact of killing with a deadly weapon. But that rule, however correct as an abstract proposition, can seldom, it is said, be of practical utility in ascertaining the species of malice; for that fact is rarely if ever presented in a case unaccompanied with other facts and circumstances explaining the killing; and when other facts appear, the presumption as thus stated is apt to mislead. *U. S. v. Meagher (Tex.)*, 37 Fed. Rep. 879.

3. 4 Bl. Com. 199-201; Darry v. People, 10 N. Y. 138; *Parke v. Blackiston*, 3 Harr. (Del.) 378.

Malice to be Inferred from All the Facts in the Case.—"If malice is found, it must be drawn as an inference from everything that is proved taken together and considered as a whole. Every fact, no matter how small; every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon; and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred. *U. S. v. King*, 34 Fed. Rep. 312.

Particular malice, or personal malice, is ill-will, grudge, a desire to be revenged on a particular person. *Brooks v. Jones*, 11 Ired. L. (N. Car.) 261; 4 Bl. Com. 200.

4. Anderson's Law Dict. describes the state of mind in which many acts (crimes and torts) are done; as malicious, abandonment, arrest, battery, burning, communication, desertion, injury, intention, libel, mischief, prosecution, publication, etc., and for a full treatment see those titles. In a legal sense it describes any unlawful act done wilfully and purposely to the prejudice and injury of another. *Com. v. Snelling*, 15 Pick. (Mass.) 340.

MALICIOUSLY.—With deliberate intention to injure; wilful; as the malicious burning of a building.¹

In *Com. v. Williams*, 110 Mass. 401, COLT, J., in discussing the difference in the meaning of "*wilful*" and "*malicious*" says: "The injury must not only be wilful, that is intentional and by design, as distinguished from that which is thoughtless or accidental, but it must, in addition, be '*malicious*' in the sense that an act or injury done, either out of a spirit of wanton cruelty or black and diabolical revenge. Wilfulness is implied maliciousness, but maliciousness is not implied in wilfulness. To make wilful imply both a wrong and malice is to give to it a force and effect beyond what it will bear, or what can be maintained, either in common acceptance or its legal import." See also *Gregory v. C. C. C. & I. R. Co.*, 11 West. Rep. 825; *U. S. v. Coffin*, 1 Sumn. (U. S.) 394; *U. S. v. Ruggles*, 5 Mason (U. S.) 192; *Anderson v. How*, 116 N. Y. 342; *Com. v. Kneeland*, 20 Pick. (Mass.) 245.

A "malicious act" is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse. In trials for this offence, the legal signification of the words "*wilfully*" and "*maliciously*" must be explained to the jury. *Bowers v. State*, 7 S. W. Rep. (Tex.) 247. See also *Terrell v. State*, 8 S. W. Rep. (Tenn.) 215; *Wright v. State*, 9 Yerg. (Tenn.) 343; *Werley v. State*, 11 Humph. (Tenn.) 175.

Malicious in Statute.—In *Folwell v. State*, 49 N. J. L. 32, BEASLEY, C. J., observes: "The word '*maliciously*' where used in the definition of a statutory crime, the act forbidden being merely *malum prohibitum*, has almost always the effect of making a bad intent or evil mind a constituent of the offence. The whole doctrine of that large class of offences falling under the general denomination of *malicious mischief* is founded on this theory. As used in Mass. Gen. Stat., ch. 168, § 28 (providing for punishing one who '*maliciously*' threatens to accuse another of crime.) means wilfully and intentionally, and not necessarily with spite and malice towards the threatened person." *Com. v. Goodwin*, 122 Mass. 19.

In *Gardner v. Mansbridge*, 57 L. T., N. S. 266, SMITH, J., observes: "The

question for determination in this case is whether a person who gathers mushrooms growing in their natural state in a field, and who does no other damage or injury, except what may be done by the fact of gathering and carrying away the mushrooms themselves, can be found guilty of having '*wilfully* or '*maliciously*' committed any damage, or injury, or spoil, to or upon any real or personal property of a public or private nature, within the intent and meaning of § 52 of the Malicious Injuries to Property act, 1861 (24 & 25 Vict., ch. 97). It could not, in our judgment, be really contended that a person who merely picked mushrooms growing in a state of nature in a field was guilty of '*maliciously* committing injury to real or personal property."

1. *Tuttle v. Bishop*, 30 Conn. 85.

In a spirit of wicked revenge towards a person, or of wanton cruelty towards an animal. *Commonwealth v. Walden*, 3 Cush. (Mass.) 559.

In misdemeanors and felonies, imports a criminal motive, intent or purpose. *Com. v. Brooks*, 9 Gray (Mass.) 303; *Com. v. Boynton*, 116 Mass. 345.

In *Mogue Steamship Co. v. McGregor, Goa & Co.*, 61 L. T., N. S. 825, LORD ESHER, M. R., observes in his opinion: "The terms '*maliciously*,' '*wrongfully*,' and '*injure*,' are words all of which have accurate meanings well known to the law, but which also have a popular and less precise signification into which it is necessary to see that the argument does not imperceptibly slide. An intent to '*injure*,' in strictness, means more than an intent to harm. It connotes an intent to do wrongful harm. '*Maliciously*,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term '*wrongful*' imports in its turn the infringement of some right. See also *State v. Cook*, 7 South. Rep. 64.

Maliciously, as Used in Statute.—In *Com. v. Goodwin*, 122 Mass. 19-35, COLT, J., observes: "There is no authority for the proposition that the word '*maliciously*' as used in the Gen. Stat., ch. 160, § 28, *Massachusetts*, means a feeling of ill will, spite, revenge and malice towards the person threatened. The wilful doing of an unlawful act without excuse is ordinarily sufficient

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MALICIOUS MISCHIEF.—(See also **ANIMALS**, vol. 1, p. 571.)

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I. DEFINITION—1. **At Common Law.**—Malicious mischief, at common law, is any malicious or mischievous injury either to the rights of another or to those of the public in general.¹ At common law, some of the cases limit the offence to injuries to per-

to support the allegation and that it was done maliciously and with criminal intent. There are some injuries in the nature of trespasses to property which are made criminal and punished as malicious mischief, when, in the words of the statute, the acts are done 'wilfully and maliciously.' It has been held, with reference to that class of offences, that the malice required to support the prosecution must contain the additional element of cruelty or of hostility or revenge towards the person. The wilful doing of an unlawful act, without excuse, when applied, as a definition of malice, to injuries to property alone, would make many more trespasses punishable criminally, against the plain intention of these statutes. It is the special depravity or special hostility towards the owner which makes a crime of that which would otherwise be a mere trespass to property. The crime here charged is an offence of a different description; it is an attempt to extort money, and is not to be classed with malicious mischief. The act itself implies criminal intent, and there is no occasion in construing the statute to hold that to create the offence anything more is required than is implied in the usual definition of malice."

Equivalent Words in Statute.—In describing a statutory offence in an indictment, it is sufficient, if words equivalent in meaning to those in the statute, or words of more general signification are used. *Thus:* Where the word "wilfully" is used in the statute, it will be sufficient if the word "*maliciously*" is employed in the instrument. A man may do an act wilfully, and yet be free of malice. But he cannot do an act "*maliciously*" without at the same time doing it wilfully. The malicious doing of an act includes the wilful doing of it. Malice includes intent and will. *State v. Robins*, 66 Me. 324.

1. 2 Whart. Crim. L. (8th ed.), § 1067.

"This offence includes all malicious physical injuries to the rights of another which impair utility or materially diminish value. Thus it has been considered an offence at common law to maliciously destroy a horse belonging to another, or a cow, or a steer, or any beast whatever, which may be the property of another; to wantonly kill an animal where the effect is to disturb and molest a family; to maliciously cast the carcass of an animal into a well in daily use; to maliciously poison chickens; to fraudulently tear up a promissory note, or break windows; to maliciously set fire to a number of barrels of tar belonging to another; to maliciously destroy any barrack or corn crib; to maliciously girdle or injure trees or plants kept either for use or ornament; to maliciously break up a boat; to maliciously injure or deface tombs; and to maliciously strip from a building copper pipes or sheeting." *State v. Watts*, 48 Ark. 56; s. c., 3 Am. St. Rep. 216.

Indictable at Common Law.—The offence was indictable at common law. *People v. Smith*, 5 Cow. (N. Y.) 258; *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419; *People v. Moody*, 5 Park. Crim. (N. Y.) 568; *Commonwealth v. Wing*, 9 Pick. (Mass.) 1; *Commonwealth v. Leach*, 1 Mass. 59; *State v. Wilson*, 3 Mo. 125; *State v. Morris*, 3 Mo. 127; *State v. Batchelder*, 5 N. H. 549; *Respublica v. Teischer*, 1 Dall. (Pa.) 335; *Commonwealth v. Henderson*, 8 Gratt. (Va.) 708; *State v. Council*, 1 Overt. (Tenn.) 305; *State v. Hamilton*, 1 Houst. C. C. (Del.) 281; *State v. Watts*, 48 Ark. 56; s. c., 3 Am. St. Rep. 216; *Snap v. People*, 19 Ill. 79; *State v. Landreth*, 2 Car. L. Rep. 446; *State v. Robinson*, 3 Dev. & Bat. 130; s. c., 32 Am. Dec. 661. It has been held indictable also under Scotch law. 1 Hume Crim. Law (2nd ed.) 119.

sonal property.¹ A distinction is to be noted between malicious mischief, sometimes called malicious trespass, and the civil action of trespass.²

2. **Statutes.**—In England, and many, if not all, of the States of this country, statutes have been enacted defining the offence, and in a number of instances specifically enumerating the acts which constitute the offence.³

Not Indictable at Common Law.—

There are some cases which deny that malicious mischief was an indictable offence at common law. *State v. Wheeler*, 3 Vt. 344; *State v. Beekman*, 34 Dutch. (N. J.) 124; *State v. Burroughs*, 2 Halst. (N. J.) 426; *Illies v. Knight*, 3 Tex. 312; *Black v. State*, 2 Md. 376; *State v. Manuel*, 72 N. Car. 201; 8 c., 21 Am. Rep. 455.

1. An indictment for "unlawfully, wickedly and maliciously" cutting and destroying a quantity of standing Indian corn, cannot be supported.

An indictment for malicious mischief will only lie for the malicious destruction of personal property; and growing corn, except in a few cases, is regarded as part of the realty. *State v. Helmes*, 5 Ired. (N. C.) 364; *State v. Robinson*, 3 Dev. & Bat. (N. C.) 130; *State v. Manuel*, 72 N. C. 201.

The following cases hold that malicious injury to real estate is an indictable offence: *State v. Wilson*, 3 Mo. 125; *State v. Morris*, 3 Mo. 127; *State v. Batchelder*, 5 N. H. 549; *Phillips v. State*, 19 Tex. 158; *Loomis v. Edgerton*, 19 Wend. 419; *State v. Burroughs*, 2 Halst. (N. J.) 426.

2. *Dawson v. State*, 52 Ind. 478.

3. Injuries to Cattle and Other Animals.

—Killing, maiming, disfiguring horses, cattle or other beasts. *State v. Bocker*, 32 Tex. 611; *U. S. v. Gideon*, 1 Minn. 292; *State v. Credle*, 91 N. Car. 640. A horse is included under the term cattle. *State v. Hambleton*, 22 Mo. 452; *State v. Clifton*, 24 Mo. 376; *Rex v. Mott*, 2 East P. C. (Eng.) 1075; 1 Leach C. C. 73 n.; *Rex v. Patty*, 2 East P. C. (Eng.) 1074; *Rex v. Moyle*, 2 East P. C. (Eng.) 1076.

Cutting mane and tail of horse included under malicious injuries to animals. *Oviatt v. State*, 19 Ohio St. 573; *State v. Smith*, Cheves (S. C.) 157.

Poisoning horses. *Croy v. State*, 32 Ind. 384; *Commonwealth v. McLaughlin*, 105 Mass. 460.

Shooting and wounding a horse. *Thompson v. State*, 51 Miss. 353; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558.

monwealth v. Walden, 3 Cush. (Mass.) 558.

Pouring acid into eye of mare and blinding her was maiming. *Rex v. Owens*, 1 M. C. C. (Eng.) 205.

Injuring a horse when it was trespassing. *Snap v. People*, 19 Ill. 79.

Driving nail into horse's foot, though injury only temporary. *Rex v. Haywood*, 2 East P. C. 1076.

Proof of killing a gelding will not support a charge of killing a horse. *Ghalston v. State*, 33 Tex. 342.

Wilful and wanton injury to stock, though unlawfully running at large. *State v. Brigman*, 94 N. C. 888.

Burning cow house, thereby causing the death of the cow, is indictable. *Rex v. Houghton*, 5 C. & P. (Eng.) 559.

Unlawful and malicious killing of a cow. *Taylor v. State*, 6 Humph. (Tenn.) 285. (*Compare State v. Allen*, 72 N. C. 114.)

Injuring sheep by setting a dog on them was not maiming within the English statute. *Rex v. Hughes*, 2 C. & P. 420. But see *Elmsley's case*, 1 Lewin C. C. (Eng.) 126.

Altering brand of cattle includes putting new brand on cattle already branded. *Linney v. State*, 6 Tex. 1; *State v. Nichols*, 12 Rich. (S. Car.) 672.

A hog is a domestic beast. *State v. Enslow*, 10 Iowa 115.

Indictment for killing a sow maintainable under statute against wilful shooting of a hog. *Shubrick v. State*, 2 S. C. 21.

Injury to a hog included under "trees already cut or any other timber or property. *Commonwealth v. Percavill*, 4 Leigh (Va.) 686.

Pigs are cattle. *Rex v. Chapple*, R. & R. C. C. (Eng.) 77. And so are asses, *Rex v. Whitney*, 1 M. C. C. (Eng.) 3.

The malicious killing of a dog is an indictable offence under the statutes of Indiana. *State v. Sumner*, 2 Carter (Ind.) 377; *Kinsman v. State*, 77 Ind. 132. But not in Virginia. *Davis v. Comm.*, 17 Gratt. (Va.) 617.

Leaving poisoned meat in a garden

to kill a trespassing dog not indictable under English statute. *Daniel v. Janes*, 2 C. P. D. (Eng.) 351.

A buffalo, though domesticated, is not included under the term "cattle." *State v. Crenshaw*, 22 Mo. 457.

Injuries to Trees and Timber.—Injury to fruit trees. *People v. Horr*, 7 Barb. (N. Y.) 9.

Injury to shade trees. *State v. Priebnow*, 14 Neb. 484.

Destroying trees marked to designate point in boundary line. *State v. Malloy*, 34 N. J. L. 410.

Carrying away timber from owner's ground. *State v. Malone*, 46 Ark. 140.

Injury to growing wood. *Reg. v. Dodson*, 9 A. & E. (Eng.) 704.

"Woods" includes an old field, abandoned and overgrown with brush, etc. *Hall v. Crawford*, 5 Jones (N. C.) 3.

Not necessary that the timber be carried away or cut for the purpose of gain in order to constitute the offence. *Johnson v. State*, 61 Ala. 9.

Not necessary that a tree be wholly destroyed. *Rex v. Taylor, R. & R. C. C.* (Eng.) 373.

Cutting shrubs upon an unproved allegation that they will injure a wall, is malicious mischief, though the title to the place where the shrubs grew is in dispute. *Rex v. Whateley*, 4 M. & R. 431.

Injuries to Grain or Crops.—An indictment under a statute prohibiting the burning of wheat or straw will not be sustained if the wheat or straw be threshed, cleaned and stored in a barn. *Commonwealth v. Erskine*, 8 Gratt. (Va.) 624.

A shock of wheat held not a stack. *Denbow v. State*, 18 Ohio 11.

Severing growing grain. *State v. Gurnee*, 14 Kan. 111; *State v. Haney*, 32 Kan. 428; s. c., 4 Pac. R. 831.

Growing wheat is not included under an act making the destruction of a barrack, shock or crib of wheat a criminal offence. *Parris v. People*, 76 Ill. 274.

An empty barrack not included under such an act. *Chapmann v. Commonwealth*, 5 Whart. (Pa.) 427.

Cutting, removing or carrying away grain, fruit or plants. *State v. Allisbach*, 69 Ind. 50.

One may be guilty of malicious mischief in wantonly destroying crops, though authorized to open a way through a field, if he act maliciously. *Harris v. State*, 73 Ga. 41.

Damage done to a field by a poacher's dog pursuing game is not a ma-

licious mischief. *Reg. v. Prestney*, 3 Cox C. C. 505.

Flax seed is grain within the meaning of the act. *Reg. v. Spencer*, 7 Cox C. C. 189.

Injuries to Buildings.—Breaking windows. *State v. Whittier*, 21 Me. 341.

Malicious injury to a church or private building. *State v. Brant*, 14 Iowa (6 With.) 180.

Injury to public property. *Read v. State*, 1 Ind. 511.

Miscellaneous Cases.—Breaking up a boat. *Loomis v. Edgerton*, 19 Wend. 419.

Cutting ropes by which banner is suspended. *State v. Webster*, 17 N. H. 543.

Cutting cable of fish car and allowing car to float away. *Commonwealth v. Soule*, 2 Met. (Mass.) 21.

Throwing stones at a railroad train. *State v. Simpson*, 2 Hawks (N. C.) 460; *Rex v. Bowry*, 10 Jur. (Eng.) 211.

Injuring well by throwing unwholesome matter into it. *State v. Buckman*, 8 N. H. 203.

Knowingly injuring sick by discharging a gun in neighborhood. *Commonwealth v. Wing*, 9 Pick. 1.

Breaking into room of sick person with knowledge that it will injure such person. *Commonwealth v. Taylor*, 5 Bin. (Pa.) 277; *Hackett v. Commonwealth*, 15 Pa. St. 95.

Meddling with fire alarm boxes. *Koppersmith v. State*, 51 Ala. 6.

Injuring or interfering with machinery. *Rex v. Tracey, Russ. & R. C. C.* (Eng.) 452; *Reg. v. Fisher*, 10 Cox C. C. (Eng.) 146; s. c., L. R. 1 C. C. 7; *Rex v. Mackerel*, 4 C. & P. (Eng.) 448; *Rex v. Hutchins, Deac. C. L.* (Eng.) 1517; *Rex v. Bartlett, Deac. C. L.* 1517; *Rex v. Chubb, Deac. C. L.* 1518; *Reg. v. Norris*, 9 C. & P. (Eng.) 241.

Ploughs are machines within the English statute. *Reg. v. Gray*, 9 Cox C. C. (Eng.) 417; L. & C. 365; 33 L. J. M. C. 78; 10 Jur. N. S. 160; 9 L. T. 733; 12 W. R. 350.

Injuring an aqueduct. *State v. Jones*, 33 Vt. 443.

Destroying water wheel. *Rex v. Fidler*, 4 C. & P. (Eng.) 449.

Injuring an erection used in the business of a mine. *Reg. v. Whittingham*, 9 C. & P. (Eng.) 235.

Poisoning hens. *Commonwealth v. Falvey*, 108 Mass. 304.

Injury to ladies' dresses included under statute prohibiting injury to personal property of another. *Commonwealth v. Sullivan*, 107 Mass. 218.

In order to bring an offence under the head of malicious mischief it must appear that the mischief was itself the object of the act, and not that it was incidental to some other act lawful or unlawful.¹

II. ESSENTIALS OF THE OFFENCE—1. Malice.—To constitute malicious mischief at common law, in injuries to property, malice towards the owner or possessor of the property is essential, but where the offence is shown to have been wilful or wanton, malice will generally be presumed.²

Driving cattle from their accustomed range. *Smith v. State*, 43 Tex. 433; *Darnell v. State*, 43 Tex. 147.

Tearing down a fence. *State v. Hovis*, 76 N. C. 117; *Hurlbut v. State*, 12 Tex. App. 109.

Cutting warp in looms in a cotton factory. *State v. Hamilton*, 1 Houst. Crim. C. (Del.) 281; *Reg. v. Smith*, 6 Cox C. C. (Eng.) 198.

Stealing chickens an offence under "Ku-Klux" law. *Walpole v. State*, 9 *Baxter* (Tenn.) 370.

Appellant was convicted of knowingly causing horses to go within the enclosed land of one B, without his consent. The proof was that appellant rented from B a part of a field, and turned his horses upon the part he rented, whence they strayed on to the other part. The crop had been gathered, and nothing was stipulated in the rental contract upon the subject. *Held*, that appellant had the right to pasture his horses on the land he had rented, and, the conviction not being warranted by law, the cause is dismissed. *Coggins v. State*, 12 Tex. App. 109. *Contra*, where there was a growing crop and defendant was repeatedly warned. *Cleveland v. State*, 8 Tex. App. 44.

Injury to locomotive not included under statute against injury to fruit, corn, grain, or other agricultural product or property, real or personal, of any description whatever. *Murray v. State*, 21 Tex. App. 620; s. c., 57 Am. Rep. 623; nor a private storehouse. *Beeson v. State*, 23 Tex. App. 406; nor a set of buggy harness. *Terry v. State*, 25 Tex. App. 714.

1. *Wright v. State*, 30 Ga. 325; *Sattler v. People*, 59 Ill. 68; *Palmer v. State*, 45 Ind. 388; *Lossen v. State*, 62 Ind. 437; *Duncan v. State*, 49 Miss. 331; *Goforth v. State*, 8 Humph. (Tenn.) 37.

2. On an indictment under the North Carolina act (Rev. Stat., ch. 34, § 55), in relation to the altering or defacing the marks of cattle, etc., if the act of altering

or defacing, etc., is proved to have been wilfully done, it necessarily follows that the intent was to defraud or injure the owner, unless there be proof to the contrary.

It is no objection to a conviction on an indictment for this offence, that the cattle, beast, etc., had, at the time the act was done, strayed from its owner. *State v. Davis*, 2 Ired. (N. C.) 153. See also *State v. Pierce*, 7 Ala. 728; *Johnson v. State*, 1 Ala. (S. C.) 72; *Hobson v. State*, 44 Ala. 380; *Pippen v. State*, 77 Ala. 81; *Wright v. State*, 30 Ga. 325; s. c., 76 Am. Dec. 656; *Mosely v. State*, 28 Ga. 190; *State v. Jackson*, 12 Ired. (N. C.) 329; *State v. Latham*, 13 Ired. (N. C.) 33; *State v. Hill*, 79 N. C. 656; *Dawson v. State*, 52 Ind. 478; *State v. Enslow*, 10 Iowa 115; *State v. McDermott*, 36 Iowa 107; *State v. Flynn*, 28 Iowa 26; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558; *Duncan v. State*, 49 Miss. 331; *Thompson v. State*, 51 Miss. 353; *U. S. v. Gideon*, 1 Minn. 292; *Brown v. State*, 26 Ohio St. 176; *Calef v. Thomas*, 81 Ill. 478; *Gaskill v. State*, 56 Ind. 550; *State v. Wilcox*, 3 Yerg. (Tenn.) 278; s. c., 24 Am. Dec. 569; *Goforth v. State*, 8 Humph. (Tenn.) 37; *Stone v. State*, 3 Heisk. (Tenn.) 457; *Wallace v. State*, 30 Tex. 758; *Branch v. State*, 41 Tex. 622; *Newton v. State*, 3 Tex. App. 245; *Compare Northcot v. State*, 42 Ala. 330; *Hill v. State*, 43 Ala. 335; *State v. Newby*, 64 N. C. 23; *Frazier v. Brown*, 12 Ohio St. 294; *Allison v. State*, 42 Ind. 354; *Reg. v. Tivey*, 1 C. & K. (Eng.) 704; 1 Den. C. C. 63.

Reckless Conduct Causing Injury.—Where one causes internal injury to a horse, not through any malice or ill will toward the animal or owner, but simply through reckless disregard of consequences and to satisfy depraved and brutal tastes, he is guilty of maliciously injuring the animal. *Reg. v. Welch*, 12 B. D. (Eng.) 23; 45 L. J. M. C. 17; 33 L. T. 753.

Malice Toward Bailee.—Where prop-

2. Injury or Damage.—Injury or damage must result, or the act, however dangerous or wanton it may be, will not constitute the offence of malicious mischief.¹

III. INDICTMENT.—An indictment for malicious mischief should state the ownership or possession of the property by some one,² the nature and extent of the injury, and, in States where the value affects the punishment or jurisdiction, the value of the property destroyed or the extent of the damage should be stated.³

erty was injured while in possession of a bailee by one having malice toward such bailee. *Held*, that it was sufficient to prove that the act was done with malice toward the special owner or bailee. *Stone v. State*, 3 Heisk. (Tenn.) 457.

Malice Toward Son of the Owner.—Where one was charged with malicious mischief and it was shown that the defendant was actuated by malice toward the son of the owner. *Held*, that this was not sufficient to sustain the indictment. *Northcot v. State*, 42 Ala. 330.

Malice Toward the Property Injured.—There must be malice directed toward the owner of the property and not merely against the property itself. *State v. Wilcox*, 3 Yerg. (Tenn.) 278; s. c., 24 Am. Dec. 569; *Brown v. State*, 26 Ohio St. 176; *Shepard's Case*, 2 Leach Cr. L. 609; *Pearce's Case*, 2 Leach 594.

Servant Acting Under Master's Orders.—If servants are ordered to do an act which, if the master have no right to order it done, is against the law and they do it believing that the master had the right, they are liable; but if anyone knew the act of the master to be wrongful he will be liable to indictment. *Reg. v. James*, 8 C. & P. 131.

Act Done Under Supposed Right.—Where one does an act which the statute declares a malicious mischief under a supposed right, without an evil mind, he is not liable to indictment. *Reg. v. Matthews*, 14 Cox C. C. (Eng.) 5.

Malicious Injury by Owner.—The statutory offence of cruelty to animals may be committed by a malicious injury of one's own animal; and malice toward the owner is not an essential ingredient of the offence. *State v. Avery*, 44 N. H. 392. See also *State v. Hurd*, 51 N. H. 176.

Maliciously, How Defined.—The word "maliciously," as used in the Massachusetts Rev. Stat., ch. 126, § 39, relating to malicious mischief, is not sufficiently defined as "the wilfully doing of any act

prohibited by law, and for which the defendant has no lawful excuse." *Commonwealth v. Walden*, 3 Cush. (Mass.) 558.

1. *Wait v. Green*, 5 Park. Crim. (N. Y.) 185; *Hampton v. State*, 10 Lea (Tenn.) 639.

2. *State v. Jackson*, 7 Ind. 270; *Staadon v. People*, 82 Ill. 432; *State v. Haney*, 32 Kan. 428; s. c., 4 Pac. R. 831; *Dist'g State v. Gurnee*, 14 Kan. 111; *Davis v. Com.*, 30 Pa. St. 421; *State v. Smith*, 21 Tex. 748; *Ritter v. State*, 33 Tex. 608. See *Commonwealth v. Sowle*, 9 Gray (Mass.) 304; *State v. Bocker*, 32 Tex. 611.

An indictment charging that the defendant maliciously destroyed divers windows of the county seminary building, the property of the county of Sullivan, sufficiently charges a malicious injury to public property, under the Revised Statute of Indiana, p. 975, ch. 53, § 71, and charges the offence with sufficient certainty. *Read v. State*, 1 Ind. Carter, 511.

"It is not denied that the prosecutor must prove the title to the property described in the indictment as he has laid it; and he does so when he gives evidence of possession. That alone is evidence of a special or qualified property, property which is sufficient to uphold an averment of ownership, in a civil or criminal case." *People v. Horr*, 7 Barb. (N. Y.) 9.

Variance Between Proof and Allegation of Ownership.—*Mayer v. State*, 33 Tex. 340; *Hughes v. State*, 103 Ind. 344.

Failure to Prove Allegation of Ownership.—*Smith v. State*, 43 Tex. 433; *Rex v. Patrick*, 2 East P. C. (Eng.) 1059; *Rex v. Howe*, 1 Leach C. C. (Eng.) 481; 2 East P. C. (Eng.) 588.

When Allegation of Ownership Is Unnecessary.—*Owens v. State*, 52 Ala. 400.

3. *State v. Garner*, 8 Port. (Ala.) 447; *Caldwell v. State*, 49 Ala. 34; *State v. Aydelott*, 7 Blackf. (Ind.) 157; *State v. Shadley*, 16 Ind. 230; *Brown v. State*, 76 Ind. 85; *Sample v. State*, 104 Ind.

Malice should be alleged, and some of the cases hold that the words "maliciously, wilfully, etc.," are sufficient.¹ Where there are statutes, care must be taken to bring the allegation within the words of the statute, and when so brought the use of particular words will not be held necessary.²

289; *Commonwealth v. Cox*, 7 Allen (Mass.) 577; *McKinney v. People*, 32 Mich. 284; *State v. Heath*, 41 Tex. 426; *Nicholson v. State*, 3 Tex. Ct. App. 31.

The affidavit need not state the value of the injury maliciously inflicted. *State v. Clevinger*, 14 Ind. 366.

Where the statute requires that the damage shall be over a certain sum in order to constitute the offence, it is not necessary to allege the value of each article injured, but only that the damage exceeded the statutory amount. *Reg. v. Thomas*, 12 Cox C. C. (Eng.) 54; 24 L. T. 398.

1. *State v. Rydelott*, 7 Blackf. (Ind.) 157.

An indictment for malicious mischief must either expressly charge malice against the owner, or otherwise fully describe the offence. It is not sufficient to set forth that the act was done "feloniously, wilfully, and maliciously," without averring that it was done "mischievously," or with malice against the owner. *State v. Jackson*, 12 (N. C.) Ired. 329. See also *Thompson v. State*, 51 Miss. 353.

2. **Force and Arms.**—In an indictment for malicious mischief, it is not necessary to aver that the injury was done "with force and arms."

If the indictment charge the unlawful and malicious killing of a cow, it is good, without the use of the word "beast," a cow being a beast within the meaning of the statute. *Taylor v. State*, 6 Humph. (Tenn.) 285.

"Break, Destroy or Injure."—In an indictment under the statute, which says that "every person who shall wilfully and maliciously break, destroy or injure," etc., the property of another (R. C. 1885, p. 584, § 60), the offence is well described as a breaking alone, or as destroying or as injuring, as either act is to commit an offence, and one or all things may be charged according to the circumstances of the case.

Under that statute no negative averment is necessary. *State v. Batson*, 31 Mo. 343.

Omission of word "feloniously" in indictment under Wagn. Stat. 462, § 5

(Mo.), held fatal. *State v. Dieffenbacher*, 51 Mo. 26.

Word "unlawfully" need not be used in charging malicious trespass. *State v. Maddox*, 85 Ind. 585.

Omission of word "malicious" held immaterial. *People v. O'Brien*, 60 Mich. 8.

Omission of words unlawfully and maliciously held bad. *Rex v. Lewis*, 2 Russ. C. & M. (Eng.) 1066.

The word "maliciously" used in a statute requires that the act be shown to have been wilfully done. *Reg. v. Pemberton*, 2 L. R. C. C. (Eng.) 119.

Injury to Cattle.—Under the statute against maliciously killing "the cattle" of another (Rev. Code, 1845, § 57), an indictment for maliciously killing a "certain horse beast, to wit, one mare," is sufficient. *State v. Hambleton*, 22 Mo. (1 Jones) 452.

Also "certain cattle, to wit, one mare." *State v. Clifton*, 24 Mo. (3 Jones) 376.

Under the same statute a buffalo, though domesticated, is not within the description of "cattle." *State v. Crenshaw*, 22 Mo. (1 Jones) 457.

Driving Cattle from Range.—An indictment for driving cattle from their accustomed range need not describe range nor state distance the cattle were driven. *Darnell v. State*, 43 Tex. 147.

Criminal Intent and Injury.—An indictment on the Rev. Stat., ch. 126, § 39, which charges the defendant, in the words of the statute, with wilfully and maliciously administering a certain poison to the horse of another person, is sufficient, without further averment of any criminal intent, or of any injury to the horse. *Com. v. Brooks*, 9 Gray (Mass.) 299.

Necessary Averment of Injury to Glass. An indictment upon Rev. Stat., ch. 126, § 42, for malicious destruction of glass, must aver the glass to be part of a building. An allegation that it was in a certain building is not sufficient. *Com. v. Bean*, 11 Cush. (Mass.) 414.

Cutting Cable of Fish Car.—On an indictment under Rev. Stat. of Massachusetts, ch. 126, § 39, charging that the defendant wilfully destroyed and in-

jured a cable to which a lobster car was moored and fastened, proof that he cut the cable a few feet from one end, so as to let the car float off, was held sufficient to warrant his conviction. *Com. v. Soule*, 2 Met. (Mass.) 21.

Destroying Note.—An indictment for destroying a note, drawn under a statute which punishes any person who shall deface or destroy, etc., any promissory note for the payment of money or property, should state whether the note destroyed was payable in money or property.

When the tenor of the note cannot be set forth in such an indictment, because it has been destroyed, the substance and effect of it should at least be averred. *Birdg v. State*, 31 Ind. 88.

Single Offence Though More Than One Owner.—A complaint under Gen. Stat., ch. 165, § 41, which alleges that the defendant, at a time and place named, "with force and arms unlawfully and cruelly did beat and torture a certain horse of the property of" the complainant and another person, does not charge two offences. *Com. v. Lufkin*, 7 Allen (Mass.) 579. See also *Long v. State*, 43 Tex. 467.

Injury to Two Animals One Offence.—A malicious injury to two animals, inflicted as one transaction in fact, is but one offence in law. In an information for maliciously killing horses, the manner of killing need not be set forth, and if it be, it is surplusage. *Hayworth v. State*, 14 Ind. 590.

But when at different times the indictment should charge two offences. *Burgess v. State*, 44 Ala. 190.

Information for injury to property of two owners must negative consent of each owner. *Govitt v. State*, 25 Tex. App. 419.

Proof of injury a number of times the damages amounting in the aggregate to the statutory sum will not sustain an indictment. *Reg. v. Williams*, 9 Cox C. C. (Eng.) 338.

Insufficient Averments.—A complaint, which charges a malicious destruction of cabbages, "situated and growing on land," does not sufficiently charge a malicious injury to personal property, within Stat. 1846, ch. 52, for want of showing that the cabbages were not part of the realty. A complaint on Stat. 1855, ch. 457, for the malicious destruction of a tree, shrub or vine on the land of another, must aver an unlawful entry by the defendant on the

land. *Com. v. Dougherty*, 6 Gray (Mass.) 349.

An information charged that the defendant did knowingly and wilfully, without lawful authority, cut down and carry off a lime tree between his land and the land of a certain J. H., contrary to the form of the statute. *Held*, that the offence was not so charged as to be punishable by any law in force in Virginia. *Powell's Case*, 8 Leigh (Va.) 719.

In an indictment for maliciously cutting down a tree marked to designate "a corner of a tract of land." *Held*, defective in that it did not specify that such corner was not a "point on the boundary," those being the words of the statute. *State v. Malloy*, 34 N. J. L. 410. See also *Com. v. McLaughlin*, 105 Mass. 460; *State v. Stanton*, 66 N. Car. 640; *State v. McKee*, 109 Ind. 497.

Consequential Damages.—The prisoners were indicted for maliciously damaging some growing trees (elsewhere than in a park, etc.), and thereby doing injury to the owners to an amount exceeding £5. It was proved that the real injury to the trees amounted to only £1, but that the cost of replacing the hedge in which they stood would bring up the amount to over £5. *Held*, that the latter, being only consequential injury, the indictment could not be supported. *Reg. v. Whiteman*, 25 Eng. Law & Eq. 590.

Miscellaneous Cases—When Evidence Would Support Charge of Larceny.—An indictment for malicious mischief will not necessarily be defeated, merely because the acts proved might have supported a charge for larceny. *The State v. Leavitt*, 32 Maine (2 Red.) 183.

When Negative Averment Unnecessary.—An indictment charged that the defendant "unlawfully, wilfully and maliciously did enter upon the lands of R. B. there situate, and did then and there set fire to the woods on said land." *Held* sufficient without stating that the lands were not the property of the defendant. *State v. Purdie*, 67 N. Car. 326. See also *Murrah v. State*, 51 Miss. 675.

Omission of Date When Offence Committed.—*State v. Hoover*, 31 Ark. 676; *Bailey v. State*, 65 Ga. 410.

Removing Parts of Wagon.—An information charging that "defendant on, etc., did maliciously and mischievously injure one wagon, the property of P & S K, of the value \$40, by then and there removing certain parts thereof (men-

IV. INTENT.—The intent with which the act is done is material, and if it be shown that the defendant acted in good faith or under a claim of right, the charge of malicious mischief cannot be sustained.¹

1. Evidence.—Any evidence tending to rebut the charge of malice or going to show the animus of the defendant is admissible though it be in relation to something subsequent to the act itself.²

tioning them), where the said K could never find them, which parts, etc., were of the value of \$7, all to the damage of said K, seven dollars," was held sufficient. *State v. Williams*, 21 Ind. 206.

1. *Sattler v. People*, 59 Ill. 68; *Lossen v. State*, 62 Ind. 437; *Dawson v. State*, 52 Ind. 478; *Palmer v. State*, 45 Ind. 388; *State v. Flynn*, 28 Iowa 26; *State v. Kempf*, 11 Mo. App. 88; *State v. Zinn*, 26 Mo. App. 17; *State v. Reynolds*, 95 N. Car. 616; *State v. Winslow*, 95 N. Car. 649; *State v. Stevens*, 109 N. Y. 159; *Goforth v. State*, 8 Humph. (Tenn.) 37; *North Carolina v. Vanderford*, 35 Fed. Rep. (U. S.) 282. Compare *Carter v. State*, 18 Tex. App. 573; *Knight v. State*, 64 Miss. 802.

2. On an indictment for malicious mischief in shooting a mule which was in the defendant's cornfield, evidence of the thievish and unmanageable character of the mule and his proclivity for being in such places, is admissible to show absence of malice. *Wright v. State*, 30 Ga. 325. See also *State v. Graham*, 46 Mo. 490; *State v. Waters*, 6 Jones (N. Car.) 276. Compare *Snap v. People*, 19 Ill. 80; *Jones v. State*, 3 Tex. App. 228.

In a prosecution for malicious trespass in cutting a canal reservoir embankment, evidence of long disuse of the canal, and that the stagnant water caused sickness in the vicinity of the reservoir, is admissible to rebut the presumption of malice. *State v. Bush*, 29 Ind. 110.

When Defendant Acted Under Legal Advice.—Evidence that the defendant acted under legal advice was properly excluded where the facts made it apparent that there was no color of right of entry. *People v. Stevens*, 109 N. Y. 159.

It is proper to show that a person indicted for destroying a machine was compelled to do so, and that he had planned to escape from a mob so compelling persons. *Rex v. Crutchley*, 5 C. & P. 133.

Materiality of Right of Possession by

Defendant.—In a criminal prosecution under the Rev. Stat. of *Maine*, ch. 162, § 13, for wilfully destroying the property of a person without his consent, it is immaterial whether the property came rightfully or wrongfully into the possession of the defendant. *The State v. Pike*, 33 Maine (3 Red.) 361.

In a prosecution under § 2 of the act of 1855, for wilfully destroying a fence, it must be shown that the defendant has been guilty of a trespass, and he may offer any evidence in defence which would be competent for him in an action of trespass. *State v. Clark*, 5 Dutch. (N. J.) 96.

In an indictment for wrongfully desecrating and disfiguring a public burying ground, to show that the defendant was the owner of the fee of small lots within it, under titles derived from various grantees to whom they had been conveyed, "to be used for burial ground," and evidence to show such ownership, is inadmissible. *Com. v. Wellington*, 7 Allen (Mass.) 299.

Competency of Witness.—On the trial of an indictment for malicious mischief, under the fifth section of the fourth article of the penal code, the person whose property is injured is not a competent witness for the State. *Blackstone v. The State*, 15 Ala. 415. See also *West v. State*, 32 Tex. 651.

Charge to Jury.—On trial of an indictment for malicious mischief, it is sufficient to charge the jury that they must be "satisfied" as to the ownership of the property in question. The phrase "beyond reasonable doubt" is not indispensable. *State v. Sears*, Phill. (N. Car.) L. 146; *State v. Knox*, Phill. (N. Car.) L. 312.

Evidence of the Same Acts on Other Occasions.—Upon an indictment for administering poison with intent to kill, horses, evidence of having administered the poison at other times is admissible to show the intent. But if it appear that it was done under the belief that it would improve the appearance of the horses the defendant should be ac-

V. JURISDICTION.—A justice of the peace has jurisdiction in an action for malicious mischief to real estate though the defendant claim an adverse title.¹

MALICIOUS PROSECUTION—(See also FALSE IMPRISONMENT).

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| <p>I. Definition and Nature, 16.</p> <p>II. General Principle on Which Action Depends, 19.</p> <p>III. Essentials to Malicious Prosecution, 21.</p> <p>1. <i>Criminal Actions</i>, 21.</p> <p> (a) <i>Malice</i>, 22.</p> <p> (b) <i>Want of Probable Cause</i>, 24.</p> <p> (c) <i>Termination of Former Action</i>, 28.</p> <p>2. <i>Civil Actions</i>, 32.</p> <p>IV. Who May Sue, 37.</p> <p>V. Who May be Sued, 38.</p> <p>1. <i>Generally</i>, 38.</p> <p>2. <i>Partners</i>, 39.</p> <p>3. <i>Corporations</i>, 39.</p> | <p>4. <i>Infants</i>, 41.</p> <p>5. <i>Public Officers</i>, 41.</p> <p>VI. Pleading, 42.</p> <p>1. <i>Complaint</i>, 42.</p> <p>2. <i>Answer</i>, 45.</p> <p>VII. Practice, 45.</p> <p>VIII. Defences, 51.</p> <p>1. <i>Generally</i>, 51.</p> <p>2. <i>Advice of Counsel</i>, 53.</p> <p>3. <i>Miscellaneous</i>, 58.</p> <p>IX. Evidence, 58.</p> <p>1. <i>Strict Rules of Evidence</i>, 58.</p> <p>2. <i>End of Prosecution</i>, 59.</p> <p>3. <i>Character</i>, 59.</p> <p>4. <i>Malice</i>, 61.</p> <p>5. <i>Want of Probable Cause</i>, 63.</p> <p>X. Damages, 71.</p> |
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I. DEFINITION AND NATURE.—The action for malicious prosecution is, as its name would indicate, one to recover the damages sustained by a defendant in a prior proceeding which has been commenced or carried on from a malicious motive and without any probable cause therefor. Not all unfounded prosecutions by which defendants are injured afford the basis of this action. Usually a plaintiff in a civil action is sufficiently punished for the bringing of an unwarranted action by having the legal costs of such action taxed against him. And it is desirable in the interest of good government that offences against the laws be speedily and certainly punished. So those who set in motion the criminal laws for the apprehension of supposed offenders should be protected in such laudable work if the same is done with correct motive and upon probable cause.² This action is not in nature unlike an action for slander,³ and it seems may be

quitted. *Rex v. Mogg*, 4 C. & P. (Eng.) 363.

1. *State v. Rising*, 10 Nev. 97.

2. Actions for malicious arrest are strictly guarded. The circumstances under which they may be maintained are accurately stated and they are never encouraged except in plain cases. *Ventress v. Rosser*, 73 Ga. 534; *Potter v. Seale*, 8 Cal. 217.

3. An action for malicious prosecution is much in the nature of an action for slander, and the malice of the prosecutor, and the disgrace, vexation and expense of the prosecuted, are not measured by the sufficiency or insufficiency of the charge on which the

prosecution is instituted. *Stancliff v. Palmeter*, 18 Ind. 321.

In both actions the character of the plaintiff is involved. In both actions the plaintiff is required to show malice on the part of the defendant. And in both actions the plaintiff, if he recovers, may recover exemplary or punitive damages. *Bailey v. Dodge*, 28 Kan. 72.

An action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had, as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the damages of the plaintiff, but the scandal, vexation and expense, upon

joined with one for false imprisonment,¹ although it has necessarily little in connection with that action.²

In order that the plaintiff may maintain this action, three things must concur. 1st. The motive of the party instituting or prosecuting the suit or proceeding must have been malicious.³

which this action is founded. Hilliard on Torts, vol. 2, p. 412.

The plaintiff may recover not only for the unlawful arrest and imprisonment and the expenses of his arrest, but also for the injury to his fame and reputation. And such recovery is a bar to subsequent action for slander for the accusation uttered for the purpose of procuring the arrest at the time when it was made. *Sheldon v. Carpenter*, 4 Comst. (N. Y.) 578. *Cooley on Torts* 193. 3 *Sutherland on Dam* 699.

A declaration may contain a count for slander and one for malicious prosecution. *Miles v. Oldfield*, 4 *Yeates* (Pa.) 423. *Pomeroy on Rem.*, § 496. *Martin v. Mattison*, 8 Abb. Pr. (N. Y.) 3; *Hull v. Vreeland*, 15 Abb. Pr. (N. Y.) 182; *Shore v. Smith*, 15 *Ohio St.* 173.

In an action for malicious prosecution, damages may be recovered for the injury to reputation, and this will be a bar to an action of slander for the same cause. So undoubtedly a recovery in an action of slander for injury to character through a malicious prosecution would be a bar to a claim for damages on the same ground in a direct action for malicious prosecution. *Jarnigan v. Fleming*, 43 *Miss.* 710.

The slander and the malicious prosecution must, however, grow out of the same transaction. And where the arrest, for which the action of malicious prosecution had terminated, took place on October 7th, 1859, and the slander for which action was pending was uttered on the 19th of January, 1860, it was held that the former action did not bar the latter. *Rockwell v. Brown*, 36 *N. Y.* 207. On the authority of *Rockwell v. Brown*, the rule is thus stated in *Townsend on Slander*, section 251. A recovery in an action for malicious prosecution is a bar to subsequent action for slander for the accusation uttered for the purpose of having the arrest made. But when the defendant published the accusation before or after making his complaint to have the plaintiff arrested an action for that publication is not barred by the recovery in the action for the malicious prosecution. See *Sheldon v. Carpenter*, 4 *N. Y.* 579; s. c., 55 *Am. Dec.* 301 and note.

1. *Bauer v. Clay*, 8 *Kan.* 580; *Neil v. Thorn*, 88 *N. Y.* 270; *Marks v. Townsend*, 97 *N. Y.* 590; *Barr v. Shaw*, 10 *Hun* (N. Y.) 580; *Bradner v. Faulkner*, 93 *N. Y.* 515. Where but one detention is complained of, the party plaintiff may allege in his petition, and prove on the trial, such facts as show either a cause of action for false imprisonment, or one for malicious prosecution, or both. *Wagstaff v. Schippel*, 27 *Kan.* 450.

In *Nebenzahl v. Townsend*, 61 *How. Pr.* (N. Y.) 353, it is held that these actions are inconsistent and cannot be joined. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. *Murphy v. Martin*, 58 *Wis.* 276; *Colter v. Lower*, 35 *Ind.* 285.

2. *Addison on Torts* (5th ed.) 130. *Pollock on Torts* 191. False imprisonment is wrongfully restraining the personal liberty of the plaintiff. Malicious prosecution is wrongfully setting the criminal law in motion against him. *Stephen on Malic. Pros.*, *Text Book Series*, 120.

There is no similitude or analogy between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendants having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal. *Johnstone v. Sutton*, 1 *T. R.* 544. Although in the strict technical sense evidence to sustain an action for false imprisonment will not sustain one for malicious prosecution. Yet if the complaint contains in effect but one cause of action, namely, malicious prosecution, which includes the arrest, separate allegations not subjecting the defendant to increased damages are no ground for reversal. *Neil v. Thorn*, 88 *N. Y.* 270.

3. **Motive.**—It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive. Malice is essential to the maintenance

2nd. The suit or proceeding complained of must have been instituted without any probable cause therefor.¹ 3rd. The suit or proceeding must be terminated.²

of such action, and not merely to the recovery of exemplary damages. In *Farmer v. Darling*, 4 Burr. 1971, one of the earliest reported cases, if not the earliest, LORD MANSFIELD instructed the jury that the foundation of the action was malice, and all the judges concurred that malice either expressed or implied and the want of probable cause must both concur. From 1766 to the present day such has been constantly held to be the law both in England and in this country. See a multitude of cases collected in 8 U. S. Dig. (1st Series) 942, p. 95. And the existence of malice is always a question exclusively for the jury. It must be found by them or the action cannot be sustained. *Stewart v. Sonneborn*, 98 U. S. 192.

Malice, in fact, must be shown in order to support the action, and while the jury may find the fact from the circumstances of the want of probable cause, or from other circumstances established in the case, they are not to be told that a wrongful charge, made without probable cause, is *per se* malicious in fact. *Harkrader v. Moore*, 44 Cal. 144. To same effect see *Cook v. Walker*, 30 Ga. 519; *Colter v. Lower*, 35 Ind. 285; *Dickinson v. Maynard*, 20 La. An. 66; *Hayne v. Blair*, 62 N. Y. 19; *Benson v. McCoy*, 36 Ala. 710; *Lindsay v. Larned*, 17 Mass. 190; *Medcalf v. Brooklyn Life Insurance Co.*, 45 Md. 198; *Burris v. North*, 64 Mo. 426; *Burnap v. Albert*, Taney (U. S.) 244; *Dietz v. Langfitt*, 63 Pa. St. 234; *Scott v. Shelor*, 28 Gratt. (Va.) 891; *Willis v. Knox*, 5 S. Car. 474; *Glaze v. Whitley*, 5 Oreg. 164; *Yocum v. Polly*, 1 B. Mon. (Ky.) 358; *Mitchell v. Mattingly*, 1 Met. (Ky.) 240; *Woods v. Finnell*, 13 Bush (Ky.) 628; *Kelton v. Bevins*, Cooke (Tenn.) 90; s. c., 5 Am. Dec. 670; *Bell v. Graham*, 1 Nott. & McC. (S. Car.) 278; s. c., 9 Am. Dec. 689; *Smith v. Zent*, 59 Ind. 362; *Evans v. Thompson*, 12 Heisk. (Tenn.) 534; *Carleton v. Taylor*, 50 Vt. 220; *McKown v. Hunter*, 30 N. Y. 625; *Fagnan v. Knox*, 66 N. Y. 525; *Gourgnes v. Howard*, 27 La. An. 339.

Malice and want of probable cause must concur in order to sustain an action for malicious prosecution. *Russell v. Deer*, 7 Ill. App. 181.

These ingredients are essential to the right of action, and if they are not found to coexist, the action is not maintainable. *Johns v. Marsh*, 52 Ind. 323; *Sharpe v. Johnston*, 76 Mo. 660; *Sherburne v. Rodman*, 51 Wis. 474; *Spain v. Howe*, 25 Wis. 625; *Plath v. Brunsdorf*, 40 Wis. 107; *Castro v. DeUriarte*, 16 Fed. Rep. 93; *Ullman v. Abrams*, 9 Bush (Ky.) 738; *Gee v. Culver*, 12 Oreg. 228; *Mitchell v. Jenkins*, 5 Barn. & Adol. 593; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md. 461; s. c., 1 Am. St. Rep. 409; *Turner v. Walker*, 3 Gill & J. (Md.) 377; s. c., 22 Am. Dec. 329; *Boyd v. Cross*, 35 Md. 196; *Leidig v. Rawson*, 1 Scam. (Ill.) 272; s. c., 29 Am. Dec. 354; *Mitchinson v. Cross*, 58 Ill. 366; *Barrett v. Spaid*, 70 Ill. 408; *Adams v. Lisher*, 3 Blackf. (Ind.) 241; *Stone v. Stevens*, 12 Conn. 219; s. c., 30 Am. Dec. 611; *Grant v. Deuel*, 3 Rob. (La.) 17; s. c., 38 Am. Dec. 228; *Maloney v. Doane*, 15 La. 278; s. c., 35 Am. Dec. 204; *Williams v. Vanmeter*, 8 Mo. 339; s. c., 41 Am. Dec. 644; *Bartlett v. Brown*, 6 R. I. 37; *Griffin v. Chubb*, 7 Tex. 603; s. c., 58 Am. Dec. 85; *Dickinson v. Maynard*, 20 La. An. 66; s. c., 96 Am. Dec. 379; *Stewart v. Sonneborn*, 98 U. S. 187; *Cottrell v. Richmond*, 5 Mo. App. 588; *Wilson v. King*, 39 N. Y. Sup. Ct. 384; *Porter v. White*, 5 Mackey (D. C.) 180; *Emerson v. Cochran*, 111 Pa. St. 619; *Jordan v. Ala. Gt. So. R. Co.* 81 Ala. 220; *Woods v. Finnell*, 13 Bush (Ky.) 628; *Smith v. Zent*, 59 Ind. 362; *Carleton v. Taylor*, 50 Vt. 220; *McKown v. Hunter*, 30 N. Y. 625; *Turner v. O'Brien*, 11 Neb. 108.

1. Want of Probable Cause.—See authorities cited under note 5. *Stacey v. Emery*, 97 U. S. 642; *Wasserman v. Louisville etc. R. Co.* 28 Fed. Rep. 802; *Lavender v. Hudgens*, 32 Ark. 763; *Smith v. Zent*, 59 Ind. 362; *McCarthy v. Kitchen*, 59 Ind. 500. But if an attachment be wrongfully sued out upon a ground untrue in fact an action will lie though there existed probable cause. *Carothers v. McIlhenny Co.*, 63 Tex. 138.

2. Termination.—The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust. *Bul. N. P.* 12 (see *Post*, 3 c.) To sustain an

Everyone is in duty bound to act fairly, honestly and without malice toward every other one. This is a moral duty, but becomes a legal and concrete one when the machinery of the law is called into use. And it is for the infraction of this duty that the action of malicious prosecution lies. So where naught but correct motive under probable cause exists, this action will not lie.¹

II. GENERAL PRINCIPLE ON WHICH ACTION DEPENDS.—As a rule, actions for malicious prosecutions cannot be maintained if the accusation complained of was not made in the ordinary and regular course of justice, and before a tribunal having power to as-

action for malicious prosecution, the failure of the proceedings against the plaintiff must be averred and proved. *Stewart v. Sonneborn*, 93 U. S. 187; *Gillespie v. Hudson*, 11 Kas. 163.

1. An action will not lie for malicious prosecution where the proceedings instituted by the defendant were fairly justified by the apparent circumstances, and where his conduct shows a fair and legitimate purpose honestly to pursue a just claim against a debtor, whose conduct was such as to give rise to just suspicions of his honesty. *Stansell v. Cleveland*, 64 Tex. 660.

There having been probable cause for the prosecution, and it having been instituted in good faith, an action will not lie for malicious prosecution. *Wasserman v. Louisville etc. R. Co.*, 28 Fed. Rep. 802. An action of malicious prosecution will not lie for making a charge of facts which are true, the magistrate erroneously believing them to constitute a crime, and issuing a warrant accordingly. *Hahn v. Schmidt*, 64 Cal. 924; *Carter v. Sutherland*, 52 Mich. 587; *Teal v. Fissel*, 28 Fed. Rep. 351.

Where the complaint did not charge the commission of any specific offence, and the facts stated did not impute any crime, but the justice of the peace, by mistake of judgment, and thinking a crime was charged, caused the arrest of the party, the law will not hold the person who made the complaint responsible, in an action for malicious prosecution, for the consequence of such error. *Newman v. Davis*, 58 Iowa 447.

But it is held that a party who maliciously, and without probable cause, prosecutes another upon a criminal charge, cannot in any degree avoid his liability by showing that the information or indictment was defective or insufficient either in substance or form. This must be so upon principle. The

gist of the action is the criminal prosecution instituted with malice and without probable cause, resulting in damage to plaintiff by depriving him of his liberty, injuring his reputation or putting him to expense. These concur in a prosecution upon an insufficient information the same as upon a sufficient one. *Shaul v. Brown*, 28 Iowa 37; s. c., 4 Am. Rep. 151; *Sears v. Hathaway*, 12 Cal. 277; *Streight v. Bell*, 37 Ind. 550; *Forrest v. Collier*, 20 Ala. 175; *Stancliff v. Palmeto*, 18 Ind. 321; 1 Hill on Torts (3d ed.) 426. *Pearli v. Reed*, 30 Kan. 534; *Bell v. Keepers*, 37 Kan. 64.

A bad indictment serves all the purposes of malice by putting the party to expense and exposing him. *Humphry v. Case*, 8 Conn. 101; s. c., 20 Am. Dec. 95; *Whipple v. Fuller*, 11 Conn. 532; s. c., 29 Am. Dec. 330; *Stone v. Staples*, 12 Conn. 219; s. c., 30 Am. Dec. 611.

However if the arrest is one for perjury, for having sworn falsely upon a point not material to the issue then on trial it is without probable cause, as false testimony is not perjury unless it is upon a point material to the issue. *Plath v. Braunsdorff*, 40 Wis. 107; *Smith v. Deaver*, 4 Jones L. (N. Car.) 513. And where a party, knowing that a certain act does not constitute a crime, procures another to be indicted for a crime, an action for malicious prosecution lies, *Dennis v. Ryan*, 65 N. Y. 385. This action will lie against a trial justice who suffered the plaintiff, whom he had sentenced to pay a fine and costs, to go at large and ten weeks afterward, the fine and costs remaining unpaid, committed him to jail upon a *mittimus* for the purpose of extorting money from him. *Fisher v. Deans*, 107 Mass. 118.

But an action brought in the name of another person, without his authority, is a groundless and unlawful suit, and for the damage done to the defendant

certain the truth or falsity of the charge, and punish the supposed offender.¹ It can hardly be said, however, that the courts are in perfect accord on this proposition.² Neither can it be maintained, where one pursues his legal right, even though he does so maliciously, and without reasonable and probable cause; as, for instance, causes an execution to issue upon a judgment which he holds.³ Nor where the action complained of has been acquiesced in as by compromise.⁴

In such a suit he may recover against the person by whom it was brought. *Forster v. Dow*, 29 Me. 442.

The criminal law was not designed to assist in the collection of debts, and he who attempts to so use it must expect to smart for it. *Kelley v. Sage*, 12 Kan. 109. Instituting a criminal prosecution against another to recover one's property is, in a legal sense, from an improper motive and malicious, although the prosecutor had reasonable grounds for belief of the plaintiff's guilt. *Gabel v. Welsensee*, 49 Tex. 131.

1. The rule here stated is deduced from the holding of a majority of the courts. See *Bidwell v. Osgood*, 3 Pick. (Mass.) 379; s. c., 15 Am. Dec. 228; *Bixby v. Brundage*, 2 Gray (Mass.) 129; s. c., 61 Am. Dec. 443; *Castro v. DeUriarte*, 16 Fed. Rep. 93; *Whiting v. Johnson*, 6 Gray (Mass.) 246; *Marshall v. Betner*, 17 Ala. 832; *Painter v. Ives*, 4 Neb. 122.

When the justice has by law no jurisdiction of the subject matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings cannot be properly called a prosecution. *Sweet v. Negus*, 30 Mich. 406.

2. Other cases, however, hold that an action on the case for malicious prosecution may be maintained where the court has no jurisdiction, if the proceedings are malicious and unfounded, and without probable cause, and occasion legal damages to the party accused. *Stone v. Stevens*, 12 Conn. 319; s. c., 30 Am. Dec. 611; *Wood v. Sutor* (Tex.), 8 S. W. Rep. 51. *Ex parte Wilson*, 114 U. S. 417; *Boon v. Maul*, 3 N. J. L. 863.

So an action for malicious prosecution will lie, if the malice and falsehood be put forward as the gravamen, and the arrest as the consequence. *Morris v. Scott*, 21 Wend. (N. Y.) 281; s. c., 34 Am. Dec. 236. Same rule is laid down in *Platt v. Niles*, 1 Edm. (N. Y.) 432, but held not to apply where mal-

ice and falsehood are not the gravamen.

Where the want of jurisdiction does not appear upon the face of the warrant, and is only made to appear by evidence *aliunde*, the party arrested and prosecuted may maintain an action for malicious prosecution, upon showing that it was malicious, and in the absence of a probable cause. *Sweet v. Negus*, 30 Mich. 406.

If, however, the magistrate has jurisdiction of the subject matter, there is sufficient prosecution and acquittal, to furnish a foundation for the action. Notwithstanding any insufficiency of the complaint, or defect of process by which the plaintiff was brought before the court, or want of jurisdiction arising from such defect, where the plaintiff was required to plead to the complaint, to answer further thereto, at a subsequent day to give surety for her appearance, and in default of bail she was committed, and upon the day fixed for trial she was discharged, the magistrate finding and adjudging her to be not guilty of said charge. *Gibbs v. Ames*, 119 Mass. 60. This case is distinguished from *Whiting v. Johnson*, 6 Gray (Mass.) 129, and *Bixby v. Brundage*, 2 Gray (Mass.) 129; s. c., 61 Am. Dec. 443; in that in them the magistrate had no jurisdiction of the subject matter.

3. *Parker v. Francis*, 1 Pa. St. 156; *Davis v. Clough*, 8 N. H. 157; *Woodmanson v. Logan*, 3 N. J. L. 93; *Stone v. Swift*, 4 Pick. (Mass.) 389; *Pierce v. Thompson*, 6 Pick. (Mass.) 193; *Gorton v. De Angelis*, 6 Wend. (N. Y.) 418; 2 Addison on Torts (Wood's ed.) 78.

4. There having been two actions brought, one by A against B, and the other by B against A, and which were pending at the same time, were included in one settlement by the parties, by which A paid to B the difference between a portion of the sum sued for by B and the amount sought to be

III. ESSENTIALS TO MALICIOUS PROSECUTION—1. Criminal Actions.

—It is universally held that a criminal proceeding having been brought or prosecuted maliciously, and without probable cause, affords, when terminated, the basis of an action of malicious prosecution against the one so bringing or prosecuting such proceeding.¹

The varied character and phrases of such criminal proceedings are here noted.²

recovered by A; and judgment was entered for B in the action against him. *Held*, that B could not maintain an action against A for malicious prosecution in instituting that action. *Sartwell v. Parker*, 141 Mass. 405.

1. The general principle is laid down that an action lies for maliciously causing one to be indicted whereby he is damned either in person, reputation or property. 1 Hilliard on Torts 413.

2. If a person, maliciously and without probable cause, puts the criminal law in force and thereby another person is prejudiced or injured in property or person, there is such a conjunction of injury and loss as to lay the foundation for an action to recover the damages arising from the wrongful act. *Churchill v. Stiggers*, 3 El. & Bl. 937.

An action for malicious prosecution may be founded on an indictment upon which no acquittal could be had; as, for example, one rejected by the grand jury or *coram non judice* or insufficiently drawn. *Stancliff v. Palmeter*, 18 Ind. 321. *Chambers v. Robinson*, 2 Strange 691; *Wicks v. Fentham*, 4 Term R. 247; *Pippet v. Hearn*, 5 B. & Ald. 634.

So an action lies when a person, knowing that a certain act does not constitute a crime, procures the indictment of another for such an act as a crime. *Dennis v. Ryan*, 65 N. Y. 385.

Demanding excessive bail when the plaintiff has a good cause of action or holding to bail when there is no cause of action, if done vexatiously, entitles the party injured to an action for malicious prosecution. *Ray v. Law*, 1 Pet. (U. S.) 207.

And it is no defence to an action for malicious prosecution to show that the affidavit by the prosecutor was insufficient in law to authorize the arrest and prosecution which followed. *Stocking v. Howard*, 73 Mo. 25; *Morris v. Scott*, 21 Wend. (N. Y.) 281; *Stone v. Stevens*, 12 Conn. 219.

But where A made an affidavit before

a justice of the peace stating that he had lost certain goods which he believed were in the possession of B, B having been arrested under a warrant issued thereon, and, on examination, discharged, it was *held*, in an action for malicious prosecution by B against A, that A's affidavit contained no criminal charge, and that he was not therefore liable to B in an action for malicious prosecution. *McNeely v. Driskill*, 2 Blackf. (Ind.) 259. See also *Baird v. Householder*, 32 Pa. St. 168; *Bartlett v. Brown*, 6 R. I. 37; *Shaul v. Brown*, 28 Iowa 37; s. c., 4 Am. Rep. 151; *Stancliff v. Palmeter*, 18 Ind. 324; *Dennis v. Ryan*, 65 N. Y. 385; 1 Am. Lead. Cas. 281; *Anderson v. Buchanan*, *Wright* (Ohio) 725; *Streight v. Bell*, 37 Ind. 550; *Collins v. Love*, 7 Blackf. (Ind.) 416; *Barton v. Kavanaugh*, 12 La. An. 332.

Nor is it material that the plaintiff was prosecuted by an insufficient process or before a court not having jurisdiction of the matter; for a bad indictment may serve all the purposes of malice as well as a good one. *Greenleaf Evidence*, vol. 2, § 449.

Where a person falsely prosecutes another for a crime before a court having no jurisdiction of the offence, an action for malicious prosecution lies. *Morris v. Scott*, 21 Wend. (N. Y.) 281; *Stone v. Stevens*, 12 Conn. 219; *Hays v. Younglove*, 7 B. Mon. (Ky.) 545; *Sweet v. Negus*, 30 Mich. 406. *Contra*, see *Painter v. Ives*, 4 Neb. 122; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379; *Turpin v. Remy*, 3 Blackf. (Ind.) 210.

An action for malicious prosecution will lie after a criminal prosecution begun though no indictment has been preferred. *Shock v. McChesney*, 2 Yeates (Pa.) 473. It is sufficient if a charge of crime has been made to the proper officer with intent that it be entertained and acted upon as a charge of such crime. *Weston v. Beerman*, 27 L. J. Exch. 57. *Contra*, *Heyward v. Cuthbert*, 4 McCord (S. Car.) 354.

(a) *Malice*.—By the term “malice” is meant any indirect motive of wrong. It may be any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice.¹

In a legal sense, any unlawful act which is done wilfully and purposely to the injury of another is, as against that person, malicious.² It is an action based upon an improper motive, and

So if a warrant is sued out from a justice of the peace on an accusation of larceny, an action for malicious prosecution will lie, although the warrant is not placed in the officer's hands nor further proceeded on. *Holmes v. Johnson, Busbee* (N. Car.) L. 44.

However, the action will not lie if the accusation complained of was not made in the ordinary and regular course of justice and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender. *Bodwell v. Osgood*, 3 Pick. (Mass.) 379; *Turpin v. Remy*, 3 Blackf. (Ind.) 210. Nor if a complaint has been maliciously made and presented to a magistrate which results only in his sending a letter to the accused requesting him to call and explain the charge. *Newfield v. Copperman*, 47 How. (N. Y.) 87; s. c., 15 Abb. (N. Y.) Pr. N. S. 360.

Search Warrant.—An action for malicious prosecution will lie against one who maliciously, and without probable cause, institutes and carries forward proceedings under a search warrant. *Whitson v. May*, 71 Ind. 269; *Miller v. Brown*, 3 Mo. 127. And this although the magistrate refuses to issue the warrant. *Miller v. Brown*, 3 Mo. 127. Otherwise if search has been made with plaintiff's consent. *Carey v. Sheets*, 60 Ind. 17.

Bastardy Proceedings.—A malicious and unfounded prosecution for bastardy, set on foot by procuring the necessary affidavit to be filed, gives a right of action to the party accused without probable cause, though the proceeding be ended by dismissal without any arrest having been made, and the injury in such case is completed by filing the affidavit before a justice of the peace, and the issue of the warrant is not essential. *Coffey v. Myers*, 84 Ind. 105; *Green v. Cochran*, 43 Iowa 544.

Lunacy Proceedings.—One who, maliciously and without probable cause, institutes or procures to be instituted against another an inquisition of

lunacy, is liable to the latter in an action for malicious prosecution, for all damages suffered by him in excess of the taxable costs of such proceeding. *Lockenour v. Sides*, 57 Ind. 360. *Wolcott v. Eagle Ins. Co.*, 4 Mass. 433.

An action of malicious prosecution will lie against a party who causes the arrest of a person for the purpose of ascertaining who perpetrated an offence. *Johnson v. Ebberts*, 11 Fed. Rep. 129.

The remedy for causing an arrest by maliciously bringing a suit upon false charges or maliciously making a false affidavit is an action on the case for malicious prosecution. *Everett v. Henderson*, 146 Mass. 93.

1. Addison on Torts (Wood's ed.), § 853; *Stevens v. Midland Railway Co.*, 10 Exch. 356; 23 L. J. Exch. 328.

While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet, any motive other than that of instituting the prosecution for the purpose of bringing the party to justice, is a malicious motive on the part of the person who acts under the influence of it. *Jones v. Marsh*, 52 Ind. 323.

By malice is meant not the act but the wrongful motive which prompts the act. *Garvey v. Wayson*, 42 Md. 178; *Harpham v. Whitney*, 77 Ill. 32.

2. Hilliard on Torts, vol. 1, p. 446; *Griffin v. Chubb*, 7 Tex. 603; *Com. v. Snelling*, 15 Pick. (Mass.) 337; *Glasgow v. Owen*, 69 Tex. 167; *Southwestern R. Co. v. Mitchell*, 80 Ga. 438; *Johnson v. Ebberts*, 11 Fed. Rep. 129.

Malice consists of a bad motive or such reckless disregard of the rights of others as to show evil intent. *Biering v. First Nat. Bank*, 69 Tex. 599.

Malice may lie only in its being wilful, wanton or reckless, or against the accuser's sense of duty, and for ends that he is bound to know are wrong and against public policy. *Hamilton v. Smith*, 39 Mich. 222.

does not necessarily presuppose personal hatred, ill will or revenge.¹

It may be a mere wanton or careless disregard for the rights of others, or the doing of the act complained of without that ordinary prudence and discretion which persons of sufficient age and sound mind are presumed to have.²

1. Haddrick v. Heslap, 12 Ad. & El., N. S. 267.

Any motive other than a *bona fide* purpose to bring a person to punishment as a violator of the criminal law, or associated with such *bona fide* purpose, is malicious; but, if a criminal offence has been committed, and there is probable cause for believing that the person accused was the perpetrator, the prosecutor may invoke the punitive power of the law, although he may have a private grievance to redress, or may cherish malice. Jordan v. Ala. Great So. R. Co., 81 Ala. 220.

Defendant must have honestly believed in the truth of the charge made by him and he is guilty of malice if he institutes the prosecution without probable cause or from an improper motive, although there is neither actual hatred nor ill will. Spear v. Hiles, 67 Wis. 350.

The term "malice" is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. The improper motive, or want of proper motive inferrible from a wrongful act, based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action. Forbes v. Hagman, 75 Va. 168.

The malice necessary to be shown in order to maintain this action is not necessarily revenge or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malice. Wills v. Noyes, 12 Pick. (Mass.) 324; Page v. Cushing, 38 Me. 523; Humphries v. Parker, 52 Me. 502; Mitchell v. Wall, 111 Mass. 492; Pullen v. Glidden, 66 Me. 202.

The malice required has been defined with great accuracy and precision as consisting in an improper motive not necessarily any positive malignity or corruption, but a wilful disregard of the rights of others. Whether it be to compass some unlawful end or some unlawful end by unlawful means or to

do a wrong and unlawful act knowing it to be such, as when an attachment is sued out by a person who knows he has no cause of action, he may be deemed to have intended thereby to vex, harass and injure the party sued; and this would be malice enough. Alexander v. Harrison, 38 Mo. 258; s. c., 90 Am. Dec. 431; Ives v. Bartholomew, 9 Conn. 313; Kirksey v. Jones, 7 Ala. 622.

So malice will be inferred when the object of the prosecution is to simply enforce the payment of a debt. Ross v. Langworthy, 13 Neb. 492. It may also be inferred from gross culpable negligence in making enquiries and from misstatements of facts. Wiggin v. Coffin, 3 Story (U. S.) 1. And legal malice may exist though the party making the oath for the arrest may not have wilfully sworn falsely. Forbes v. Hagman, 75 Va. 168.

But mere dislike or ill will does not constitute malice in the legal sense. There must be some act done with intent to injure the plaintiff, and such act must be wrongful and done without legal justification or excuse. Peck v. Chouteau, 91 Mo. 138.

2. A criminal intent is supplied by law where the wrong and injury result from the lack, on the part of the defendant, of that ordinary prudence and discretion which persons of sufficient age and sound mind are presumed in the law to have. Murphy v. Hobbs, 8 Colo. 17. So a prosecution is malicious if instituted without probable cause and from motives of private interest, although under advice of counsel. Grundy v. Crescent News & Hotel Co., 38 La. An. 974. Where the defendant caused the arrest of the plaintiff without probable cause, but not from any actual ill will toward him, but for the purpose of finding out who had forged a certain note in his name, in the plaintiff's possession and which he claimed to be valid and to have acquired in good faith, it was held that the arrest was malicious. Johnson v. Ebberts, 6 Sawy. (U. S.) 538; s. c., 11 Fed. Rep. 129. However, a prosecution begun in good faith by advice of

The motive, however, is immaterial if there was probable cause,¹ or if the accused was in fact guilty of the offence charged.²

(b) *Want of Probable Cause.*—As we have seen, in order that an action for malicious prosecution may be maintained, the plaintiff must show that the defendant had no probable cause for the commencement or continuation of the proceeding complained of. What then is “probable cause”?

Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.³

counsel is not malicious. *Wright v. Hanna*, 98 Ind. 217.

Malice does not necessarily mean alone that state of mind which must proceed from a spiteful, malignant or revengeful disposition, but includes as well that which proceeds from an ill regulated mind, not sufficiently cautious and recklessly bent on the attainment of some desired end although it may inflict wanton injury upon another. *Brewer v. Jacobs*, 22 Fed. Rep. 217. But one who uses another's name to prosecute a suit without authority is liable for damages sustained by the defendant in said suit, although there was no malice. *Bond v. Chapin*, 8 Met. (Mass.) 31.

1. *Ames v. Schneider*, 69 Ill. 376; *Smith v. Austin*, 49 Mich. 286; *Emerson v. Cochran*, 111 Pa. St. 619; *Flickinger v. Wagner*, 46 Md. 580; *Miller v. Willigen*, 48 Barb. (N. Y.) 30.

2. *Adams v. Lisher*, 3 Blackf. (Ind.) 241; *Foshay v. Ferguson*, 2 Denio (N. Y.) 617. And malice cannot be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law. *Sears v. Hathaway*, 12 Cal. 277.

3. *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Walker v. Camp*, 63 Iowa 627; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544; *Barron v. Mason*, 31 Vt. 189; *Hays v. Blizzard*, 30 Ind. 457; *Lauda v. Obert*, 45 Tex. 539; *Mowry v. Whipple*, 8 R. I. 360; *Ames v. Snider*, 69 Ill. 376; *McGurn v. Brackett*, 33 Me. 331; *Wilmarth v. Mountford*, 4 Wash. (U. S.) 79; *Heyne v. Blair*, 62 N. Y. 19; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Ross v. Langworthy*, 13 Neb. 492; *Boyd v. Cross*, 35 Md. 197; *Cooper v. Utterbach*, 37 Md. 282; *Shafer v. Loucks*, 58 Barb. (N. Y.) 426; *Morey*

v. Whipple, 8 R. I. 360; *Center v. Spring*, 2 Iowa 393; *Munns v. Dupont*, 3 Wash. (U. S.) 31; *Sharpe v. Johnston*, 76 Mo. 660; *Ross v. Innis*, 35 Ill. 487; s. c., 85 Am. Dec. 373; *Paddock v. Watts*, 116 Ind. 146; *Glasgow v. Owen*, 69 Texas 167.

Probable cause is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives, *Ulmer v. Leland*, 1 Greenl. (Me.) 135; s. c., 10 Am. Dec. 48. The prosecutor may act upon appearances; and if the apparent facts are such that a discrete and prudent man would be led to the belief that the accused had committed a crime, he will not be liable in the action although it may turn out that the accused was innocent. *Carl v. Ayers*, 53 N. Y. 15.

If there be an honest belief of guilt and if there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearance and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances and excluding those within his knowledge which tend to prove innocence. *Hampton v. Jorles*, 58 Iowa 317. Mere suspicions, without reasonable grounds for believing them to be founded in fact, however, will not amount to a probable cause. *Hirsch v. Feeney*, 83 Ill. 548.

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence charged. *Davie v. Wisher*, 72

Ill. 262; *Brown v. Willoughby*, 5 Colo. 1. Probable cause, in the perspicuous and comprehensive language of Mr. Hilliard, is defined to be such a state of facts, known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice, upon facts within the party's knowledge, to believe, or entertain an honest and strong suspicion that the person accused is guilty. Hilliard on Torts, ch. 12, § 18.

Probable cause is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe that the person accused is guilty. *Jordan v. Ala. Great So. R. Co.*, 81 Ala. 220..

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged. *Cole v. Curtis*, 16 Minn. 182; *Casey v. Sevaton*, 30 Minn. 516; *Burton v. St. Paul etc. R. Co.*, 33 Minn. 189.

In deciding upon the existence of probable cause, the prosecutor's belief in the guilt or innocence of the party cannot be considered, nor does the existence of such facts as might influence his judgment have any weight, but the test is the effect they might have upon the judgment of others. *Ramsey v. Arrott*, 64 Tex. 320.

Probable cause upon which to found a prosecution exists only where there is such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong persuasion that the person is guilty. No mere suspicion nor even a strong belief arising from the character of the accused, his habits or countenance can be admitted as a justification. *Holburn v. Neal*, 4 Dana (Ky.) 120.

Probable cause is conduct of the accused tending to show that the prosecution was undertaken from public motives or such facts as would induce a reasonable man to commence a prosecution, or circumstances sufficient to warrant a prudent man in the belief that the party is guilty, or such a state of facts as would lead a man of ordinary caution and prudence to entertain a belief of the guilt, without facts to support it, does not show probable cause. *Graeter v. Williams*, 55 Ind. 461; *Bit-*

ting v. TenEyck, 82 Ind. 421; s. c., 42 Am. Rep. 505. But actual knowledge that a crime was committed is not necessary, nor is it essential that the prosecutor should know the facts and circumstances upon which he predicates his belief. He may act upon credible information or deceptive appearances of guilt, if he acts in good faith. *Brown v. Willoughby*, 5 Colo. 1.

The prosecution of a suit which has no foundation except in the assumption that the judgment of the highest State court is not law, is without probable cause. *Butcher's Union Slaughter House Co. v. Crescent City Live Stock Co.*, 37 La. An. 874.

And in a case where it appears by the evidence in the case, that the plaintiff was arrested by the procurement of the defendants on a charge of larceny of certain oil; that when he was alleged to have stolen this oil, he was in the possession thereof as a tenant of oil wells, it being oil which he had himself produced;—that he was bound to deliver, whenever called on, one-third of the oil he produced as rent to his landlord; and that he by his contract was forbidden to remove any oil from the premises without notice to his landlord; that without such notice he did remove all the oil, which at a particular time he had on the premises, and appropriated it to his own use, claiming that there was no rent oil then due to his landlord, because more oil had been taken as rent on a previous occasion by the landlord than he was entitled to; and that this had been taken in the absence of the plaintiff. These facts and this claim of the plaintiff's was known to the prosecutors, the defendants; nevertheless, they had him arrested on a charge of stealing the rent oil claimed to be due and taken off under these circumstances, and appropriated by the plaintiff to his own use. *Held*, that there was no probable cause to justify the defendants in procuring this prosecution to be set on foot. *Vinal v. Core*, 18 W. Va. 1. Evidence warranting a finding that a railroad conductor who ordered plaintiff's arrest, did not believe that plaintiff was attempting to evade the payment of fare, justifies a finding that the arrest was made without probable cause. *Krulevitz v. Eastern R. Co.*, 143 Mass. 228.

The plaintiff found the cows of the defendant in his garden, and sent a messenger to the defendant, requesting him to come and pay the damage done

Such facts and circumstances must not only exist, but the defendant must have believed in the guilt of the plaintiff.¹ It is upon the existence of such belief based upon such facts and circumstances that the question of probable cause rests, and not upon the actual guilt of the accused.² Mere belief is not enough, however sincerely entertained.³ The degree of caution

by the cows, and to take them away. The defendant thereupon went to an attorney and told him that he had heard that the plaintiff had his cows, and had secreted them, and that he could not find them; and the attorney advised the defendant to cause the arrest of the plaintiff for larceny, which was done. *Held*, that there was actual malice, and a want of probable cause for the arrest. *Wild v. Odell*, 56 Cal. 136.

1. The honest belief of a person commencing a criminal prosecution against another, in the guilt of the accused is an essential element or fact for him in showing probable cause or in disproving the want of it; but he must also show such reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief before his belief can become his vindication or shield. If he should show such ground and circumstances and yet it was apparent that he did not himself believe in the guilt of the accused, they would not protect him. *Shaul v. Brown*, 28 Iowa 37; s. c., 4 Am. Rep. 151; *Lawrence v. Lanning*, 4 Ind. 196; *Jacks v. Stimpson*, 13 Ill. 701; *Wills v. Noyes*, 12 Pick. (Mass.) 324; *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357; *Farnam v. Feeley*, 56 N. Y. 451. But the defendant need not be convinced of plaintiff's guilt of the crime for which he causes his arrest, in order to justify such arrest. It is sufficient if the facts be such as to produce a suspicion in the mind of a prudent man. *Keep v. Griggs*, 12 Ill. App. 511. The defendant should have honestly believed that the plaintiff was guilty of the offence charged. *Spear v. Hiles*, 67 Wis. 350.

2. *Carl v. Ayers*, 53 N. Y. 14; *Baldwin v. Weed*, 17 Wend. (N. Y.) 224; *Bacon v. Towne*, 4 Cush. (Mass.) 218; *Thompson v. Lumley*, 50 How. (N. Y.) Pr. 105; *Moore v. Sauborin*, 42 Mo. 490; *Callaway v. Burr*, 32 Mich. 332; *King v. Colvin*, 11 R. I. 582; *Foshay v. Ferguson*, 2 Den. (N. Y.) 617; *Burlingame v. Burlingame*, 8 Cow. (N. Y.)

141; *Scanlan v. Cowley*, 2 Hilt. (N. Y.) 489; *French v. Smith*, 4 Vt. 363; *Swaim v. Stafford*, 3 Ired. (N. Car.) 289; *Johnson v. Chambers*, 10 Ired. (N. Car.) 287; *Fagnan v. Knox*, 66 N. Y. 525; *Miller v. Milligan*, 48 Barb. (N. Y.) 30.

And although the facts known make out a *prima facie* case of guilt, yet if the circumstances are all consistent with the innocence of the party and the prosecutor knows the accused is not guilty or does not believe him to be guilty he cannot have reasonable cause for the prosecution. *Townshend, Sland. & Lib.*, § 428, p. 715; *Fagan v. Knox*, 1 Abb. (N. Y.) 246; *Woodworth v. Mills*, 61 Wis. 44. The question of probable cause is entirely independent of plaintiff's actual guilt or innocence of the crime for which he was prosecuted. *Lytton v. Baird*, 95 Ind. 349.

It is not necessary that all the facts shall be true upon which the prosecutor acts. If he honestly believes them to be true and they are of such a character as would induce a reasonable and prudent man to believe them to be true, then there is probable cause. *Bourne v. Stout*, 62 Ill. 261; *Forbes v. Hagman*, 75 Va. 168.

The honest and reasonable belief of the one making the complaint is a necessary element in determining whether he acted without probable cause and maliciously. *Krulovitz v. Eastern R. Co.*, 140 Mass. 573.

3. *Ross v. Langworthy*, 13 Neb. 492. *Cooley on Torts* 182. Conjecture or suspicion of guilt does not amount to probable cause and does not justify an arrest. *Stone v. Stevens*, 12 Conn. 219. The mere belief of a person making a criminal complaint, that it is true, does not alone justify a prosecution thereunder; it must rest on reasonable grounds and on such facts as would lead a person of ordinary caution to honestly suspect the accused of guilt. *Spalding v. Lowe*, 56 Mich. 366; *Ramsey v. Arrott*, 64 Tex. 320. Floating rumors are not adequate foundation for such a belief. *Smith v. Edge*, 52 Pa. St. 419.

and care required is that exercised by men ordinarily.¹ Such caution as this requires proper diligence and enquiry.² It matters not that there was probable cause for the arrest of an innocent plaintiff if the same was unknown to defendant at the time he caused the arrest.³ And a defendant is not liable for causing the arrest of a guilty person even though such arrest was made without probable cause.⁴

The expressions "reasonable cause" and "probable cause" have essentially the same meaning,⁵ but "just or proper cause" has not.⁶

To what extent the advice of counsel affects the question of probable cause, see section 8, DEFENCES.

Some instances of what facts do and do not constitute probable cause are cited in the notes.⁷

1. It is enough if the prosecutor acted with such a degree of impartiality, reasonableness and freedom from prejudice as can be fairly expected of a man of ordinary prudence and caution, acting without malice. *Casey v. Severson*, 30 Minn. 516; *Cole v. Curtis*, 16 Minn. 182; *McGurn v. Brackett*, 33 Me. 331.

2. *Paddock v. Watts*, 116 Ind. 146. In an action to recover damages for an alleged malicious prosecution the following instruction was given for the plaintiff: Reasonable and probable cause for a criminal prosecution depend very much upon the particular circumstances of each case; but the facts ought to show that the defendant exercised proper diligence and made honest and faithful enquiry into the facts and circumstances inducing belief in the guilt of the accused, and had knowledge of circumstances of his guilt sufficient to satisfy a reasonable mind that plaintiff was guilty and that his guilt could reasonably be expected to be established by a criminal prosecution; and if the jury believe that no such facts existed, and no such faithful and honest enquiry into the facts and circumstances of the guilt of the plaintiff was made by the defendant, then there was no reasonable and probable cause for the prosecution against the plaintiff." *Planters' Insurance Co. v. Williams*, 60 Miss. 916. But the apparently truthful statements of a child eleven years old who claimed to have seen the plaintiff commit the offence with which he was charged constitutes probable cause. *Dwain v. Desalzo*, 66 Cal. 415.

3. *Galloway v. Stewart*, 49 Ind. 156; s. c., 19 Am. Rep. 677; *Turner v. Ambler*, 10 Q. B. 252. Probable cause may

consist of such facts as lead to the inference that the party was actuated by a reasonable conviction of the justice of his suit, and it must appear that he became acquainted with those facts before bringing the suit. *Stansell v. Cleveland*, 64 Tex. 660.

Probable cause is to be determined by facts known to the defendant and which influenced him in instituting the proceedings not by those developed on the trial. *Scott v. Shelor*, 28 Grat. (Va.) 891. Evidence showing plaintiff's innocence is not admissible unless the facts were known to the defendant when he preferred the charge. *King v. Colvin*, 11 R. I. 582; *Brennan v. Tracy*, 2 Mo. App. 540.

4. *Sears v. Hathaway*, 12 Cal. 277.

5. *Stacy v. Emery*, 97 U. S. 642.

6. *Van De Wiele v. Callanan*, 7 Daly (N. Y.) 386.

7. A prosecution for felony will not be held to have been without probable cause if there was probable cause to believe the accused guilty as an accessory before the fact to such felony. *Spear v. Hiles*, 67 Wis. 350. One who can fortify his ejectment suit by the testimony of reliable experts and who is honestly advised by counsel that he has a case, cannot be charged with having instituted it without probable cause although it fails. *Allen v. Codman*, 139 Mass. 136.

One sued for malicious prosecution and false imprisonment of plaintiff, attempted to justify the alleged wrong by alleging ownership through a tax title of certain land, for cutting timber on which he had prosecuted and caused plaintiff's arrest. *Held*: (1.) That a charge instructing the jury that the tax title gave the defendant no right either

(c) *Termination of Former Action.*—It is a well recognized general rule that no action for malicious prosecution will lie until the proceeding complained of has been legally terminated in favor of the defendant therein.¹ If the action has been appealed the appeal must have been determined.² If for maliciously su-

to the land or the timber growing on it, and that its existence would not constitute probable cause in favor of defendant for believing that the land or the timber thereon had been his property, was error. (2.) The true question was, whether or not the tax deed tended to show the existence of probable cause for defendant to believe that he owned the land described in it, and the timber thereon, and this should have been left to the jury for the purpose of negating malice, and in mitigation of exemplary damages. *McDaniel v. Needham*, 61 Tex. 269. If a defendant acted upon the advice of counsel and upon such advice had an honest belief in the validity of the debt sued for and of his right to recover it; and in the institution of bankruptcy proceedings had acted likewise on such advice and under an honest belief that he was taking and using only such remedies as the law provided for the collection of what he believed to be a *bona fide* debt, he having first given a full statement of the facts to counsel, then such facts would constitute in law probable cause. *Stewart v. Sonneborn*, 98 U. S. 187.

M caused plaintiff to be arrested for larceny, the grand jury refused to indict and plaintiff sued for malicious prosecution. Plaintiff had ordered goods and upon their delivery to him offered a dishonored promissory note in payment for them, which was refused and the vender neither got money nor were the goods returned. *Held*, that if the jury thought plaintiff's conduct suspicious of a swindle, the prosecution of him would be justified although an actual case of larceny was not made out. *Wilmarth v. Mountford*, 4 Wash. (U. S. 79).

1. *Hatch v. Cohen*, 84 N. Car. 602; *Lowe v. Wartman*, 47 N. J. L. 413; *Apgar v. Woolston*, 43 N. J. L. 57; *West v. Hayes*, 104 Ind. 251; *Stewart v. Sonneborn*, 98 U. S. 187; *Swensgaard v. Davis*, 33 Minn. 368; *Casebeer v. Drahoble*, 13 Neb. 465; *Wood v. Laycock*, 3 Metc. (Ky.) 192; *O'Brien v. Barry*, 106 Mass. 300; s. c., 8 Am. Rep. 329; *Grant v. Moore*, 29 Cal. 644; *Gillespie v. Hudson*, 11 Kan. 163; *Hamilburgh v. Shepard*, 119 Mass. 30; *Gor-*

rell v. Snow, 31 Ind. 215; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Steel v. Williams*, 18 Ind. 161; *Pratt v. Page*, 18 Wis. 337; *West v. Hayes*, 104 Ind. 251; *Thomason v. De Motte*, 9 Abb. Pr. (N. Y.) 242; *Monroe v. Maples*, 1 Root (Conn.) 422; *Spring v. Besore*, 12 B. Mon. (Ky.) 551; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Parker v. Farley*, 10 Cush. (Mass.) 279; *Bacon v. Waters*, 2 Allen (Mass.) 400; *Sayles v. Briggs*, 4 Met. (Mass.) 421; *Stone v. Crocker*, 24 Pick. (Mass.) 87; *Davis v. Clough*, 8 N. H. 157; *Cardinal v. Smith*, 109 Mass. 158; s. c., 12 Am. Rep. 682; *Leever v. Hamill*, 57 Ind. 423; *Brown v. Randall*, 36 Conn. 56; *Glasgow v. Owen*, 69 Tex. 167.

Where a magistrate has authority only to bind over or discharge and he discharges, the discharge is equivalent to an acquittal and will avail the accused as evidence to support the allegation of acquittal. *Sayles v. Briggs*, 4 Met. (Mass.) 421.

The reasons why an action should be terminated in favor of a defendant before the defendant can commence an action for a malicious prosecution would seem to be as follows: First, if the action is still pending the plaintiff therein may show in that action that he had probable cause for commencing the suit, by obtaining a judgment therein against the defendant, and he should not be called upon to show such fact in a second action until he has had this opportunity of showing it in the first; second, and if the action has terminated against the defendant then there is already an adjudication against him, showing conclusively that the plaintiff had probable cause for commencing the action. When neither of these reasons applies we suppose the action for malicious prosecution may be maintained, if the other necessary facts can be shown. *Marbourg v. Smith*, 11 Kan. 554.

2. *Reynolds v. DeGeer*, 13 Ill. App. 113; *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y.) 353; *Howell v. Edwards*, 8 Ired. (N. Car.) 516.

When a party has a final judgment on trial, the prosecution is so far terminated that he may sue for malicious

ing out an injunction, the injunction must have been finally disposed of.¹ This general rule, however, does not obtain where the proceedings have been *ex parte*, the defendant in such proceedings having had no opportunity to defend as in cases of attachment.²

So in peace cases the action will lie, even though the defendant in such case was required to and did give bond to keep the peace.³

And, generally, the rule is not applicable where the prosecution has terminated under such circumstances that the accused had no opportunity to controvert the facts alleged against him and to secure a determination thereon in his favor.⁴ Nor is it necessary that such termination be such as would bar any other prosecution for the same offence.⁵ If the prosecution terminated in a conviction the action will not lie,⁶ unless such conviction was procured by the fraud or perjury of the defendant.⁷ The prosecution may be said to be terminated (1) where there is a verdict of not guilty;⁸ (2) where the grand jury ignores a bill;⁹ (3)

prosecution. If an appeal from the judgment be pending when he brings his action, he simply takes the risk of an adverse decision on the appeal, which will defeat such action. It seems that the appeal from the judgment may furnish a reason for staying the trial of the action for malicious prosecution until the decision of the appeal. *Marks v. Townsend*, 97 N. Y. 590.

After a criminal complaint has been entered in the superior court, upon appeal, the entry of a *nolle prosequi* by the prosecuting officer, by the procurement of the defendant's attorney, his discharge not being ordered by the court, is not such a termination of the prosecution as will enable him to maintain an action against the complainant for malicious prosecution. *Langford v. B. & A. R. Co.*, 144 Mass. 431.

1. *Tatum v. Morris*, 18 Ala. 302.

2. An action for malicious prosecution may be maintained for maliciously, and without probable cause, suing out an attachment without either averring or proving that the attachment complained of had been discharged or otherwise terminated adversely to the claim of the party employing its aid. *Fortman v. Rottier*, 8 Ohio St. 548; *Bump v. Betts*, 19 Wend. (N. Y.) 421.

3. *Hyde v. Greuch*, 62 Md. 577.

4. *Swensgaard v. Davis*, 33 Minn. 368; *Olson v. Neal*, 63 Iowa 214. As where the arrest was without jurisdiction. *Steel v. Williams*, 18 Ind. 161; *Searll v. McCracken*, 16 How. Pr. (N. Y.) 262.

5. *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Gilbert v. Emmons*, 42 Ill. 143. As where the indictment is such that no acquittal could be had as if it be rejected by the grand jury or be *coram non judice*, or be insufficiently drawn. *Stancliff v. Palmeter*, 18 Ind. 321.

6. *Hibbing v. Hyde*, 50 Cal. 206; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Monroe v. Maples*, 1 Root (Conn.) 422; *Miller v. Deere*, 2 Abb. Pr. (N. Y.) 1.

7. *Palmer v. Avery*, 41 Barb. (N. Y.) 290; *Burt v. Place*, 4 Wend. (N. Y.) 591; *Witham v. Gowen*, 14 Me. 362; *Payson v. Caswell*, 22 Me. 212.

8. A judgment of acquittal is admissible to show that the prosecution has terminated. *Winn v. Peckham*, 42 Wis. 493. When the criminal prosecution is ended if it terminates in favor of the accused, he may then maintain his action for malicious prosecution. *Apgar v. Woolston*, 43 N. J. L. 57; *Lowe v. Wartman*, 47 N. J. L. 413.

9. The discharge, upon the failure to find an indictment, of an accused person, bound over on a complaint to await the action of the grand jury, is such a termination of the proceedings against him as is necessary to sustain an action for a malicious prosecution, without regard to the fact that a *nolle prosequi* is subsequently entered. *Graves v. Dawson*, 130 Mass. 78; s. c., 39 Am. Rep. 429; *Bacon v. Waters*, 2 Allen (Mass.) 400; *Cardinal v. Smith*, 109 Mass. 158; s. c., 12 Am. Rep. 682; *Jones v. Givin*, Gilb. 185; *Morgan v. Hughes*, 2 T. R. 225; *Mitchel v. Will-*

where a *nolle prosequi* is entered;¹ (4) where the accused has

iams, 11 M. & W. 205; *Lowe v. Wartman*, 47 N. J. L. 413. In an action for malicious prosecution by causing plaintiff to be arrested upon a criminal charge, the failure of the grand jury to find an indictment and the discharge of the accused by the court constitute such a termination of the proceedings as is necessary to sustain the action. *Hower v. Lewton*, 18 Fla. 328.

1. The rule stated in the text is not invariably held. Indeed there are many cases holding otherwise. But it seems on reason and weight of authority to be the better rule. In *Brown v. Randall*, 36 Conn. 56; s. c., 4 Am. Rep. 35. After saying that the question has never been adjudicated in that State, and therefore it may be determined upon principle, the court further discusses the case as follows:

"One reason given for this is, that no termination of the prosecution in favor of the accused short of an acquittal will discharge the crime or be a bar to a new indictment. This reasoning is not satisfactory. The possibility that the plaintiff may be again prosecuted for the same alleged offence is not inconsistent with an entire want of probable cause in the first prosecution. This reason seems to have been disregarded in *Sayles v. Briggs*, 4 Met. (Mass.) 421. The complainant abandoned the prosecution against the plaintiff, after a trial, and the magistrate, who could only bind over or discharge the person accused, discharged him. The court held that the action could be maintained. Yet such a charge could be no bar to a subsequent prosecution. Another reason given is, that the common law will not favor actions in behalf of a party criminally prosecuted against one who has acted as complainant in behalf of the public, and ostensibly for the public good; it therefore requires that the plaintiff in such an action shall begin by offering the verdict of a jury who have considered the cause on its merits. This may be a very proper caution to a jury, and a matter which ought to be considered by them in weighing evidence, but we see no sufficient reason for adopting it as an absolute rule of law. The effect of this is, in some cases at least, to shut out the truth. No such rule has been adopted in this State, and we think it is contrary to the prevailing notions of the profession. On the whole, we think it wise and safe,

when a prosecution has been abandoned, as this was, without any arrangement with the accused, and without any request from him that it should be so abandoned, to leave the question of probable cause to the jury." *Brown v. Randall*, 36 Conn. 56; s. c., 4 Am. Rep. 35; *Lowe v. Wartman*, 47 N. J. L. 413; *Moulton v. Beecher*, 15 N. Y. Sup. Ct. 100; *Chapman v. Woods*, 6 Blackf. (Ind.) 504; *Yocum v. Polly*, 1 B. Mon. (Ky.) 358; *Richter v. Koster*, 45 Ind. 440; *Graves v. Dawson*, 133 Mass. 419; *Rice v. Ponder*, 7 Ired. (N. Car.) 390.

The entry of a *nolle prosequi* without a subsequent renewal of the prosecution is sufficient evidence of its termination to warrant the bringing of the action for malicious prosecution. *Kennedy v. Holladay*, 25 Mo. App. 503.

In an action for malicious prosecution the plaintiff must allege and prove a legal determination of the original action. And where a *nolle prosequi* was entered of record, and the defendant discharged, it is such a conclusion of the original action as will entitle the plaintiff to sue. *Hatch v. Cohen*, 84 N. Car. 602; s. c., 37 Am. Rep. 630. The entry of a *nolle prosequi* for any reason other than some irregularity or informality in the information itself, is an end to the prosecution of that case, and, unless such *nolle prosequi* is vacated at the same term, the defendant can be further prosecuted for the same offence, if at all; only upon a new complaint, arrest, and examination. *Woodworth v. Mills*, 61 Wis. 44; *Murphy v. Moore*, (Pa.) 11 Atl. Rep. 665. But *contra* *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Parker v. Farley*, 10 Cush. (Mass.) 279; *Bacon v. Waters*, 2 Allen (Mass.) 400; *Gariny v. Fraser*, 76 Me. 37; *Driggs v. Barton*, 44 Vt. 124; *Brown v. Lakeman*, 12 Cush. (Mass.) 482.

But it seems that it cannot be said as a matter of law that a *nolle prosequi* either is or is not a sufficient termination. While generally speaking it may be said to be a sufficient termination it is so because all the other facts make it so, rather than because of this one fact. The court in *Graves v. Dawson*, 130 Mass. 78; s. c., 39 Am. Rep. 429, say: "Whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution, is to be determined by the facts of the particular case, of which facts the entry of a *nolle*

been discharged from bail or imprisonment.¹ All that is necessary is that the particular prosecution or proceeding shall have been disposed of in a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*.²

prosequi may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one."

But a *nolle prosequi* entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, is not such a determination of the prosecution alleged to have been malicious as will enable the party prosecuted to maintain the action. *Langford v. Boston etc. R. Co.*, 144 Mass. 431; but see *Gallagher v. Stoddard*, 47 Hun (N. Y.) 102.

1. *Schoonover v. Myers*, 28 Ill. 308; *McWilliams v. Hoban*, 42 Md. 56; *Gilbert v. Emmons*, 42 Ill. 143; *Fay v. O'Neill*, 36 N. Y. 11; *Hatch v. Cohen*, 84 N. Car. 602. So if the indictment is quashed and the defendant discharged. *Hays v. Blizzard*, 30 Ind. 457.

2. If the action is commenced by complaint to a magistrate who has jurisdiction only to bind over or discharge, his record stating that the complainant withdrew his prosecution and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles v. Briggs*, 4 Met. (Mass.) 421; *Cardinal v. Smith*, 109 Mass. 158; s. c., 12 Am. Rep. 682.

In a case of malicious prosecution. *Held*, that the right of an action accrues "whenever the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." *Casebeer v. Drahoble*, 13 Neb. 465. And the law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff to prosecution for the same offence shall have been extinguished, before the action for malicious prosecution is brought. Consequently the refusal of the grand jury to find an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to

bring his action. *Apgar v. Woolston*, 43 N. J. L. 57.

It is a sufficient termination of the criminal proceeding if there was a dismissal before trial. A verdict and judgment on the merits is not essential. *Kelley v. Sage*, 12 Kan. 109; *Bell v. Matthews*, 37 Kan. 686. So where the action has been dismissed at plaintiff's costs and is not commenced again. *Marbourg v. Smith*, 11 Kan. 554.

A discharge by a magistrate of a person arrested on a complaint is a sufficient termination of the case to support an action for malicious prosecution, even if the magistrate has only power to bind over or discharge the accused. *Moyle v. Drake*, 141 Mass. 238.

And an action is not prematurely brought where the plaintiff has been discharged on preliminary examination by magistrate, although afterward an indictment is found for the same matter. *Costello v. Knight*, 4 Mackey (D. C.) 65.

And in a complaint in an action for malicious prosecution it was alleged that "on motion and request of the defendant made in person, said affidavit, prosecution and charges were dismissed, and plaintiff was not required to go to trial hereon," it was *held* to show sufficient termination of the prosecution. *Clegg v. Waterbury*, 88 Ind. 21. So, where the record of the criminal case upon which the suit for malicious prosecution was founded, was in evidence, and showed a judgment in these words: "The defendant moves to quash the indictment herein, which motion the court sustains, and said defendant is discharged." *Held*, that this, though informal, was a good judgment, ending the prosecution and discharging the defendant. *Lytton v. Baird*, 95 Ind. 349.

But striking the cause from the docket on motion of the State's attorney, with leave to reinstate the same, is not such a legal termination of the prosecution as will permit an action for malicious prosecution to lie. *Blalock v. Randall*, 76 Ill. 224. Where a criminal prosecution is commenced before a

In a civil suit where one settles by paying all that was claimed in such suit he cannot base an action for malicious prosecution thereon.¹

A discharge on *habeas corpus* is a sufficient termination.²

2. Civil Actions.—At common law, the defendant in an action maliciously brought without probable cause has a right of action against the plaintiff in such action after its termination in favor of such defendant, and this regardless of whether the plaintiff had interfered with either the person or property of the defendant.³ But after the enactment of the statute of Marlbridge in the fifty-second year of Henry III, giving costs to successful defendants by way of damage against the plaintiff *pro falso clamore* it came to be held that an action for malicious prosecution would not lie in civil actions unless in cases where there had been arrest of the person or seizure of property or other special injury which would not necessarily result in all suits prosecuted to recover for

justice of the peace and is afterwards dismissed with the intention of commencing it again in the district court, *held*, that such criminal prosecution before the justice of the peace cannot constitute the basis of an action for a malicious prosecution while the criminal prosecution is still pending in the district court. *Schippel v. Norton*, 38 Kan. 567.

Where the evidence showed that owing to the failure of the defendant to appear as a witness in a case where he had caused the plaintiff to be arrested, the cause had been continued from time to time, till the plaintiff was finally allowed to go at liberty. It was *held* that this sufficiently showed an end of such prosecution. *Leever v. Hamill*, 57 Ind. 423. So, in a case where the evidence was that the complainant in a criminal proceeding failed to appear and prosecute before the justice after notice to do so, and that the justice discharged the present plaintiff, it was *held* that it showed a sufficient termination of the prosecution. *Swensgaard v. Davis*, 33 Minn. 368.

But if a person, having been committed in default of bail for his appearance at the next term of court, procures his discharge on a writ of *habeas corpus*, this is not such a termination of the prosecution as will support this action. *Walker v. Martin*, 43 Ill. 508; *Swartwout v. Dickelmann*, 12 Hun (N. Y.) 358.

Where a magistrate can neither convict nor commit, but only bind over or discharge, and does discharge the accused, the prosecution is at an end so

far as to warrant an action for malicious prosecution. *Driggs v. Barton*. 44 Vt. 124.

The dismissal of an action by a stipulation providing that each party shall pay his own costs, is such a termination of the case in favor of the defendant as will enable him to maintain an action for malicious prosecution. *Kinsey v. Wallace*, 36 Ind. 462.

An arrest of judgment after conviction is not a proper termination. *Kirkpatrick v. Kirkpatrick*, 39 Pa. St. 288.

1. *Sartwell v. Parker*, 141 Mass. 405; *Foster v. Orr* (Oreg.), 21 Pac. Rep. 440.

2. *Zebble v. Storey*, 117 Pa. St. 478; *Charles v. Abell*, Bright. (Pa.) 131. *Contra*, *Schoffel v. Kleintz*, Bright. (Pa.) 132; *Walker v. Martin*, 43 Ill. 508.

3. Co. Litt. 161; *Webster v. Haigh*, 2 Lev. 210; *Goslin v. Wilcock*, 2 Wils. 302; 4 Mod. 13; *Waleler v. Freeman*, Hob. 205; 3 Chitt. Bla. 125.

General Doctrine.—It is the universal doctrine that if one maliciously and without probable cause, sue out a civil process and cause the defendant to be arrested or his property attached, such person is liable for the damages sustained thereby. *Watkins v. Baird*, 6 Mass. 506; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Stone v. Swift*, 4 Pick. (Mass.) 389; *Tomlinson v. Warner*, 9 Ohio 103; *McFadden v. Whitney et al.* (N. J.), 18 Atl. Rep. 62.

And in such case the suit will lie, even though there may have been a

like causes of action. And this is the rule adopted by some of the courts of this country.¹

valid cause of action, if in fact there was no probable cause for the attachment, and it was taken out maliciously. *Fortman v. Rottier*, 8 Ohio St. 548.

1. In *Potts v. Imlay*, 4 N. J. L. 330, the court said: "The courts of law are open to every citizen and he may sue *folies quoties* upon the penalty of lawful costs only. These are considered as sufficient for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice and say the legislature have not given me enough. Merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie nor ever did, so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievances or damage, not necessarily incident to a defence but superadded to it by the malice and contrivance of the defendant; and of these, an arrest seems to be the only one spoken of in our books."

The rule laid down in *Potts v. Imlay*, is cited and approved in *Bitz v. Meyer*, 11 Vroom (N. J.) 252; s. c., 29 Am. Rep. 233; *Woodmanse v. Logan*, 2 N. J. L. 93; *Parker v. Frambes*, 2 N. J. L. 156.

The action of ejectment temporarily clouds the title to the property in controversy, and so may, for the time, prevent a sale or a mortgage upon it. But a damage of this kind is not more direct than that resulting from the expenses, loss of time, and often loss of credit, arising from the ordinary forms of legal controversy. All are troublesome, expensive, and often ruinous; and if for such damage the action of case could be maintained, there would be no end of litigation, for the conclusion of one suit would be but the beginning of another. It is, therefore, wisely determined that for the prosecution of a civil suit, however unfounded, where there has been no interference with either the person or property of the defendant, no action will lie. *Muldoon v. Rickey*, 103 Pa. St. 110; *Mayer v. Walter*, 64 Pa. St. 283; *Kramer v. Stock*, 10 Watts (Pa.) 115; *Eberly v. Rupp*, 90 Pa. St. 259.

It is true a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding;

but when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, or a groundless and malicious seizure of property the false and malicious placing the plaintiff in bankruptcy, or the like.

Or where the plaintiff declares that he has been falsely and maliciously arrested, or that, by reason of a false claim, maliciously asserted by the defendant, he was required to give bail, and upon failure he was detained in custody or his property was attached, there the action lies; because of the special damage sustained by the plaintiff.

It is not enough, however, for the plaintiff to declare generally that the defendant brought an action against him *ex malitia et sine causa per quod* he put him to great charge; but he must allege and show the grievance especially. Otherwise parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution. *McNamee v. Minke*, 49 Md. 122.

We think the doctrine is well established by the great preponderance of authority, that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action. This doctrine is supported by the following considerations: the courts are open and free to all who have grievances and seek redress, therefore, and there should be no restraint upon a suitor through fear of liability resulting from failure in the action which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends

The contrary rule adopted by courts equal in number and respectability is that an action can be maintained where neither the person nor the property was seized for damages accruing in suits brought maliciously and without probable cause.¹

without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation rather than to promote it. *Wetmore v. Mellinger*, 64 Iowa 741; s. c., 52 Am. Rep. 465; *Smith v. Hintrager*, 67 Iowa 109.

In *England*, prior to the statute of 52 Henry III, 1267, where one sued another maliciously and without probable cause, he was liable to such person in damages in an action on the case; but since the passage of that statute, which gave costs to the defendant *per falsum clamorem*, the bringing of a civil suit maliciously and without probable cause was not a ground upon which an action could be maintained, unless the action was one whereby the person of the defendant was arrested or his property attached, or some special damage was done to him; and this it was necessary to set out specially. Such was the common law as adopted in this State by the act of 1784. *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

An action in ejectment against one's tenant unaccompanied by any interference with person or property, forms no ground for claim of damages without clear proof of malice and want of probable cause. *Johnson v. Meyer*, 36 La. An. 333.

A suit for malicious prosecution of a civil action may be maintained though no process other than the summons was issued therein. *Eastin v. Bank of Stockton*, 66 Cal. 123; s. c., 56 Am. Rep. 77.

1. It is too clear for discussion, that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defence of the suit; he must look up his evidence and employ counsel. This waste of time and necessary expenditure of money, by its results, affects the property of the defendant. For these expenses, the costs, recovered in the action, are no compensation at all. In some of the States, reasonable attorney's fees for the successful party are included in the taxable costs. It is not so here. No good and sufficient reason can be given why he

who has maliciously and without probable cause instituted a suit against another should not be required to pay the party so sued such sum as will make him entirely whole, and so a majority of the decided cases in this country hold. *McCardle v. McGinley*, 86 Ind. 538; s. c., 44 Am. Rep. 343; *Lockenour v. Sides*, 57 Ind. 360; s. c., 26 Am. Rep. 58; *Pangburn v. Bull*, 1 Wend. (N. Y.) 345.

We are of the opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable and probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit in excess of the taxable costs obtained by him; and to maintain an action to recover such damages it is not material whether the malicious suit was commenced by process of attachment or by summons only. *Closson v. Staples*, 42 Vt. 209; s. c., 1 Am. Rep. 316.

An action on the case at common law is sustainable for a vexatious civil suit in which there was no arrest or holding to bail. *Whipple v. Fuller*, 11 Conn. 582; *Stone v. Stevens*, 12 Conn. 219.

After the statute giving costs to the defendant, it was held by the common law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejectment. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest or requiring excessive bail before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to

But such action will not lie for damages sustained by being sued in an action not malicious and without probable cause.¹ Neither will the mere suing out of a process without probable cause and with malice without levy of the same authorize a recovery by the party against whom the process was issued.²

This action will lie against one for maliciously and without probable cause procuring another to be adjudged a bankrupt,³

the payment of costs *per falso clamore* is no recompense to the defendant, when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action or been nonsuited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained. But where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached or his body had been taken charge of by the sheriff. While the damages may be less in the one case than in the other, the legal right exists and some remedy should be afforded. Following the doctrine of the common law that for every injury there is a remedy, we see no reason for denying a remedy to the plaintiff; and where a party seeks, a judicial tribunal for the purpose alone of gratifying his malice, he should be made to recompense the party injured for the damage actually sustained, and the court should see that a remedy is afforded for the purpose. *Woods v. Finnell*, 13 Bush (Ky.) 628.

Can an action for malicious prosecution be maintained in a case like the one at bar? where neither the person nor the property was seized nor bail nor security required, and the ordinary costs of defending the prosecution have already been allowed. We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution without probable cause has in fact been had and terminated, and the defendant in such prosecution has sustained damages over and above his taxable costs in the case, etc. . . . At common law the defendant in such a case always had a remedy. Originally it was an action for malicious prosecution. Subsequently it was amercement of the plaintiff

pro falso clamore. But now and in this State, as amercement is abolished, the defendant must return to his original remedy of malicious prosecution. *Marbourg v. Smith*, 11 Kan. 554.

An action will lie against one who maliciously and without probable cause, brings successive suits against another, returnable before a justice of the peace at a distant place, dismissing the suits upon their appearance, and causing trouble and expense. *Payne v. Donegan*, 9 Ill. App. 566.

Where a civil action is commenced and prosecuted maliciously without proper cause, and is terminated in favor of the defendant, the plaintiff is liable for damages in excess of taxable costs sustained in defending. *Brown v. Cape Girardeau*, 90 Mo. 377.

The cases on these two views are collected and revised by Mr. Lawson in an article in the *American Law Register*, vol. 21, p. 281.

1. *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190.

2. *Biering v. National Bank*, 69 Tex. 599. But such action will lie where a judgment creditor knowingly, and with intent to oppress the defendant, caused to issue execution against him for a sum in excess of what was due on the judgment. *Hall v. Leaming*, 2 Vroom (N. J.) 321.

3. **Bankruptcy.**—An action for malicious prosecution will lie where the defendant falsely and maliciously procured the plaintiff to be adjudged a bankrupt upon affidavit which was not sufficient legally to warrant an adjudication. *Farley v. Danks*, 4 El. & Bl. 493; *Oldfield v. Dodd*, 8 Exch. 578.

Also where the defendant had maliciously procured another person who was a pauper to prosecute a groundless suit against the plaintiff, and the plaintiff by reason of such poverty had been unable to obtain satisfaction for the costs adjudged to him in that case. *Pechell v. Watson*, 8 M. & W. 691; *McNamee v. Minke*, 49 Md. 122. But where the plaintiff has reasonable cause to believe that the defendant is his

or thus procuring an injunction,¹ or thus instituting an action for forcible entry and detainer;² or for procuring another to be attached for contempt of court. But not for filing a petition for the purpose of having the plaintiff declared in contempt.³

This action also lies against one who improperly causes a garnishee process to issue.⁴ Or for demanding or holding to excessive bail.⁵

While the suing out of an attachment maliciously and without probable cause entitles the party injured to maintain this action, the defendant, in the absence of a statute giving the right of action, cannot maintain an action except where an attachment bond has been given, where there is no malice, or where there is probable cause.⁶

debtor, and has committed an act of bankruptcy, he is justified in proceeding against him as a bankrupt. *Stewart v. Sonneborn*, 98 U. S. 187.

1. Injunction.—Where a railroad company, through its superintendent, consented that a mill owner might erect a dam which would overflow a portion of its right of way, and upon a sale by the owner to another, the latter obtained a similar licence; and the dam having been broken in consequence of a flood, the company filed a bill and obtained an interlocutory injunction to prevent the owner from rebuilding the dam; and if, upon the final trial, the bill was dismissed, an action would lie for the malicious suing out of the injunction without probable cause, whereby the owner had sustained special damage in being deprived of the use of his property, and this principle is not altered by the fact that the case was in equity, and that the damages were consequent upon an injunction granted by the chancellor. *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

Where a corporation maliciously sued a plaintiff, and on an *ex parte* application obtained an injunction restraining him from entering on certain coal lands, and a year thereafter dismissed its action. *Held* that he could maintain an action for malicious prosecution. *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

2. Forcible Entry and Detainer.—An action may be maintained for maliciously and without probable cause instituting an action in forcible entry and detainer. *Pope v. Pollock* (Ohio St.), 21 N. E. Rep. 356.

So where a blaster lost his eyes while in the service of the owner of a rock quarry, or of his contractor or lessee,

and that the owner of the quarry gave him a house and lot for life, as a compensation for the injury received, and to prevent any suit against himself or his lessee, furnished a good and valid consideration to support a conveyance so made, and the injured blaster having been in possession, under such a settlement, for more than seven years, and being unable to give security in order to resist by counter affidavit a warrant to dispossess him, if the feoffer caused him to be ejected under such a warrant, it was a tort for which a recovery could be had. *Crusselle v. Pugh*, 71 Ga. 744.

3. Proceedings for Contempt.—A declaration alleging that the defendant maliciously made use of the process of the court by causing a petition for the purpose of having the plaintiff declared in contempt of court and removed from the office of receiver, and to disgrace him in the eyes of another, and such allegations were false to the knowledge of the defendant, and that the plaintiff was greatly injured thereby states no cause of action in favor of the plaintiff. *Bartlett v. Christliff*, 69 Md. 219.

4. Garnishee.—One who has been improperly subjected to damages by means of a garnishee proceeding can maintain an action of malicious prosecution, other conditions existing. *Noonan v. Orton*, 30 Wis. 356.

5. Excessive Bail.—It is held that maliciously demanding excessive bail where there is good cause of action, or holding to bail where there is no cause of action, if done vexatiously, entitles the party injured to an action for a malicious prosecution. But if bail be not exacted, such action will not lie. *Ray v. Law, Pet.* (C. C.) 207; *McNamee v. Minke*, 49 Md. 122.

6. Where by statute no bond in attach-

IV. WHO MAY SUE.—The action for a malicious prosecution is one sounding in tort, and for injury not to the property but to the person of the plaintiff. The common law, as it exists in this country, coming to us by the statute of 3 Edward III, ch. 8, is that every kind of injury to a person by which his property has been rendered less beneficial, gives a right of action which may be assigned or survives to his personal representative.¹ Hence the rights of a person for merely personal injury, such as malicious prosecution, may not be assigned; and such right dies with the party.² Under the codes of most of the States the common law rule, so far as malicious prosecution is concerned, remains unchanged. So that in general only the person who has suffered the damage can maintain this action.³ This being the rule at common law. Where the injury is to the person it is usually several, although suffered by more than one and inflicted at the same time and by the same person; and when this is so, each one who has suffered an injury must bring his separate action.⁴ But where two had jointly incurred expense in procuring their discharge from a joint arrest of both, it was allowed that they might sue jointly.⁵ Except where the common law rule is changed by statute, where the malicious prosecution complained of has been committed upon the wife, either before or after her marriage, she must be joined in an action therefor with her husband.⁶ But this rule is very much changed in most of the States by the Married Women's acts. If by any means the malicious

ment is required, and notice given, the defendant cannot maintain an action against the plaintiff in attachment by showing merely that the writ was wrongfully sued out, there being no debt due from him, but he must show malice, want of probable cause and damages, as required by the principles of common law in actions for malicious prosecution. *Preston v. Cooper*, 1 Dill. (U. S.) 589. A contrary rule prevails in *Tennessee* because of the provisions of the statute in that State. *Jerman v. Stewart*, 12 Fed. Rep. 266.

1. *Chitty's Plead.* 69; *Zabriskie v. Smith*, 36 Barb. (N. Y.) 270; *Hoyt v. Thompson*, 1 Seld. (N. Y.) 347.

2. *Boyd v. Blankman*, 29 Cal. 10; *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Lawrence v. Martin*, 22 Cal. 173; *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543.

3. A master, however, may maintain this action for the malicious prosecution of his slave. *Locke v. Gibbs*, 4 Ired. (N. C.) 42. And in *Maine* it seems that a father may maintain the action for a malicious prosecution of his minor son. *Severance v. Judkins*, 73

Me 376. In *California* it is held that a cause of action for malicious prosecution is not assignable. *Lawrence v. Martin*, 22 Cal. 174. And in *Wisconsin* it is held that an action for malicious prosecution is an action for personal injury, and, although special loss to plaintiff's business resulting therefrom may be alleged to aggravate damages, yet the right to maintain the action does not pass to an assignee in bankruptcy. *Noonan v. Orton*, 34 Wis. 259.

4. 1 *Chitty's Plead.* 64; *McLeod v. McLeod*, 73 Ala. 42.

5. 1 *Chitty's Plead.* 64; 10 *Moore* 446.

6. *Beach v. Ranney*, 2 Hill (N. Y.) 309; *Johnson v. Dicken*, 25 Mo. 580.

The code of *Louisiana* provided that a suit for malicious prosecution of the wife must be brought by her husband. In such an action the husband filed a paper stating that he comes "solely to assist her in prosecuting this suit, and as husband does not claim any share in said damages, but joins her to claim the same in her behalf." It was held that this was not a compliance with the statute, and that the fact that the par-

prosecution should result in the death of the party, then undoubtedly an action would lie for the benefit of the one authorized by the statute to sue; as the statute 9 and 10 Vict., ch. 93, known as LORD CAMPBELL'S act, has been substantially re-enacted in most of the States.

V. WHO MAY BE SUED—1. Generally.—The one who makes the charge or procures the prosecution is liable, and this whether he does it himself or procures another to do it.¹

ties were nonresidents of that State cannot make an exception. *Meyerson v. Alter*, 11 Fed. Rep. 688.

1. It is enough if the defendant instigated the prosecution, actively promoted it, or it was carried on with his countenance and approbation, and this whether there were others concerned in it or not. *Stansbury v. Fogle*, 37 Md. 369; *Grant v. Deuel*, 3 Rob. (La.) 17; s. c., 38 Am. Dec. 228; *Burnap v. Albert*, Taney (U. S.) 244; *Wells v. Parsons*, 3 Har. (Del.) 505. And evidence that the defendant procured the warrant and wagered that he would convict the plaintiff sufficiently proves his connection with the prosecution. *Kline v. Shuler*, 8 Ired. (N. Car.) 484.

He need not participate in the execution of the process. It is enough if he makes out the affidavit maliciously, vexatiously and without probable cause, without proof of further intervention on his part. *Walser v. Thies*, 56 Mo. 89.

An action for malicious prosecution lies against several defendants and that without alleging a conspiracy. *Dreux v. Domec*, 18 Cal. 83.

A conductor ordering the arrest of a passenger for nonpayment of fare when he did not believe such passenger was attempting to evade such payment, is as liable as though he himself had made it. *Krulevitz v. Eastern R. Co.*, 143 Mass. 228. And an attorney who advises, begins and conducts a criminal prosecution upon an understanding with his client that the charge against the accused is untrue, is liable for damages for malicious prosecution. *Staley v. Turner*, 21 Mo. App. 244.

But an attorney is not liable unless in conducting the litigation complained of he knew there was no cause of action, and knew also that his client was acting solely from illegal or malicious motives; and in forming his opinion upon these matters he has a right to act upon such information as his client imparts,

and is not bound to inform himself elsewhere. *Peck v. Chouteau*, 91 Mo. 138; *Bicknell v. Dorion*, 16 Pick. (Mass.) 478.

And the person who maliciously makes an affidavit for the procurement of an attachment becomes liable for the resulting injury without further intervention on his part. *Walser v. Thies*, 56 Mo. 89. So if a person gives another general authority to use his name as he sees fit in prosecuting suits without informing himself of the facts and circumstances and shares the compensation, may properly be joined as a defendant with the person using his name in the prosecution of a malicious suit and cannot shield himself by a plea of ignorance. *Kinsey v. Wallace*, 36 Cal. 462.

In a case where F & A, partners, living in Baltimore, carried on a business near Richmond by their general agent, M, M brings an action in the name of F & A against H & G, partners, claiming they are indebted to the plaintiffs; and upon affidavit by M, under the statute, H & G are held to bail, and, not being able to give it, they are held in prison until the trial, when the plaintiffs are nonsuited. H and G then bring their separate actions against F and A for malicious arrest and imprisonment. It seems F & A had no knowledge of the arrest and imprisonment until the parties were in prison, when F, coming to Richmond, he was informed of the fact by M, when he made no enquiry as to the grounds of the arrest, and he gave no directions for their release. *Held*, This was a virtual ratification and adoption of what had been done by the agent; and the principals, F & A, are responsible for the consequences of the agent's acts. *Forbes v. Hagman*, 75 Va. 168.

It has been *held*, however, that it does not follow that because a person attends the hearing he adopts the proceeding or renders himself responsible for the motive or actions of the person

2. Partners.—A partner, however, cannot be held liable for the false imprisonment of a debtor of the copartnership by a copartner when he neither directs, participates in nor receives any benefit from such arrest.¹

3. Corporations.—In some of the earlier cases it is held that a corporation aggregate could not be made liable in an action of malicious prosecution for the institution of a malicious suit by one of its officers or agents on the ground that such action was *ultra vires*.² But yielding to the growth of ideas the later cases

who instituted it, although that person may be his agent. *Weston v. Beeman*, 27 L. J. Exch. 57.

The agent or attorney who maliciously or illegally sues on the process is also liable and is a proper defendant. *Warfield v. Campbell*, 35 Ala. 349; *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Stockley v. Hornidge*, 8 C. & P. 16; *Grove v. Bradenburg*, 7 Blackf. (Ind.) 234.

It is, however, held where a criminal prosecution was commenced by a railroad company, through its agents and attorneys, for malicious injury to its property, the person in its employ who gave the information which led to the investigation and made the affidavit on which the arrest was issued, is not in any sense the prosecutor. *Jordan v. Ala. Great So. R. Co.*, 81 Ala. 220. The contrary doctrine is stated—and it would seem properly so—in *Pierce on Railroads* 292. The corporation and its servant, by whose act the injury was done, may be joined in an action of tort in the nature of trespass. *Hussey v. Norfolk So. R. Co.*, 98 N. Car. 34; s. c., 2 Am. St. Rep. 312.

Neither can this action be maintained against an attorney at law for bringing an action, unless he commenced it without authority, or unless there was a conspiracy between him and his client to bring a groundless suit, knowing it to be such, and without intent or expectation of maintaining it. *Bicknell v. Dorion*, 16 Pick. (Mass.) 478.

Neither will proof of malice and want of probable cause on the part of a prosecuting witness sustain an action against a party conspiring with such witness to commence the prosecution. Malice and want of probable cause must also be proven against such party. *Green v. Cochran*, 43 Iowa 544.

And where there was a voluntary association for the prosecution of thieves that caused the plaintiff's prosecution, it was held that only the members par-

ticipating therein were liable for malicious prosecution. *Johnson v. Miller*, 69 Iowa 562.

It is not, however, necessary in an action against two defendants that both should have signed the complaint on which the defendant was arrested. *Casebeer v. Drahoble*, 13 Neb. 465.

Advising persons not to become sureties for one who has been arrested, does not tend to show that those who give such advice have conspired with the person who caused the arrest, and are, therefore, liable with him to an action for malicious prosecution. Nor does their enmity toward the person arrested, nor their wish to drive him out of town. *Labar v. Batt*, 56 Mich. 589.

One is not liable for an arrest made by a policeman on information furnished by such person's clerk without his knowledge or authority. *Hershey v. O'Neill*, 36 Fed. Rep. 168.

1. *Rosenkrans v. Barker*, 115 Ill. 331; 1 Lindl. Partn., bk. 2, ch. 1, § 4; *Arbuckle v. Taylor*, 3 Dow. 160.

In *Gilbert v. Emmons*, 42 Ill. 143, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested would not render the partner so knowing and consenting liable to an action for malicious prosecution; it was necessary that the consent should be of such a character as to amount to advice and co-operation.

2. *Gillett v. Mo. Valley R. Co.*, 55 Mo. 315; s. c., 17 Am. Rep. 653; *Childs v. Bank of Mo.*, 17 Mo. 213; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; *Goodspeed v. East Haddam Bank*, 22 Conn. 530. In this case the court divided evenly. *Stevens v. Mid. R. Co.*, 10 Exch. 352; *Owsley v. Montgomery R. Co.*, 37 Ala. 560; *Addison on Torts*, Wood's ed., vol. 2, p. 86. See also *Abrath v. Northeastern R. Co.*, 11 App. Cas. 247. Compare CORPORATIONS, vol. 4, p. 257, and generally, p. 250 *et seq.*

seem to be all taking the opposite view and hold that corporations are liable for this as well as for other torts of their officers and agents in the same manner and to the same extent that individuals are liable under like circumstances.¹ A municipal corporation may probably become liable to this action.²

1. *Hussey v. Norfolk So. R. Co.*, 98 N. Car. 34; s. c., 2 Am. St. Rep. 312 and note; *Vance v. Erie R. Co.*, 32 N. J. L. 334, s. c., 90 Am. Dec. 665; *Fenton v. Wilson S. M. Co.*, 9 Phila. (Pa.) 189; *Reed v. Home Savings Bank*, 130 Mass. 443; *Morton v. Metropolitan Ins. Co.*, 34 Hun (N. Y.) 366; affirmed 103 N. Y. 645; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469; s. c., 25 Am. Rep. 783; *Boogher v. Life Assn.*, 75 Mo. 319; *Woodward v. St. Louis etc. R. Co.*, 85 Mo. 142; *Copley v. G. & B. Sewing Machine Co.*, 2 Woods (U. S.) 494; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *Williams v. Planter's Ins. Co.*, 57 Miss. 759; s. c., 34 Am. Rep. 494; *Carter v. Howe Machine Co.*, 51 Md. 290; s. c., 34 Am. Rep. 311; *National Bank v. Graham*, 100 U. S. 699; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Edwards v. Midland R. Co.*, 2 B. Div. 43; *L. T. 694*; *Cooley on Torts* 121; *Goodspeed v. East Haddam Bank*, 22 Conn. 530 (decided by an evenly divided court); *Pierce on Railroads* 273; *Denver etc. R. Co. v. Harris*, 122 U. S. 597.

The leading case sustaining this view is that of *Goodspeed v. East Haddam Bank*, 22 Conn. 530, which, although decided by an evenly divided court, seems to have turned the tide in its direction. The argument of *CHURCH, C. J.*, is as follows: "These institutions (corporations) have so multiplied and extended within a few years that they are connected with, and, in a great degree, influence all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this, but we say that, as new relations from this cause are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied. The views of the old lawyers regarding the real nature, power and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically and consistently with their re-

spective charters; and no good reason is discovered why this should not be so, or why it cannot be done in a case like this without violating any sensible or useful principle. But after all the objection to the remedy of this plaintiff against the bank in its corporate capacity is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of torts which essentially consist in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore cannot commence or prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives and act from motives, is to deny the evidence of our senses when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive they can have a bad one; they can intend to do evil as well as good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted and subsequently sanctioned by the bank in the usual modes of its action, and still to claim that although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application." And the corporation and its servant by whose act the injury was done may be joined in the action. *Hussey v. Norfolk S. R. Co.*, 98 N. Car. 34; *Gulf etc. R. Co. v. James (Tex.)*, 10 S. W. Rep. 744. See generally *CORPORATIONS*, vol. 4, pp. 250, 257.

2. A municipal corporation is liable for the acts of its agents injurious to others when the act is in its nature lawful and authorized, but is done in an unlawful manner or unauthorized place, but it is not liable for injurious and

4. Infants.—If one shall continue a prosecution brought by him while an infant, after he becomes of age he renders himself liable.¹ But an infant is not liable for the malicious prosecution of a suit during his infancy where it was brought in his name by his next friend and without his knowledge or authority, even though he expressly assented to the suit after he had knowledge of it.²

Neither is one liable who simply consents to the use of his name by a minor as his next friend in the prosecution of an action if such action was brought against his expectation and without his consent expressed or implied.³

5. Public Officers.—In the case of public officers who have been called upon to act officially, it would seem that they may be held liable in this action upon the same grounds as others. But malice and want of probable cause ought very clearly to appear in such case.

The presumptions being strongly in their favor;⁴ mere ignorance of the law or over persuasion by others not being sufficient.⁵

In an action against a district attorney and another for maliciously conspiring to have the plaintiff convicted on an indictment for perjury, it was held that the same cannot be maintained.⁶

A sheriff, however, is not liable for taking property under valid and regular writs of attachment, even though he knew that

tortious acts which are in their nature unlawful or prohibited. In an action against a municipal corporation to recover damages for the malicious prosecution of a suit for taxes, the petition must contain facts sufficient to enable the court to determine whether or not the corporation had authority to levy, impose and collect the taxes involved in the suit, and it must also appear what the taxes were for and when or how imposed. If the municipal corporation had authority under the law and its valid ordinances to impose the taxes and authority to collect the same, its motives would be irrelevant and immaterial. *Brown v. Cape Girardeau*, 90 Mo. 377. See generally *MUNICIPAL CORPORATIONS*.

1. *Sterling v. Adams*, 3 Day (Conn.) 411.

2. In an action to recover damages for an alleged malicious prosecution of a civil action against the plaintiff by defendant, while a minor, by his next friend, the answer set up minority as a defence. The jury found that the alleged malicious suit was commenced entirely without the knowledge or authority of the defendant, who was during its pendency an infant. It was

prosecuted by the *prochein ami*, in theory at least receiving his appointment from the court and having sole control of the case, so long as he is allowed by the court to retain the place. The defendant had no power to prosecute or discontinue the suit during his minority. If the infant expressly assented to the suit after he had knowledge of it, yet he cannot become a trespasser by such assent, being liable only for his personal acts. The case of *Sterling v. Adams*, 3 Day (Conn.) 411, which bears some resemblance to this, differs in the fact that there the suit was prosecuted by the defendant after he became of age though commenced before. *Burnham v. Seaverns*, 101 Mass. 360; s. c., 100 Am. Dec. 123.

3. *Soule v. Winslow*, 66 Me. 447.

4. *Muriel v. Tracy*, 6 Mod. 170.

5. In *Wheeler v. Nesbitt*, 24 How. (U. S.) 544, where a justice of the peace was jointly sued with others for the malicious prosecution of the plaintiff, the case was decided for the defendants, but the question of the liability of the justice seems not to have been raised.

6. *Parker v. Huntington*, 2 Gray (Mass.) 124.

the plaintiff procuring the same had no cause of action and had taken out the writ with a malicious intent.¹

VI. PLEADING—1. Complaint.—The common law action for a malicious prosecution is case and not trespass.² Malice, want of probable cause and termination of former action in favor of the plaintiff being essential to the maintenance of this action, the complaint must aver that the proceeding complained of was malicious;³ that there was no probable cause therefor,⁴ and that

1. *Rice v. Miller*, 70 Tex. 613.

2. *Chitty Pl.* 136, 187; *Plummer v. Dennett*, 6 Greenl. (Me.) 421; s. c., 20 Am. Dec. 316; *Shaver v. White*, 6 Munt' (Va.) 110; s. c., 8 Am. Dec. 730; *Turner v. Walker*, 3 Gill & J. (Md.) 377; s. c., 22 Am. Dec. 329; *Mowry v. Miller*, 3 Leigh (Va.) 561; s. c., 24 Am. Dec. 680; *Lewin v. Uzuber*, 65 Md. 341; *Johnson v. Vonkettler*, 84 Ill. 315. If the court in which the prosecution is made has no jurisdiction of the complaint, and the want of jurisdiction is the sole gravamen of the suit, trespass for false imprisonment is the proper action. If the prosecution be malicious and unfounded, and be instituted in a court having no jurisdiction, the party injured may sue either in case, making the malice and want of probable cause the gravamen of his complaint, or in trespass, founding his action on the want of jurisdiction in the court. If the court had jurisdiction, and the process was regular, trespass will not lie, however malicious the conduct of the defendant may have been in setting the prosecution on foot; and the only sustainable action under such circumstances is case for the malicious motive and want of probable cause in promoting the prosecution. *Apgar v. Woolsto*, 43 N. J. L. 57.

3. *Hahn v. Schmidt*, 64 Cal. 284; *Thaule v. Krekeler*, 81 N. Y. 428; *Laird v. Taylor*, 66 Barb. (N. Y.) 139; *Fagan v. Knox*, 66 N. Y. 525; *Thompson v. Lumley*, 50 How (U. S.) 50; *Griffith v. Ogle*, 1 Binn. (Pa.) 172.

The complaint, however, need not allege that the defendant falsely as well as maliciously and without probable cause made the accusation upon which the plaintiff was arrested and convicted. *Zeigler v. Powell*, 54 Ind. 172. But a complaint which fails to allege the falsity of the affidavit upon which the attachment complained of was issued, is sufficient as against an objection made at the trial that the complaint did not state facts sufficient

to constitute a cause of action. *Cochrane v. Quackenbush*, 29 Minn. 376.

But a declaration alleging that the defendant, without reasonable or probable cause, falsely and maliciously caused and procured a writ of injunction to be issued, and falsely and maliciously caused the same to be served on the plaintiff, held bad on demurrer as not being sufficiently specific. *Barry v. Salt Co.*, 14 Phila. (Pa.) 124. So where, in the complaint in an action for malicious prosecution, there are allegations of malice, want of probable cause and an unsuccessful prosecution, or allegations from which these material facts may be inferred, the complaint may be held good after verdict. *Clegg v. Waterbury*, 88 Ind. 21. Facts tending to show the defendant's motive, e. g. a malicious publication by him procured to be made concerning the prosecutor, are proper to be proven upon the trial as showing special injury. And such averments should not be stricken out on motion. *Brockleman v. Brandt*, 10 Abb. (N. Y.) Pr. 141. So if the municipal corporation had authority under the law and its valid ordinances to impose the taxes and authority to collect the same, its motives would be irrelevant and immaterial. *Brown v. Cape Girardeau*, 90 Mo. 377.

4. *Turner v. Turner*, 85 Tenn. 387; *Hogg v. Pinckney*, 16 S. Car. 387; *Johnson v. Vonkettler*, 84 Ill. 315; *Moody v. Deutsch*, 85 Mo. 237; *Wall v. Toomey*, 52 Conn. 35; *King v. Montgomery*, 50 Cal. 115; *Wanser v. Wyckoff*, 9 Hun (N. Y.) 178; *Lavender v. Hudgens*, 32 Ark. 763; *Dennehey v. Woodsum*, 100 Mass. 195; *Scotten v. Longfellow*, 40 Ind. 23.

But a statement of facts in narrative form, which if proved would necessarily establish want of probable cause is sufficient. *Wall v. Toomey*, 52 Conn. 35; *Benson v. Bacon*, 99 Ind. 156. It, however, is held that, in an action for malicious prosecution, the petition

such proceeding had terminated in favor of the party bringing this action.¹ And must allege how it was ended.²

should state facts, and not the conclusion of the pleader upon the facts, and in an action against a municipal corporation to recover damages for the malicious prosecution of a suit for taxes, the petition must contain facts sufficient to enable the court to determine whether or not the corporation had authority to levy, impose and collect the taxes involved in the suit, and it must also appear what the taxes were for, and when and how imposed. *Brown v. Cape Girardeau*, 90 Mo. 377.

An allegation of the "falsity of the charge" is not equivalent to an allegation of "want of probable cause." Want of probable cause is the material allegation. *Scotlen v. Longfellow*, 40 Ind. 23. (see) *Hays v. Blizzard*, 30 Ind. 457. Neither is the averment "without just or probable cause" equivalent to an averment of "want of probable cause, but this objection must be raised in the trial court. *Van De-Wiele v. Callanan*, 7 Daly (N. Y.) 386. While a statement of the facts is a sufficient averment if probable cause appears therefrom, yet the proper allegation is the general one of want of probable cause. *Benson v. Bacon*, 99 Ind. 156. In an action to recover damages for the abuse of legal process it is unnecessary to allege or prove want of probable cause. *Hazard v. Harding*, 63 How (N. Y.) Pr. 326; *Smith v. Smith*, 20 Hun (N. Y.) 555.

1. *Severence v. Judkins*, 73 Me. 376; *Lawler v. Levy*, 33 La. An. 220; *Rhoadabeck v. Blair Town Lot & Land Co.*, 62 Iowa 368; *Johnson v. Finch*, 93 N. Car. 205; *Rothchild v. Meyer*, 18 Ill. App. 284; *McWilliams v. Hoban*, 42 Md. 57; *Fortman v. Rot-tier*, 8 Ohio St. 548; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Davis v. Clough*, 8 N. H. 157; *Heyward v. Cuthbert*, 4 McCord (S. Car.) 354; *Moulton v. Beecher*, 1 Abb. (N. Y.) N. Cas. 193; *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Woodworth v. Mills*, 61 Wis. 44; *O'Brien v. Barry*, 106 Mass. 300; *Swartwout v. Dickelman*, 12 Hun (N. Y.) 358; *Laird v. Taylor*, 66 Barb. (N. Y.) 139; *Foster v. Orr* (Oreg.), 21 Pac. Rep. 440; *Barrell v. Simonton*, 2 Cranch (C. C.) 657; *Garrison v. Pearce*, 3 E. D. Smith (N. Y.) 255; *Merriman v. Morgan*, 7 Oreg. 68. But omission is cured by verdict. *Cardinal v. Smith*, 109 Mass. 158.

A complaint in such action, averring that "on motion and request of the defendant, made in person, said affidavit, prosecution and charges were dismissed and plaintiff was not required to go to trial thereon," sufficiently shows that the prosecution has ended. *Clegg v. Waterbury*, 88 Ind. 21.

In an action to recover damages for the abuse of legal process it is necessary to allege or prove the termination of the prosecution. *Bebinger v. Sweet*, 1 Abb. (N. Y.) N. C. 263; s. c., 6 Hun (N. Y.) 478. While the plaintiff should allege in his complaint that the order of arrest had been vacated before the commencement of his action, it was not necessary that he should also allege that the action itself, in which the arrest was made, had been ended. *Hogg v. Pinckney*, 16 S. Car. 387. It is not sufficient to allege that the prosecuting officer has determined never to bring the indictment to trial for the reason that he deems the charge entirely unsupported. *Grant v. Moore*, 29 Cal. 644.

The allegation that plaintiff has been discharged is not an allegation of acquittal. *Morgan v. Hughes*, 2 T. R. 225; *Bacon v. Townsend*, 2 Code R. 51. Neither is it sufficient to aver that the prosecuting attorney declared the complaint frivolous and refused to try it. *Thomason v. DeMotte*, 9 Abb. (N. Y.) Pr. 242.

In an action by F against O for having maliciously caused the arrest of F in a civil action-brought against him by O, the proceedings connected with the arrest having been regular on their face, the failure of the complaint to show that the writ of arrest had been vacated or set aside by the court in the action in which it was issued is a fatal defect. And an allegation in the answer that the plaintiff after being arrested paid the defendant's demand on account of which he was arrested and the disbursements accrued in the proceedings against him, does not aid the complaint in respect to such defect, but on the contrary showed that the arrest was acquiesced in by the plaintiff; and the plaintiff not having denied in his reply the said allegation in the answer, *held*, that under the pleadings he had no cause of action. *Foster v. Orr* (Oreg.), 21 Pac. Rep. 440.

2. *Coles v. Hanks*, 3 T. B. Mon.

In an action against more than one, the allegation that "defendants contriving and maliciously intending to injure the plaintiff, falsely, maliciously and without probable cause procured him to be indicted for murder," sufficiently avers a joint liability on the part of the defendants,¹ and it is not necessary to aver previous combination in order to be permitted to prove such combination for a joint wrong done by two or more persons sued together.² But where the plaintiff expects to prove a fraudulent conspiracy, the same should be distinctly averred,³ although great latitude is allowed in setting out the particular acts from which such conspiracy is to be inferred.⁴ Facts should be stated and not conclusions.⁵

If it shall appear in the complaint that the former action terminated in a conviction, such complaint is demurrable unless such other facts be averred as will show that such conviction was obtained by means of the fraud of the defendant which prevented the plaintiff from setting up his defence in the former action. And in such case it is proper to plead matter showing the defendant's motive.⁶ The reversal of a case for error of law is no exception to this rule.

Where the plaintiff attached a copy of the indictment under which he was arrested he was not estopped thereby from showing the falsity of the statements contained therein.⁷ If the complaint charge malice and want of probable cause in filing the affidavit charging the plaintiff with a criminal offence, such allegations need not be repeated in connection with the averments relative to the issuance of the warrant, the arrest and imprisonment.⁸ A general allegation of damage warrants the recovery of all damage naturally resulting from the wrongful act. But in order to recover them the plaintiff must plead his special damages, setting out with particularity the causes which produced them.⁹

(Ky.) 208; *Teague v. Wilkes*, 3 McCord (S. Car.) 461.

1. *Dreux v. Domec*, 18 Cal. 83; but in *Alabama* it is held that the right of action is several and not joint; and hence, where three parties join as co-plaintiffs in such action, there is a misjoinder of parties plaintiff. *McLeod v. McLeod*, 73 Ala. 42.

2. *Herron v. Hughes*, 25 Cal. 560.

The damage is the gist of the action and not the conspiracy. *Jenner v. Carson*, 111 Ind. 522.

3. *McHenry v. Hazard*, 45 Barb. (N. Y.) 657.

4. *Mussina v. Clark*, 17 Abb. (N. Y.) Pr. 188.

5. In an action for malicious prosecution the petition should state facts and not the conclusion of the pleader upon the facts. *Brown v. Cape Girardeau*,

90 Mo. 377; *Dreux v. Domec*, 18 Cal. 83.

6. *Brockleman v. Brandt*, 10 Abb. (N. Y.) Pr. 141; *Miller v. Deere*, 2 Abb. (N. Y.) Pr. 1; *Phillips v. Kalamazoo*, 53 Mich. 33.

7. *Hampton v. Jones*, 58 Iowa 317.

8. *Ruston v. Bidde*, 43 Ind. 515.

The law implies such damages and proof only is necessary to show their extent. *Moehring v. Hall*, 66 Tex. 240.

9. *Stanfield v. Phillips*, 78 Pa. St. 73; *Donnell v. Jones*, 13 Ala. 490; *Miles v. Weston*, 60 Ill. 361. As the kind of food that was furnished the plaintiff and the character of the prison in which he was confined and the treatment he received. *Miles v. Weston*, 60 Ill. 361. So the expenses of the plaintiff for costs and counsel fees in defending himself

2. **Answer.**—It is superfluous to set forth the facts showing probable cause, as the same may be shown under the general denial.¹ This being so, it is not error to sustain a demurrer to a special answer alleging the existence of probable cause.² And if the allegation of want of probable cause be denied, it is redundant to allege probable cause as a separate defence.³ The guilt of the plaintiff may also be shown under the general denial.⁴ The defendant may also show under the general denial that he acted in good faith upon the advice of competent counsel.⁵ But under a general denial the defendant will not be permitted to prove that plaintiff's reputation as a thief gave him reasonable grounds to suspect plaintiff of larceny.⁶ A plea that the action for malicious prosecution is itself malicious is not allowable.⁷

VII. PRACTICE.—Suits for malicious prosecution must be commenced in courts of general jurisdiction, unless otherwise specially provided, and where jurisdiction of the defendant can be personally acquired.⁸ And within the time limited by statute dating from the former action.⁹

must be specially alleged. *Thompson v. Lumley*, 7 Daly (N. Y.) 74; *Strang v. Whitehead*, 12 Wend. (N. Y.) 64. And damages arising from the loss of boarders growing out of the party's arrest must be specially pleaded. *Horne v. Sullivan*, 83 Ill. 30.

But in an action for malicious prosecution the plaintiff cannot recover for a conversion of the goods attached in the original action. *Burton v. St. Paul etc. R. Co.*, 33 Minn. 189. But in *New York* where the statute gives the defendant a right to demand of the plaintiff a bill of particulars of his claim in gross, he may not demand a bill of particulars in an action for malicious prosecution where damages are alleged to plaintiff's credit and business. *Lane v. Williams*, 37 Hun (N. Y.) 388.

The plaintiff should allege specifically what actual and also what exemplary damages he claims, and if he fails to do so a special demurrer will be sustained, but a verdict cures. *Moehring v. Hall*, 66 Tex. 240.

1. *Raddle v. Ruckgaber*, 3 Duer (N. Y.) 684; *Trogden v. Deckard*, 45 Ind. 572; *Benedict v. Seymour*, 6 How. (N. Y.) Pr. 208. See *contra*, *Brown v. Connelly*, 5 Blackf. (Ind.) 390; *Scheer v. Keown*, 34 Wis. 349; *Wilson v. Ferrari*, 1 Dis. 579. However, under a code providing that contradictory defences may be united if a general denial and a plea of justification, as for instance probable cause, are united, a verdict for the defendant on the general issue

should be set aside, as the plea of justification admits the facts negatived by the verdict. *Rigdon v. Jordan*, 81 Ga. 668.

2. *Trogden v. Deckard*, 45 Ind. 572.

3. *Rost v. Harris*, 12 Abb. (N. Y.) Pr. 446.

4. *Bruley v. Rose*, 57 Iowa 651.

5. *Folger v. Washburn*, 137 Mass. 60; *Griffin v. Chubb*, 7 Tex. 603; s. c., 58 Am. Dec. 85; *Sparling v. Conway*, 6 Mo. App. 283; *Smith v. Davis*, 3 Mont. 109; *Levy v. Brannan*, 39 Cal. 485; *Hall v. Suydam*, 6 Barb. (N. Y.) 83; *White v. Tucker*, 16 Ohio St. 468; *Wright v. Hanna*, 98 Ind. 217. But an averment in the answer that the defendant acted upon the advice of counsel is insufficient to show probable cause and may be stricken out if there is not also an averment that such advice was upon a full presentation of the facts. *Smith v. Davis*, 3 Mont. 109.

6. *Scheer v. Krown*, 34 Wis. 349; *Spear v. Hiles*, 67 Wis. 350.

7. *Noonan v. Orton*, 30 Wis. 356.

8. Though in *Texas* it seems that such suits must be brought in the county where the process of law was unjustly and maliciously sued out. *Hillard v. Wilson*, 65 Tex. 286.

9. A variance between the day laid as the one on which plaintiff was acquitted and the day of his acquittal as shown by the record is not material if the declaration alleges that the acquittal took place before suit was brought. *Mowry v. Miller*, 3 Leigh (Va.) 561.

The burden of proof is upon the plaintiff, and he must show by competent evidence that the defendant had no probable cause for the prosecution.¹ Although it is held where the defendant pleads in detail the truth of the matters involved in the prosecution that he thereby assumes the burden of their proof.² The question of malice is one of fact for the jury.³ The law of implied malice has no application.⁴ While the jury may find the

1. *Hurd v. Shaw*, 20 Ill. 354; *Jacks v. Stimpson*, 13 Ill. 701; *Richey v. McBean*, 17 Ill. 63; *Israel v. Brooks*, 23 Ill. 526; *Pangburn v. Bull*, 1 Wend. (N. Y.) 345; *Sutton v. Anderson*, 103 Pa. St. 151; *McFarland v. Washburn*, 14 Ill. App. 369; *Jordan v. Ala. Great So. R. Co.*, 81 Ala. 220; *Thaule v. Krekeler*, 81 N. Y. 428; *Workman v. Shelly*, 79 Ind. 442; *Lagaltee v. Blaisdell*, 134 Mass. 473; *Marks v. Townsend*, 97 N. Y. 590.

To support an action for a malicious criminal prosecution the plaintiff must prove in the first place the fact of prosecution and that the defendant was himself the prosecutor or that he instigated its commencement and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice. Proof of these several facts is indispensable to support the declaration; and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars the defendant has no occasion to offer any evidence in his defence. *Wheeler v. Nesbitt*, 24 How. (U. S.) 544.

2. *Morris v. Corson*, 7 Cow. (N. Y.) 281.

3. *Wagstaff v. Schippel*, 27 Kan. 450; *Gee v. Culver*, 12 Oreg. 228; *Forbes v. Hagman*, 75 Va. 168; *Strickler v. Greer*, 95 Ind. 596; *Stansell v. Cleveland*, 64 Tex. 660; *Roy v. Goings*, 112 Ill. 656; *Hirschi v. Mettelman*, 7 Ill. App. 112; *Comsky v. Breen*, 7 Ill. App. 369; *Ventress v. Rosser*, 73 Ga. 534; *Oliver v. Pate*, 43 Ind. 132; *Anderson v. Keller*, 67 Ga. 58; *Center v. Spring*, 2 Iowa 393; *Newell v. Downs*, 8 Blackf. (Ind.) 523; *Page v. Cushing*, 38 Me. 523; *Boyd v. Cross*, 35 Md. 194; *Stewart v. Sonneborn*, 98 U. S. 187; *Hamilton v. Smith*, 39 Mich. 222; *Ritchey v. Davis*, 11 Iowa 124; *Von Latham v. Libby*, 38 Barb. (N. Y.) 339; *Moody v. Dentsch*, 85 Mo. 237; *Holliday v. Sterling*, 62

Mo. 321; *Humphries v. Parker*, 52 Me 502; *Schofield v. Ferrers*, 47 Pa. St. 194; *Munns v. Dupont*, 3 Wash. (C. C.) 37; *Stewart v. Sonneborn*, 98 U. S. 187, 193.

But it is error to make the conduct of the jury under like circumstances a criterion as to whether defendant acted with malice and upon probable cause. *Coleman v. Allen*, 79 Ga. 637.

4. But the term "malice" has in law a twofold signification. There is what is known as "malice in law" or "implied malice" and "malice in fact" or "actual malice." "Malice in law" denotes a legal inference of malice from certain facts proved. It is a presumption of malice which the law raises from an act unlawful in itself which is injurious to another, and is declared by the court. "Malice in fact" or "actual malice" relates to the actual state or condition of the mind of the person who did the act, and is a question of fact, upon the circumstances of each particular case, to be found by the jury. In actions for malicious prosecutions there is no such thing as malice in law, but malice in fact must be proved, and its existence is purely a question of fact for the jury. *Ritchey v. Davis*, 11 Iowa 124.

But in this form of action malice is not considered in the sense of spite or hatred against an individual, but of *malice animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell v. Jenkins*, 5 Barn. & Adol. 594.

To prove actual malice it is not necessary, therefore, that the prosecution complained of should proceed from hatred or ill will to the plaintiff, but it may be inferred from any improper and unjustifiable motive which the facts disclose influenced the conduct of the defendant in instituting the prosecution. "But it is well established," said LIBBEY, J., "that the plaintiff is not required to prove 'express malice,' in the popular signification of the term; as that defendant was prompted by malevolence, or acted from motives of ill will, resentment or hatred towards the plaintiff. It is sufficient if he proves it in its

fact of malice from the facts that establish want of probable cause,¹

enlarged sense. "In a legal sense, any act done wilfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Com. v. Snelling*, 15 Pick. (Mass.) 327.

"The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious." *Willis v. Noves*, 12 Pick. (Mass.) 324; *Pullen v. Glidden*, 66 Me. 202. See also *Page v. Cushing*, 38 Me. 523; *Humphries v. Parker*, 52 Me. 502; *Mitchell v. Wall*, 111 Mass. 492.

While it is true that express or actual malice refers or relates to the mental state or purpose of the party who committed the act, and its existence must be proved, the law does not require direct evidence of such mental state or purpose; but the character of the act itself with all its surrounding facts and circumstances, may be enquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act; and if, upon a full consideration of these, that motive is found to be improper and unjustifiable, the law authorizes the jury to find it was malicious. If, for instance, an officer should arrest a party, not out of spite or any spirit of hatred or revenge, but for the purpose of increasing his fees, or magnifying his importance and administering to his vanity, the motive which prompted such conduct would be improper and wrongful, and, in a legal sense, malicious. In this form of action, therefore, malice has reference to the mind and judgment of the defendant in the particular act charged, and is one of intent, and open to the jury. *Barron v. Mason*, 31 Vt. 189. It is not the guilt of the prosecuted, but the intention of the prosecutor, which is the subject of examination in this action. *McMahan v. Armstrong*, 2 Stew. & P. (Ala.) 154. And what that intention was, whether malicious or justifiable, is for the jury, and not for the court, to infer from the facts and circumstances of the case. In a word, whether the defendant acted with malice is never a legal presumption, whatever may be the facts, but is always

a question for the consideration of the jury.

Without proof of malice, an action for malicious prosecution cannot be maintained, nor does the law infer malice from the want of probable cause. *Strickler v. Greer*, 95 Ind. 596.

1. Malice is not inferred as a conclusion of law, but may be inferred as a fact from want of probable cause. It is for the jury to determine whether they will so infer it or not. *Oliver v. Pati*, 43 Ind. 132. Malice may be inferred from a total want of probable cause, and the inference arising from a total want of probable cause may be rebutted by proof. This want is a question for the jury. *Ventreux v. Rosser*, 73 Ga. 534. Malice is not implied from an unfounded prosecution, but it may be inferred from a want of probable cause for it. *Carson v. Edgeworth*, 43 Mich. 241; *Dietz v. Langfitt*, 63 Pa. St. 234. Malice may be inferred from want of probable cause for arrest of debtor, and need not be otherwise proved though the presumption is subject to rebuttal. *Block v. Meyers*, 33 La. An. 776.

The malice necessary to be shown can be inferred from want of probable cause. *Hogg v. Pinckney*, 16 S. Car. 387; *Caldwell v. Bennett*, 22 S. Car. 1; *Murphy v. Hobbs*, 7 Colo. 541; *Carson v. Edgeworth*, 43 Mich. 241; *Strans v. Young*, 36 Md. 246; *Brown v. Willoughby*, 5 Colo. 1; *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Mowry v. Whipple*, 8 R. I. 360; *Levy v. Brannan*, 39 Cal. 485; *Pullen v. Glidden*, 66 Me. 202; *Paddock v. Watts*, 116 Ind. 146; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Crawford v. Ryan* (Pa. St.), 7 Atl. Rep. 745. This inference, however, is one of fact, and not of law. *Greer v. Whitfield*, 4 Lea (Tenn.) 85. In an action for malicious prosecution, malice cannot be inferred from want of probable cause, but it may be inferred from the same facts which go to establish want of probable cause. *Sharpe v. Johnston*, 76 Mo. 660.

In an action for malicious prosecution, the jury may infer malice from the want of probable cause; and where there is evidence from which it could be found that the prosecution was instituted without probable cause, the verdict will not, on the evidence, be disturbed on appeal. *Heap v. Parrish*, 104 Ind. 36. In an action for malicious

they cannot find malice if probable cause exists.¹ It is, therefore, error to instruct the jury that they must find malice if they fail to find probable cause.² There seems to be one exception to the rule that malice cannot be implied, viz., where criminal prosecutions are instituted not to vindicate the law and punish crime but to coerce the payment of a debt or restitution of property; in such case the law conclusively implies malice.³ This exception, after all, is seeming rather than real, as it is the absolute want of probable cause and the use of the criminal law for an unauthorized purpose that impels the belief that there was malice. The jury, however, are never warranted in finding want of probable cause from the existence of even express malice.⁴ If the facts are undisputed, then the question of probable cause is one of law for the court.⁵ If the facts are disputed the jury

prosecution, when all the facts and circumstances proven show a want of probable cause for the arrest and imprisonment of the plaintiff on a charge of crime, the jury may take this fact into consideration, and from it infer malice, not as a matter of law, but as a conclusion of fact. *Roy v. Goings*, 112 Ill. 656. Malice may be inferred by the jury from the want of probable cause. It is no inference of law, but can be repelled by facts and circumstances indicating a fair and legitimate purpose, and an honest pursuit of a claim believed to be just. *Stansell v. Cleveland*, 64 Tex. 66. In this action malice may be inferred from want of probable cause, though it is said it is not a necessary inference. It is always a question for the jury under all the circumstances of the case. *Forbes v. Hagman*, 75 Va. 168.

Whether malice exists or not is a pure question of fact for the jury, and should not be passed upon by the court, except to define to the jury clearly what is meant by malice. Whether particular facts admitted, undisputed or assumed, do or do not constitute malice, or are such that malice may be inferred from, is a mere question of fact for the jury. The court can draw no inference from any state of facts that malice does or does not exist. *Vinal v. Core*, 18 W. Va. 1. Malice may be inferred from the total want of probable cause, and the fact that the defendant is an upright and honest man, incapable of swearing falsely, is not inconsistent with malice. *Decoux v. Lieux*, 33 La. An. 392.

1. *Kaufman v. Wicks*, 62 Tex. 234.

2. *Ritchey v. Davis*, 11 Iowa 124; *Schofield v. Ferrers*, 47 Pa. St. 194.

3. *Ross v. Langworthy*, 13 Neb. 492; *Brooks v. Warwick*, 2 Stark 393; *McDonald v. Rook*, 2 Bing. (N. Car.) 219. That evil quality of the heart which prompts a man to make a false charge against another for the purpose of private gain or advantage is legal malice. *Kimball v. Bates*, 50 Me. 308. If a criminal prosecution is instituted for some collateral purpose and as a means of coercing another to surrender some right or claim which he makes regardless of whether or not the person against whom it is commenced has committed a criminal offence, the prosecution so begun is without probable cause. *Peden v. Mail*, Ind. March 1889; *Paddock v. Watts*, 116 Ind. 146; *Kimball v. Bates*, 50 Me. 308.

4. *Stewart v. Sonneborn*, 98 U. S. 187; *Ross v. Innis*, 35 Ill. 487; s. c., 85 Am. Dec. 373; *Griffin v. Chubb*, 7 Tex. 603; s. c., 58 Am. Dec. 85; *Mitchinson v. Cross*, 58 Ill. 366; *Wade v. Walden*, 23 Ill. 425; *Center v. Spring*, 2 Iowa 393; *Israel v. Brooks*, 23 Ill. 526; *Grant v. Moore*, 29 Cal. 644; *Pangburn v. Bull*, 1 Wend. (N. Y.) 343; *Sharpe v. Johnston*, 76 Mo. 660; *Jordan v. Ala. Great So. R. Co.*, 81 Ala. 220; *Vantrees v. Rosser*, 73 Ga. 534.

A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; in neither case is he liable to this kind of action. *Johnstone v. Sutton*, 1 T. R. 544. So an instruction that if the prosecution alleged was not set on foot for a public purpose, then there was no probable cause, is erroneous. *Benson v. Bacon*, 99 Ind. 156.

5. *Ramsey v. Arrott*, 64 Tex. 320; *Burton v. St. Paul etc. R. Co.*, 33

must find the same specially or render a general verdict under proper instructions from the court.¹ In the sense that it is the

Minn. 189; *Johns v. Marsh*, 52 Md. 323; *Moore v. Northern Pac. R. Co.*, 37 Minn. 147; *Pauton v. Williams*, 2 Ad. & El. (N. S.) 169; *Turner v. Ambler*, 10 Ad. & El. (N. S.) 252; *Israel v. Brooks*, 23 Ill. 526; *Grant v. Moore*, 29 Cal. 644; *Stevens v. Fassett*, 27 Me. 266; *Marks v. Gray*, 27 Me. 266; *Besson v. Southard*, 10 N. Y. 240; *Ash v. Marlow*, 20 Ohio 119; *Parli v. Reed*, 30 Kan. 534; *Eastin v. Stockton Bank*, 66 Cal. 123; s. c., 56 Am. Rep. 77; *Fulton v. Ouesti*, 66 Cal. 575; *Lytton v. Baird*, 95 Ind. 349; *McNulty v. Walker*, 64 Miss. 198; *Lacy v. Mitchell*, 23 Ind. 67; *Cloon v. Garry*, 13 Gray (Mass.) 201; *Masten v. Deyo*, 2 Wend. (N. Y.) 424; *Von Latham v. Libby*, 38 Barb. (N. Y.) 339; *Page v. Cushing*, 38 Me. 523; *Laughlin v. Clawson*, 27 Pa. St. 328; *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Sartwell v. Parker*, 141 Mass. 405; *Stewart v. Sonneborn*, 98 U. S. 187.

The courts have not wholly agreed upon the application of this rule, especially where the facts are many and complicated. TINDAL, C. J., says: "Such being the rule of law, where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in, distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them. *Pantoq v. Williams*, 2 Ald. & El. (N. S.) 169.

The question of probable cause is primarily one for the court, but if the facts tending to establish the existence or want of probable cause are in dispute, then it is a question for the jury; in which case it is the duty of the court to submit the evidence to the jury with instructions to determine its credibility, and that the facts amount to probable cause, or that they do not. *Atchison* etc.

R. Co. v. Watson, 37 Kan. 773; *Bell v. Matthews*, 37 Kan. 686. On the other hand, it is held that the law does not, and could not, prescribe a definite rule as to what particular facts shall constitute this reasonable ground of belief. The only rule which it can or does prescribe is, that the facts in each particular case must be such as would reasonably produce such belief in the minds of ordinary men, but in such case it is for the jury to say, not only what specific facts are established, but to determine their effect as a fact within the rule mentioned, and only upon such finding does the law pronounce its conclusion. *Cochran v. Toher*, 14 Minn. 385. So it is held that, at least under some circumstances, it is a question to be submitted to the jury. *Anderson v. Keller*, 67 Ga. 58. The want of probable cause is a question of fact for the jury. *Heldt v. Webster*, 60 Tex. 207. And if the facts on the question of probable cause are undisputed, their legal sufficiency should be submitted to the jury without any hypothetical instructions. *Medcalf v. Brooklyn Ins. Co.*, 45 Md. 198.

1. If conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law. But where there is no dispute about the facts it is the duty of the court on the trial to apply the law to them. *Besson v. Southard*, 10 N. Y. 236. In an action for malicious prosecution probable cause is a mixed question of law and fact, in the sense that the jury are to determine the facts and the court to decide whether or not they constitute probable cause. *Walbridge v. Pruden*, 102 Pa. St. 1. It is error to leave the jury to determine whether the facts do or do not establish the want of probable cause. *Emerson v. Skaggs*, 52 Cal. 246. What facts exist in a particular case where there is a dispute in reference to them is a question exclusively for the jury. *Burton v. St. Paul* etc. R. Co., 33 Minn. 189. But it is for the court to determine whether upon the facts found probable cause for the prosecution did or did not exist. *Coleman v. Henrich*, 2 Mackey (D. C.) 189. In actions for malicious prosecution, the jury should be in-

structed, as matter of law, as to what constitutes probable cause, and then it is for them to say, from a review of all the facts, and circumstances proved to have been present to the mind of the prosecutor, at the time he commenced his prosecution, or the plaintiff, when he instituted his civil action, whether there was or was not probable cause for such a proceeding. *Caldwell v. Bennett*, 22 S. Car. 1.

The question as to what amounts to probable cause is one of law in a very important sense.¹ It is, therefore, generally the duty of the court, where evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not. What was the defendant's belief is, however, always a question for the jury. *Stewart v. Sonneborn*, 98 U. S. 187. Where the evidence is conflicting the court properly charged that if the facts were as testified to by plaintiff, stating them, there was no probable cause; but if the facts were as stated by witness for defendant, stating them, there was probable cause. *Acker v. Gundy* (Pa.), 12 Atl. Rep. 595.

While the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be derived therefrom, really exist, it is for the court to determine whether, upon the facts so found, there be probable cause, or the want of it. *Jones v. Marsh*, 52 Ind. 323. And it is error for the court to leave the jury to determine whether certain facts did exist, and if so, whether they justified the defendant. *Bulkley v. Smith*, 2 Duer (N. Y.) 704.

Where there is a substantial dispute about the facts constituting the existence or want of probable cause, it is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause. It is, therefore, generally the duty of the court in such a case, when evidence is given to disprove the existence of probable cause, to submit to the jury its credibility and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. The court should group the facts in the instructions which the evidence tends to prove, and then instruct the jury that if they find such facts have been established, they must

find that there was or was not probable cause. *Atchison etc. R. Co. v. Watson*, 37 Kan. 773; *Sweeney v. Perney*, 40 Kan. 102; *Johnson v. Miller*, 69 Iowa 562; *Shaul v. Brown*, 28 Iowa 37; *Gee v. Culver*, 12 Oreg. 228. This rule must not be made a pretext by which a question, primarily for the court, is transferred to the jury. There must be a substantial dispute about the existence of probable cause before it can properly go to the jury; and if about the facts that are claimed to prove or disprove probable cause there can fairly be said to be a dispute, a conflict of testimony, irreconcilable statements of witnesses, a strong flavor of improbability, then the jury are the sole judges of these as of every other material fact in the case; but if the evidence on this question, fairly considered and impartially weighed, produces on the mind of the court a reasonable conviction of the existence or want of probable cause, then it is the clear duty of the court to instruct the jury accordingly. The dispute must be of such character as to compel the court to weigh evidence, and determine the credibility of witnesses before it ceases to be a question of law for the court and becomes an issue of fact for the jury. *Atchison etc. R. Co. v. Watson*, 37 Kan. 773.

It is often said in the books that, in actions for malicious prosecution, the question whether there was probable cause for instituting the prosecution is a question of law for the court. This proposition does not mean that it is the province of the court to decide upon conflicting evidence whether there was or was not such probable cause, but that, where the evidence is not conflicting, or where the facts are conceded, it is the province of the court to tell the jury whether the facts do or do not afford such probable cause. Whereas, in this case the evidence as to the facts is conflicting, it is the duty of the court to tell the jury whether the hypothetical state of facts which the evidence of each party tends to prove does or does not, if found by them to exist, afford such probable cause. As a general rule, it is error for the court, in instructing the jury, to submit a question of law to them for determination; and hence, in an action for malicious prosecution, it is error for the court to submit to the jury, generally, the question whether there was or was not probable

jury's province to find the facts and the court's to say whether or not those ascertained or admitted facts constitute probable cause, it is frequently said that probable cause is a mixed question of law and facts.¹ It would seem, therefore, that the better practice would be to set out the facts relied upon to show want of probable cause in the complaint, that their sufficiency might be tested by demurrer.² And if, upon the trial, the undisputed evidence of the plaintiff fails as a matter of law to show want of probable cause, the court should direct a verdict for the defendant.³ An action for malicious prosecution must abate if it appear that a prior action is pending for the same cause of action, even though it also appear that such former action was prematurely brought because commenced before the prosecution complained of had terminated.⁴

VIII. DEFENCES—1. **Generally.**—It is a good defence to the action of malicious prosecution if the defendant show either that he neither was the prosecutor nor instigated the prosecution.⁵

cause for the prosecution. *Meysenberg v. Engelke*, 18 Mo. App. 346; *Driggs v. Barton*, 44 Vt. 124. To the same effect *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Kidder v. Parkhurst*, 3 Allen (Mass.) 393; *Ulmer v. Leland*, 1 Me. 135; *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Comms. v. Clark*, 94 U. S. 278; *Hill v. Palm*, 38 Mo. 13; *Vantrees v. Rosser*, 73 Ga. 534.

1. The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact, but whether, supposing them to be true, they amount to a probable cause is a question of law. **LORD MANSFIELD** in *Johnstone v. Sutton*, 1 T. R. 545; *Humphries v. Parker*, 52 Me. 502; *Ash v. Marlow*, 20 Ohio 119; *Ramsey v. Arrott*, 64 Tex. 320; *Moody v. Deutsch*, 85 Mo. 237; *Lytton v. Baird*, 95 Ind. 349; *Stewart v. Sonneborn*, 98 U. S. 187; *Heyne v. Blair*, 62 N. Y. 19; *Moore v. Northern Pac. R. Co.*, 37 Minn. 147; *Sartwell v. Parker*, 141 Mass. 405; *McNulty v. Walker*, 64 Miss. 198; *Glassgow v. Owen*, 69 Tex. 167; *Munns v. Dupont*, 3 Wash. (U. S.) 31.

2. *Brown v. Connelly*, 5 Blackf. (Ind.) 390; *Morris v. Corson*, 7 Cow. (N. Y.) 281.

3. *Grant v. Moore*, 29 Cal. 644.

4. *Foster v. Napier*, 73 Ala. 593.

5. *Wheeler v. Nesbitt*, 24 How. (U. S.) 544. One is not liable for stating facts going to show an offence has been

committed if he makes no request for the arrest. *Larke v. Bande*, 4 Mo. App. 186. A caused B's arrest upon a warrant for larceny. The justice of his own motion changed the charge to one of disorderly conduct and fined and committed B. *Held*, that A was not liable for anything done after the charge had been changed. *Frankfurter v. Bryan*, 12 Ill. App. 549.

One who makes before a committing magistrate an affidavit of facts conceded to be true, which the magistrate erroneously believes constitute a crime, and issues a warrant of arrest accordingly, is not liable in damages to the person arrested. *Hahn v. Schmidt*, 64 Cal. 284. Defendant called plaintiff a thief and liar and a justice of the peace thinking a crime was charged caused the arrest of the plaintiff. *Held*, the defendant was not liable for the mistake of the justice. *Newman v. Davis*, 58 Iowa 447. But where a party files a complaint upon which he causes the arrest of another for an alleged crime, it is no defence to an action for malicious prosecution that the complaint was technically defective; so long as it was treated by the justice and officer as sufficient, and the defendant was in fact arrested thereon, the party filing it is estopped from questioning its sufficiency. *Parli v. Reed*, 30 Kan. 534.

So if the defendant acted without probable cause it is no defence that the person who, at the defendant's instigation, made the complaint had probable cause for believing it to be well founded.

That the prosecution is not terminated or that it terminated in the conviction of plaintiff¹ (with exceptions hereinbefore noted). That the charge preferred against the plaintiff was well founded.² That it was made with probable cause³—

Woodworth v. Mills, 61 Wis. 44. And it is no defence that the arrest was made on an *alias* warrant instead of the original, it being the duty of the officer to issue such *alias* upon the return of the original not executed. McLeod v. McLeod, 75 Ala. 483.

1. See III, 1, c.

2. The guilt of plaintiff is a good defence even though the same was not known to the defendant at the time. Adams v. Lisher, 3 Blackf. (Ind.) 241; s. c., 25 Am. Dec. 102; Ulmer v. Leland, 1 Greenl. (Me.) 135; s. c., 10 Am. Dec. 48; Plummer v. Gheen, 3 Hawks. (N. Car.) 66; s. c., 14 Am. Dec. 572.

The action for malicious prosecution is given in favor of an innocent plaintiff, not of a guilty one. Hence, when A brought trover against B and B after a verdict in his favor sued A for malicious prosecution, *held*, that evidence of facts tending to show B's guilt, which facts were not known to A when he brought the action of trover, although inadmissible to show probable cause on the part of A, should be admitted as bearing on the actual guilt of B.

In the suit for malicious prosecution A requested the presiding judge to charge the jury that if in the action of trover the question of fact whether B had been guilty of acts amounting to trover and conversion was submitted to the jury and deliberated upon, then a verdict for the defendant should be given in the suit for malicious prosecution. *Held*, that this request was properly refused. Newton v. Weaver, 13 R. I. 616.

In an action for malicious prosecution, if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty, no recovery can be had. Parkhurst v. Masteller, 57 Iowa 474.

In an action for malicious prosecution the defendant may show the guilt of the plaintiff, under the general issue, especially when the guilt consisted of facts known to the prosecutor at the time; and where there was evidence from which the jury might have believed the plaintiff was guilty, though discharged by the examining magistrate, and instruction that the plaintiff was not

guilty of the crime charged was erroneous. Bruley v. Rose, 57 Iowa 651. And in a case where the defence was that by mistake of the magistrate in drawing the affidavit the defendant was made to charge a different crime from that intended; the defendant may prove that the crime intended to be charged was true according to his belief. O'Brien v. Frasier, 47 N. J. L., 347; s. c., 54 Am. Rep. 170.

3. In suit for malicious prosecution it is not necessary that the prosecutor should have had actual knowledge that the crime charged had been committed. Nor is it essential that he should have known the facts and circumstances upon which he predicated his belief. He may act upon credible information or deceptive appearances of guilt, if he acts in good faith. And if in such case defendant can show that he had probable cause for his conduct in instituting the prosecution he is not liable. Brown v. Willoughby, 5 Colo. 1. One is not liable for malicious prosecution if there was probable cause for the prosecution and arrest instituted by him although he was actuated by feelings of hatred and revenge. Leyenberger v. Paul, 12 Ill. App. 635. An action for malicious prosecution is not maintainable where probable cause is shown irrespective of the motive of the prosecutor. Mysenberg v. Engelke, 18 Mo. App. 346. The action cannot be maintained even though expressed malice be shown if the defendant had good reason to believe and did believe that the plaintiff committed the offence charged. Murphy v. Martin, 58 Wis. 276. If the belief in the party's guilt is induced by facts and circumstances sufficient to cause a suspicion of guilt in the mind of a reasonably cautious person it is a justification for commencing a criminal prosecution. Angelo v. Paul, 85 Ill. 106; Anderson v. Friend, 85 Ill. 135. But in order to justify himself a defendant must have acted upon all the facts within his knowledge; he cannot justify the prosecution by putting forth the *prima facie* circumstances of guilt and excluding those within his knowledge tending to prove innocence. Fagnan v. Knox, 66 N. Y. 525. Neither is the

That it was made without malice.¹

2. Advice of Counsel.—It is stated broadly, in many cases, that a plaintiff who, after consulting counsel in good standing and fully disclosing the facts of his case within his knowledge, acts upon the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action.² This is so because it dis-

mere fact that defendant had honestly suspected or believed the plaintiff to be guilty of the crime for which he had caused the latter to be prosecuted, a defence. *Graeter v. Williams*, 55 Ind. 461.

And it is no defence that the information on which plaintiff was arrested contained an accusation for which probable cause may have existed with groundless charges, even though plaintiff is unable to adjust the damages between the two. *Boogher v. Bryant*, 86 Mo. 42.

1. If the defendant in the action for malicious prosecution was not the prosecutor in fact, and is sought to be made so by construction for having given false information, which led to a subsequent arrest, the motive is material and proof that the information was given in good faith is a defence to the action. *Farnham v. Feeley*, 56 N. Y. 451.

And in any case, although the defendant is unable to justify by proof of probable cause, he may still rebut the presumption of malice by showing facts and circumstances calculated to produce at the time on the mind of a reasonable and prudent man a well grounded belief or suspicion of the guilt of the person accused. *Harpham v. Whitney*, 77 Ill. 32.

2. Professors of law are proper advisers of men in doubtful circumstances, and their advice when fairly obtained exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous but the client is not responsible for the error. He is not the insurer of his lawyer. Where the fact of probable cause is in the very question submitted to counsel in such cases, and when the client is instructed that there is probable cause he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party it is important that he resort to a professional adviser of competency and integrity. He is not, in the language of JUDGE ROYES, "to make such resort a mere cover for the prosecution, but when he has done his whole duty in the premises he is not

to be made liable because the facts did not clearly warrant the advice and prosecution.

Suppression, evasions or falsehood would make him liable; but if fairly submitted and if the advice obtained was followed in good faith he has a defence to the action." *Walter v. Sample*, 25 Pa. St. 275; *Burmis v. North*, 64 Mo. 426; *Ames v. Rathbun*, 55 Barb. (N. Y.) 194; *Fisher v. Forrester*, 33 Pa. St. 501; *Potter v. Seale*, 8 Cal. 217; *Thelin v. Dorsey*, 59 Md. 539; *Sharpe v. Johnston*, 59 Mo. 557; *Ross v. Innis*, 35 Ill. 487; s. c., 85 Am. Dec. 373; *Alexander v. Harrison*, 38 Mo. 258; s. c., 90 Am. Dec. 431; *Moore v. No. Pac. R. Co.*, 37 Minn. 147; *Gilbertson v. Fuller*, 40 Minn. 413; *Blunt v. Little*, 3 Mason (U. S.) 102; *Stone v. Swift*, 4 Pick. (Mass.) 393; s. c., 16 Am. Dec. 349; *Wills v. Noyes*, 12 Pick. (Mass.) 327; *Wilder v. Holden*, 24 Pick. (Mass.) 8; *Newton v. Weaver*, 13 R. I. 616; *Jordan v. Ala. Great So. R. Co.*, 81 Ala. 220; *Smith v. Austin*, 49 Mich. 286; *Anderson v. Friend*, 71 Ill. 475; *Wicker v. Hotchkiss*, 62 Ill. 107; s. c., 14 Am. Rep. 75; *Stanton v. Hart*, 27 Mich. 539; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *White v. Carr*, 71 Me. 555; s. c., 36 Am. Rep. 353; *Découx v. Lieux*, 33 La. An. 392; *Clark v. Baldwin*, 25 Kan. 120; *Davie v. Wisher*, 72 Ill. 262; *Ash v. Marlow*, 20 Ohio 119; *Eastman v. Keasor*, 44 N. H. 519; *Hill v. Palm*, 38 Mo. 13.

A party, in order to shield himself from a prosecution for an alleged malicious arrest, etc., by the advice of counsel, must make a full statement of all the material facts to the attorney advising him. The person seeking such advice will not be protected if he makes a garbled statement of the facts and circumstances bearing upon the question of the guilt or innocence of the person proposed to be arrested. In this case, a mortgagee of crops grown by him, before the maturity of the debt, gathered a load of beans from the land on which they were grown, and took them to his residence, about two miles distant, to thresh them. The mortgagee, on learning this, posted notices for a

foreclosure of the mortgage, and forbade the mortgageor from removing any more of the crops, and threatened to have him arrested if he did. The latter, claiming he had the right to gather the beans, and denying the mortgagee's right to foreclose, gathered another load of beans, in open day, under claim of right, when the mortgagee had him arrested and imprisoned on a charge of larceny. In an action for malicious prosecution, by the mortgageor, against the mortgagee, the latter sought to justify under the advice of the State's attorney: *Held*, that he should have disclosed to the attorney, whose advice he sought, that the plaintiff took the property openly, in daylight, as any one would his own property, and that plaintiff had insisted that the mortgagee had no right to foreclose, and that he had claimed the right to gather and preserve the beans, in order to protect himself, as he had been advised he might do. *Roy v. Goings*, 112 Ill. 656.

It is true that a party in some cases may act on the advice of counsel *bona fide* sought and obtained, without incurring liability for damages as for a *tort*, even though the counsel may have been mistaken in the law. But to justify him, something more than the mere advice must be made to appear. The facts must be shown on which the advice was given; and it must be a full, correct and honest statement by the defendants of all the material facts known to them, without reference to their understanding of the case. *Forbes v. Hagman*, 75 Va. 168.

Where it does not appear by a preponderance of the evidence that defendant before commencing the prosecution truly, fully, fairly, and in good faith, stated to counsel all of the facts of the case known to him, or which with reasonable diligence he could ascertain or discover, and was afterward unconditionally advised by such counsel to institute such prosecution and that defendant instituted the same in good faith and without malice, believing plaintiff to be guilty of the offence charged, plaintiff may recover. *Manning v. Finn*, 23 Neb. 511. But *contra* the defendant may set up this defence although he did not submit to his counsel facts which he might have ascertained by reasonable diligence. *Johnson v. Miller*, 69 Iowa 562. But the fact that defendant acted upon the advice of counsel is not in itself a defence, but is a circumstance to be con-

sidered by the jury. *Hobb v. Pinckney*, 16 S. Car. 387; *Jacobs v. Crum*, 62 Tex. 411; *Ramsey v. Arrott*, 64 Tex. 322; *Glasgow v. Owen*, 69 Tex. 167; *Fox v. Davis*, 55 Ga. 208 (the last case was so decided because of the provision of the code). If a person has consulted counsel who has advised prosecution, but nevertheless the client believes it will fail and is actuated by angry feelings he cannot excuse himself. *Sharpe v. Johnson*, 76 Mo. 660.

A sued B for a malicious prosecution; it was *held* that it was for the jury to say whether the fact that the attorney under whose advice B acted was also his attorney in a civil action against A, to recover the money charged to have been embezzled made the attorney an improper adviser. *Watt v. Corey*, 76 Me. 87.

And when a person desirous of bringing an action against another goes to an attorney at law for counsel, and the attorney is directly interested in the subject matter of the suit, and this interest is known to the client, if he takes the opinion of the attorney, so interested, that he has good cause of action, and acts upon it, and it turns out to be erroneous, in an action for malicious prosecution such opinion will not be sufficient to show probable cause though honestly given by the attorney. *White v. Carr*, 71 Me. 555; s. c., 36 Am. Rep. 353.

Where the proof showed that the criminal prosecution was instituted on the advice of the State's attorney, and also that such attorney was habitually intemperate, the jury were instructed that to entitle the defendant to protect himself on the advice of an attorney, he must have communicated the facts within his knowledge, etc., to a respectable attorney in good standing, and have acted in good faith on his advice. *Held*, there was no error in the instructions in requiring the communication to have been made to an attorney in good standing, this court not being prepared to hold an attorney is in good standing merely because of his holding a commission as State's attorney. *Roy v. Goings*, 112 Ill. 656. It seems, too, that the advice must have been given honestly and in good faith by the attorney. *Sherburne v. Rodman*, 51 Wis. 474; *Plath v. Braunsdorff*, 40 Wis. 107. To make the advice of counsel a defence to such action, it is not necessary that the prosecutor should have made a full and fair

proves malice and shows probable cause.¹ A plaintiff is held

disclosure of all the facts in the case, but only of all the facts known to him, or which he could have ascertained by reasonable diligence. *Motes v. Bates*, 80 Ala. 382. And action cannot be maintained if complainant, after fully and fairly disclosing to the prosecuting officer everything within his knowledge which would tend to cause or to exclude belief in plaintiff's criminality, left him to determine on his sole responsibility whether the proceeding should be instituted, even though the case were not a proper one for prosecution. *Smith v. Austin*, 49 Mich. 286. And defendant acting upon the advice of a licenced attorney need not show that he was learned in his profession. *Horne v. Sullivan*, 83 Ill. 30; or that the facts stated to him warranted the opinion given *bona fide*. *Walter v. Sample*, 25 Pa. St. 275. But the facts upon which the opinion is founded are admissible to show the good faith of the defendant. *Cooper v. Utterback*, 37 Md. 282; *Watt v. Corey*, 76 Me. 87; *Peck v. Chouteau*, 91 Mo. 14b.

He must, however, show good faith in the selection of counsel and the counsel selected must be a regularly licenced attorney and counsellor reputable in character and considered in the community competent to give legal advice on all matters pertaining to the law. *Murphy v. Larson*, 77 Ill. 172. And all the facts known to the defendant relative to the case must have been stated. *Donnelly v. Daggett*, 145 Mass. 314; *Paddock v. Watts*, 116 Ind. 146. But the advice of a lawyer who is a pettifogger is not a defence. *Stanton v. Hart*, 27 Mich. 539.

It is sufficient to rebut the inference of malice, arising from the want of probable cause, that an honest statement of the facts were submitted to an attorney at law, who advised that they were sufficient to sustain an action and that the action was brought on that advice. *Emerson v. Cochran*, 111 Pa. St. 619; *Brewer v. Jacob*, 22 Fed. Rep. 217.

That defendant acted under advice of counsel is competent to show want of malice, though not conclusive. *Lemay v. Williams*, 32 Ark. 116; *Gulf etc. R. Co. v. James (Tex.)*, 10 S. W. Rep. 744. And if the jury can see from all the facts that the suit was malicious notwithstanding the advice of counsel,

that fact affords no protection. *Brewer v. Jacob*, 22 Fed. Rep. 217; *Davenport v. Lynch*, 6 Jones Law (N. Car.) 545; *Vinal v. Core*, 18 W. Va. 1; *Sharpe v. Johnston*, 76 Mo. 660. Evidence of the advice of a deputy prosecuting attorney to commence a prosecution is competent as tending to rebut malice. *Wright v. Hanna*, 98 Ind. 217. Evidence that an action was begun and carried on in good faith and in consequence of the advice of competent counsel upon all the facts in the prosecutor's knowledge, and all which he might by reasonable diligence have learned, is competent to rebut the presumption of malice arising from the want of probable cause; but it does not tend to establish the existence of probable cause, and is not admissible on that ground. *Sparlinger v. Conway*, 12 Mo. App. 510.

1. *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *White v. Carr*, 71 Me. 555; s. c., 36 Am. Rep. 353. The fact that the defendant sought, received and acted upon the advice of counsel affords strong evidence that there was probable cause and that the prosecution was entered into in good faith and without malice. *Skidmore v. Bricker*, 77 Ill. 164; *Murphy v. Larson*, 77 Ill. 172.

The following authorities hold that the advice of counsel upon which the defendant acted is evidence both of absence of malice and of probable cause. *Wilkinson v. Arnold*, 11 Ind. 45; *Galloway v. Stewart*, 49 Ind. 156; *Gould v. Gardiner*, 8 La. An. 12; *Phillips v. Bonham*, 16 La. An. 387; *Bartlett v. Brown*, 6 R. I. 37; *Newton v. Weaver*, 13 R. I. 616; *Soule v. Winslow*, 66 Me. 447; *Emerson v. Cochran*, 111 Pa. St. 619; *Wilder v. Hulden*, 24 Pick. (Mass.) 8; *Stanton v. Hart*, 27 Mich. 539; *Lemay v. Williams*, 32 Ark. 166; *Chandler v. McPherson*, 11 Ala. 916; *Ames v. Rathbun*, 55 Barb. (N. Y.) 194; *Smith v. Walter (Pa. St.)*, 17 Atl. Rep. 466.

It is a good defence that the defendant, before commencing the alleged malicious prosecution, it being a criminal prosecution, presented the matter to the county attorney fairly stating to him all the facts and then in good faith following the advice of the county attorney. Such a thing completely rebuts the allegation of the plaintiff that there was a want of probable cause for commencing the prosecution, and of

to know all such facts as he could by proper diligence have ascertained.¹

The advice of counsel must have been sought and followed in good faith and not as a subterfuge.²

itself shows probable cause. *Schippel v. Norton*, 38 Kan. 567; *Ross v. Innis*, 35 Ill. 487; s. c., 85 Am. Dec. 373; *Richardson v. Virtue*, 47 Thomp. & C. (N. Y.) 441.

1. *Jordon v. Ala. Great So. R. Co.*, 81 Ala. 220; *Anderson v. Friend*, 71 Ill. 475; *Wicker v. Hotchkiss*, 62 Ill. 107; *Pipkin v. Haucke*, 15 Mo. App. 373. In order that defendant may shield himself on the ground that he obtained the advice of counsel, all the facts bearing on the guilt or innocence of defendant which he knew, or by reasonable diligence could have found out, must have been laid before such counsel. *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterback*, 37 Md. 282. Even though the defendant supposed that some of the facts were not material. *Hill v. Palm*, 38 Mo. 13; *Sharpe v. Johnston*, 59 Mo. 557; *Thompson v. Lumley*, 50 How. (N. Y.) Pr. 105; *Ross v. Innis*, 26 Ill. 259.

2. *Griffin v. Chubb*, 7 Tex. 603; s. c., 58 Am. Dec. 85; *Prough v. Entriiken*, 11 Pa. St. 81; *Schmidt v. Weidman*, 63 Pa. St. 173; *Brown v. Randall*, 36 Conn. 56; *Kimball v. Bates*, 50 Me. 308; *Ames v. Rathbun*, 55 Barb. (N. Y.) 104; *Chapman v. Dodd*, 10 Minn. 350. Legal advice, if used only as a cover and not acted upon in good faith, if it does not induce an honest belief that the party has probable cause, will not screen him from prosecuting an entirely groundless suit. *Wills v. Noyes*, 12 Pick. (Mass.) 324. Before the defendant in an action for malicious prosecution can shield himself under the advice of counsel he must show that in good faith he stated the facts fully to his attorney. *Logan v. Maytag*, 57 Iowa 107. So when plaintiff before the prosecution requested the defendant to examine the supposed stolen property in his possession, which defendant refused to do. Defendant did not state this fact when he sought legal advice as to the prosecution. *Held*, that he was not exempt from liability. *Norrel v. Vogel*, 39 Minn. 107.

It is only when there exists probable cause and the arrest is effected under the advice of learned counsel, consulted in

good faith and on correct information of the facts, that a party can be exonerated from liability on the plea that he acted under legal advice. *Block v. Meyers*, 33 La. An. 776. In order to enable the defendant to base a defence upon the advice of counsel given, he should in perfect good faith obtain the advice of a competent and reliable attorney upon a full and accurate statement of all the facts. *Davie v. Wisher*, 72 Ill. 662. *Palmer v. Richardson*, 70 Ill. 544; *Soule v. Winslow*, 66 Me. 447; *Cuthbert v. Galloway*, 35 Fed. Rep. 466; *Paddock v. Watts*, 116 Ind. 146; *Donnelly v. Daggett*, 145 Mass. 314; *Smith v. Walter* (Pa. St.), 17 Atl. Rep. 466; *Walker v. Camp*, 69 Iowa 741.

Good faith in acting under advice of counsel is necessary in order to protect a party. And if after receiving such advice he is informed of other facts which satisfy him that the accused is not guilty he cannot shield himself behind the advice received. *Cole v. Curtis*, 16 Minn. 182.

The advice of counsel is entitled to more or less weight, or no weight at all; according to all the circumstances attending it, all of which should be considered by the jury. The circumstances referred to are such as these: whether the advice of counsel was sought *bona fide* or was sought only as a mode of protecting the defendants in a contemplated wrong; whether it was followed in good faith or not; whether it was really believed to be good counsel by the defendant; whether the attorney giving the advice was an attorney of character and standing or otherwise; whether he was or was not candid and disinterested in the opinion of the defendant in giving the advice; whether all the facts and circumstances as known to the defendant were frankly communicated to the attorney, or a portion of them suppressed or misstated; whether the defendant had or had not made a careful investigation of the facts before consulting counsel. Under such circumstances this advice of counsel ought to be entitled to great weight with the jury as tending to show that the de-

It, however, is sufficient that counsel advised that the plaintiff was liable without advising his prosecution.¹

A defendant, however, cannot justify a prosecution by showing that he acted under the advice of a justice of the peace.²

defendant was not actuated by legal malice; under other circumstances it would be entitled to very little or no weight, or might even tend to show that the defendant was actuated by malice. The jury alone should determine the character and effect of such advice. *Vinal v. Core*, 18 W. Va. 1. Although counsel may have advised that plaintiff was liable to a criminal charge, and although the defendant may have communicated to counsel learned in the law all the facts and circumstances bearing upon the guilt or innocence of the plaintiff which he knew or by reasonable diligence could have ascertained, yet if notwithstanding the advice of counsel he believed that the prosecutor must fail and was actuated in commencing the prosecution, not simply by angry passions or hostile feelings, but by a desire to injure and wrong the plaintiff, then most certainly he could not be said to have consulted counsel in good faith, and the jury would have been warranted in finding that the prosecution was malicious. *Sharpe v. Johnston*, 76 Mo. 660.

If defendant entertained angry feelings when he consulted counsel, he is not thereby deprived of this defence, provided such feelings were not inconsistent with good faith. *Sharpe v. Johnston*, 4 Mo. App. 575.

The law requires that one in instituting a criminal prosecution shall act in good faith, or under an honest belief of the guilt of the party arrested, and this notwithstanding he has taken legal advice. *Roy v. Goings*, 112 Ill. 656. So if he acted from motives of private interest the advice of counsel will not exempt him from liability. *Glascocock v. Bridges*, 15 La. An. 672. A defendant relied upon the advice of counsel for his defence. The district attorney testified that he told the defendant that he did not think he could convict, and that he had not a very good case. And this witness said to the defendant that he could not do anything with the plaintiff, to which the defendant replied that plaintiff had taken sides against him, and that he would "set him up for his meanness." Defendant testified that other lawyers whom he consulted ad-

vised him that he could maintain the prosecution, but none of them were produced as witness. *Held*, sufficient to sustain a verdict for plaintiff. *Vann v. McCreary*, 77 Cal. 434. If the jury can see from all the facts that the suit was malicious notwithstanding the advice of counsel, that fact affords no protection to the plaintiff in an attachment suit, and if the court can see that notwithstanding the advice it was unreasonable to believe that a ground of attachment existed, that fact of itself does not constitute cause. *Brewer v. Jacobs*, 22 Fed. Rep. 217. And where an attorney and client conspire to institute a malicious prosecution the latter cannot justify himself by the other's advice. *Hamilton v. Smith*, 39 Mich. 222.

1. *Sharpe v. Johnston*, 59 Mo. 557.

2. When the prosecution fully and fairly submits to his counsel learned in the law all the facts which he knows are capable of proof, and is advised that they are sufficient to sustain a prosecution, although the opinion be erroneous, shall the advice of a committing magistrate have the same effect? We think not. Justices of the peace are not required to be learned in the law, in fact generally through the State they are not. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them. Their duties are judicial; they may in the discharge thereof reduce the substance of the complaint to writing in the form of an information of the prosecutor, then they judicially determine whether the facts therein averred be sufficient to justify the issuing of a warrant. An educated business man may be much better qualified than many inexperienced justices of the peace to advise as to the law; yet I am not aware that the advice of such a person has ever been held to protect against damages for a malicious prosecution. *Brobst v. Ruff*, 100 Pa. St. 91; s. c., 45 Am. Rep. 358; *Gee v.*

Whether or not the defendant made a full and fair statement of all the facts to his counsel is a question for the jury.¹

3. Miscellaneous.—It is no defence to show that the affidavit made by the prosecutor was insufficient in law to authorize the prosecution.² Nor that the prosecution was before a court having no jurisdiction.³

IX. EVIDENCE—1. Strict Rules of Evidence.—In action for malicious prosecution the strict rules of evidence should be enforced.⁴ The fact of the prosecution must be proven, and this by the best evidence, to wit, the record or properly authenticated copies.⁵

Culver, 12 Oreg. 288; *Burgett v. Burgett*, 43 Ind. 78; *Coleman v. Henrich*, 2 Mackey (D. C.) 189; *Straus v. Young*, 37 Md. 282; *Olmstead v. Partridge*, 16 Gray (Mass.) 381; *Murphy v. Larson*, 77 Ill. 172; *Stanton v. Hart*, 27 Mich. 539; *Williams v. Van Meter*, 8 Mo. 339; *Sutton v. McConnel*, 45 Wis. 269. The advice of a detective is not sufficient. *Breitmesser v. Stier*, 13 Phila. (Pa.) 80. Nor of a police officer. *Coleman v. Henrich*, 2 Mackey (D. C.) 189.

Nor where a road overseer caused the arrest of one charged with stealing certain property belonging to the township, can he show that he was advised by certain property owners of the road district to commence such action. *Sweeney v. Perney*, 40 Kan. 102.

But it is held that this action cannot be maintained against the person for having made an arrest in pursuance of the advice of an alderman after an honest and unreserved statement of the facts. *Thomas v. Painter*, 10 Phila. (Pa.) 409. This seems to have been overruled in *Brobst v. Ruff*, 100 Pa. St. 91; s. c., 45 Am. Rep. 358.

It is error to allow proof that defendants were advised by a justice of the peace that on the facts in the case the plaintiff was guilty of the offence charged, as legal advice in such case, to be a justification, must be given by counsel learned in the law. *Rigdon v. Jordan*, 81 Ga. 668.

1. *McLeod v. McLeod*, 73 Ala. 42.

2. A void process procured through malice and without probable cause is even more reprehensible, if possible, than if it charges a criminal offence. The wrong is not in the charge alone, but more in the object and purpose to be gained and the intention and motive in procuring the complaint and arrest. The contents of the complaint when maliciously made, and without good cause, are of but little consequence and can give no protection. *Bell v. Keep-*

ers, 37 Kan. 64; *Stocking v. Howard*, 73 Mo. 25. See *Anse* 1.

3. *Stone v. Stevens*, 12 Conn. 219.

4. *Brown v. Smith*, 83 Ill. 291.

5. If the prosecution was in a foreign country a copy of the record is not indispensably necessary, but other evidence of the facts may be received. *Young v. Gregory*, 3 Call (Va.) 446.

The record of the judgment of acquittal is the best evidence of the determination of the prosecution. *Comisky v. Breen*, 7 Ill. App. 369.

To sustain an action for malicious prosecution the plaintiff must prove by the record, or a copy thereof, the proceedings in the prosecution against him and his acquittal. *Sayles v. Briggs*, 4 Met. (Mass.) 421. A copy is admissible. *Fant v. McDaniel*, 1 Brev. (S. Car.) 173; s. c., 2 Am. Dec. 660.

In a suit for malicious prosecution, the record of the arrest, trial and discharge before the committing court, which, from the basis of the suit, is admissible, but the reasons given by the magistrate for granting the discharge are not admissible in evidence. *Anderson v. Heller*, 67 Ga. 58. If the record contain improper matter it is not to be excluded on that ground. But the defendant may ask the court to instruct the jury to disregard such matter. *Granger v. Warrington*, 8 Ill. 299.

If the final record has not been made up an indictment may be proved by producing the original and calling the clerk to prove that it is a record of his court. *Watts v. Clegg*, 48 Ala. 561.

A slight variance between the allegation and proof of the former proceeding will not be regarded. *Leidig v. Rawson*, 2 Ill. 272; *Forbes v. Hagman*, 75 Va. 168. The record of the police court in which the complaint was tried may be used by the plaintiff in evidence. *Brainerd v. Brackett*, 33 Me. 580. The record of the magistrate is competent evidence at least to show the

And the defendant must be connected with such prosecution.¹

2. End of Prosecution.—It must also appear in evidence that the prosecution is at an end.²

3. Character.—Evidence of the general character and reputation of the plaintiff is admissible, this both as affecting the question of damages and probably, too, as affecting the question of probable cause.³

facts of the acquittal and discharge of the plaintiffs. *John v. Bridgman*, 27 Ohio St. 22.

The affidavit and warrant in the alleged malicious prosecution are competent evidence in an action therefor. *Cooper v. Turrentine*, 17 Ala. 13; *Collins v. Love*, 7 Blackf. (Ind.) 416.

The information and record in the criminal proceeding are admissible. *Mass v. Meire*, 37 Iowa 97; *Hogg v. Pinckney*, 16 S. Car. 387. It is not competent to show by the testimony of a grand juror that the evidence of the defendant, then the prosecuting witness, was taken into consideration by the grand jury in finding the indictment. *Parkhurst v. Masteller*, 57 Iowa 474. And the defendant may prove by the magistrate what the testimony before him was on the part of the government in order to show probable cause, and disprove malice. *Stevens v. Lacour*, 10 Barb. (N. Y.) 63. But the return of the officer on an attachment may be contradicted by parol. *Mott v. Smith*, 2 Cranch (U. S.) 33.

1. This may be done by any competent evidence, as by the testimony of a grand juror, by showing that the defendant employed counsel or other persons to assist in the prosecution; or that he gave instructions, paid expenses, procured witnesses, or was otherwise active in forwarding it. *Greenleaf Ev.* (Redfield's ed.), vol. 3, § 450.

In an action against two defendants it is error to reject the record of the alleged prosecution because the complaint was not signed by both. *Casebeer v. Drahoble*, 13 Neb. 465. Slight evidence that the defendant was the instigator is sufficient to go to the jury. *Miller v. Milligan*, 48 Barb. (N. Y.) 30.

The general authority of an officer or agent may be inferred from the nature of the employment and the usual course of business. *Walker v. Eastern Co. R. Co.*, L. R., 5 C. P. 640.

But acts and declarations of one defendant in the absence of another cannot be received in evidence against such other in the absence of independent

proof of a conspiracy. *Carpenter v. Sheldon*, 5 Sandf. (N. Y.) 77; *Snyder v. Brosse*, 51 Ill. 357.

Evidence that the defendant procured the warrant and wagered that he would convict the plaintiff, sufficiently connects him with the prosecution. *Kline v. Shuler*, 8 Ired. (N. Car.) 484.

To show that the defendant instigated the prosecution it may be shown that he employed counsel therefor, or gave instructions, or paid expenses, or procured witnesses, or stated that he had put the plaintiff in the penitentiary or that the defendant was in any way active in forwarding the suit. *Bitting v. Ten Eyck*, 82 Ind. 421; s. c., 42 Am. Rep. 505. But that defendant was a member of the grand jury that indicted the plaintiff and employed counsel to prosecute him is not sufficient to show a prosecution by him. *Barrett v. Chouteau*, 94 Mo. 13.

2. What is a sufficient termination see *ante*, III, 2. For this purpose a record showing the acquittal is proper and sufficient. *Mills v. McCoy*, 4 Cow. (N. Y.) 406; *Watts v. Clegg*, 48 Ala. 51. *Greenleaf Ev.* (Redf. ed.), vol. 26, § 452. *John v. Bridgman*, 27 Ohio St. 22; *Williams v. Woodhouse*, 3 Dev. (N. Car.) 257. A memorandum made by the justice of the peace at the time of a trial of a prosecution before him showing the judgment which he rendered is admissible to show the termination of the prosecution. *Long v. Rodgers*, 18 Ala. 321.

The judgment in the attachment suit in favor of the defendant to that suit is the only competent proof of the fact that the attachment was ended in favor of the plaintiff in the suit for malicious prosecution. *Brewer v. Jacobs*, 22 Fed. Rep. 217.

3. *Israel v. Brooks*, 23 Ill. 526; *Wade v. Walden*, 23 Ill. 425; *Miller v. Brown*, 43 Me. 127; *Gregory v. Chambers*, 78 Mo. 294; *Gee v. Culver*, 13 Ore. 598; *Fitzgibbon v. Brown*, 43 Me. 169; *Bacon v. Towne*, 4 Cush. (Mass.) 217.

In actions for malicious prosecu-

So, on the question of damages, evidence is admissible to show hostility and unfriendly feeling entertained by defendant towards plaintiff prior to the alleged prosecution.¹

tion, where the question for the jury is whether the defendant upon all the information he had, whether it was true or false, acted as a cautious, reasonable man not influenced by malice would act, the general reputation of the plaintiff is a proper subject of enquiry upon the question of probable cause. And since malice in fact may be inferred from the want of probable cause, it follows that it is pertinent also upon the question of malice. *Pullen v. Glidden*, 68 Me. 559. Proof of the plaintiff's bad character is always admissible in actions for malicious prosecution. *Hickman v. Jones*, 9 Wall. (U. S.) 197.

In an action for a malicious arrest of a debtor by his creditor evidence of plaintiff's general bad reputation for honesty and fair business dealing is admissible. *Rosenkrans v. Barker*, 115 Ill. 331.

Where injury to the character is charged as an element of damage the defendant may show the plaintiff's bad character in mitigation; evidence of particular criminal acts are not, however, admissible. *O'Brien v. Frasier*, 47 N. J. L. 349; s. c., 54 Am. Rep. 170.

In an action for the malicious prosecution of a criminal action, evidence of the previous good character of the plaintiff is admissible as tending to show that such prosecution was without probable cause. And it may also be shown that the defendant had known the plaintiff for several years before the criminal prosecution was commenced. This raises a presumption that he knew his reputation. *Woodworth v. Mills*, 61 Wis. 44; s. c., 50 Am. Rep. 135.

In an action for malicious prosecution, the defendant may prove the general bad reputation of the plaintiff at the place where he resided at the time of his arrest, for honesty and fair dealing in business, to rebut the proof of want of probable cause, and also in mitigation of damages. *Rosenkrans v. Barker*, 115 Ill. 331; *Gregory v. Chambers*, 78 Mo. 294; *Fitzgibbon v. Brown*, 43 Me. 169.

The good character of the accused goes far to disprove probable cause. *Ross v. Innis*, 35 Ill. 487; s. c., 85 Am. Dec. 373; *Greenl. Ev.*, § 458. See *contra* *Oliver v. Pate*, 43 Ind. 132; *Blizzard v. Hays*, 46 Ind. 166.

It is *held* that if the plaintiff disclaims any special damages for injury to his character, the defendant cannot attack such character either to rebut the evidence of malice or in mitigation of damages. *Smith v. Hyndman*, 10 Cush. (Mass.) 554.

Where the fact of the defendant's sobriety was in issue, persons long and intimately acquainted with him were admitted to testify as to his habits of temperance. *Beal v. Robeson*, 8 Ired. (N. Car.) 276.

The defendant may show that the plaintiff's only occupation was horse-racing and gambling. *Martin v. Hardesty*, 27 Ala. 458. Or that he was of notoriously bad character. *Rodriguez v. Tadmire*, 2 Esp. 721.

But where after a warrant against two defendants for larceny one of them brought his action for malicious prosecution, it was *held* that this defendant could not be allowed to prove the bad character of the other defendant. *Armstrong v. Grogan*, 5 Sneed (Tenn.) 108. The plaintiff's reputation, however, is presumed to be good. He cannot prove it. *Kennedy v. Holladay*, 25 Mo. App. 503.

It is competent for plaintiff to introduce evidence to show that before and at the time of the prosecution complained of he was a man of good moral character and reputation in the community in which he lived, and that the defendant had knowledge of this as tending to show a want of probable cause. *Blizzard v. Hays*, 46 Ind. 166.

The plaintiff, in order to prove that the prosecution was without probable cause, may show his good reputation, known to the defendant when the prosecution was commenced. *McIntire v. Levering*, 148 Mass. 546.

But evidence of defendant's reputation for peaceableness at the time of the encounter out of which the prosecution grew, is inadmissible as evidence in chief. *Walker v. Pittman*, 108 Ind. 341. And it is incompetent to show defendant's social position. *Renfro v. Prior*, 22 Mo. App. 403. But particular instances of bad conduct cannot be shown. *McIntire v. Levering*, 148 Mass. 546.

1. *Bruington v. Wingate*, 55 Iowa 140.

4. **Malice** must be proven as like the other essential facts, and while, as we have already seen, it is in but few instances presumed as a matter of law, it may be taken as proven or not as the jury shall determine from the facts that go to establish want of probable cause. It may be proven from direct evidence or it may be inferred from circumstances.¹

1. *Stansell v. Cleveland*, 64 Tex. 660; *Lyon v. Hancock*, 35 Cal. 372.

The legal malice may exist, though the party making the oath may not have wilfully sworn falsely. *Forbes & Allers v. Hagman*, 75 Va. 168.

The charge upon which a proceeding, civil or criminal, is based must have been wilfully false to establish that want of probable cause from which malice will be inferred. *Dorendinger v. Tschechtelin*, 12 Daly (N. Y.) 34. Or wanton and reckless. *Wheeler v. Nesbitt*, 24 How. (U. S.) 544.

Whatever tends to show evil intent on the part of the prosecutor in instigating the indictment is properly admissible in evidence. The intent of the prosecutor is the controlling enquiry when there is want of probable cause. And actual malice may be proved by the acts and declarations of the party. *Brown v. Willoughby*, 5 Colo. 1.

In an action for malicious prosecution, it is competent for the plaintiff to show any acts, conduct or words of the defendant on the day of the plaintiff's arrest, and while he was in custody, tending to establish malice or other improper motives in the prosecution, or a purpose to vex or oppress the plaintiff; but, the defendant not being liable for any acts or declarations of the sheriff, beyond the usual and proper mode of executing the process, unless he instigated, authorized or participated in them, the declarations of the sheriff to the plaintiff, not made in the presence of the defendant, are not competent evidence for the plaintiff. *Motes v. Bates*, 80 Ala. 382.

A malicious motive must be proven by the acts, declarations or general conduct of the defendant. *Walker v. Pittman*, 108 Ind. 341.

But malice may be inferred (*i. e.*, considered proven) from the activity and zeal displayed by the defendant in conducting the prosecution against the plaintiff. *Straus v. Young*, 36 Md. 246; *Flickinger v. Wagner*, 46 Md. 581; *Dietz v. Langfit*, 63 Pa. St. 234; *Ammerman v. Crosby*, 264 Ind. 451; *Blass v. Gregor*, 15 La. An. 421; *McKown v.*

Hunter, 30 N. Y. 625; *Mowry v. Whipple*, 8 R. I. 360; *Bozeman v. Shaw*, 37 Ark. 161.

Want of probable cause is evidence of malice, and, in cases where there is no evidence to the contrary, is sufficient to justify a verdict for the plaintiff. *Johnson v. Ebberts*, 11 Fed. Rep. 129; *Savage v. Brewer*, 16 Pick. (Mass.) 455; *Wilder v. Holden*, 24 Pick. (Mass.) 11; *Bond v. Chapin*, 8 Met. (Mass.) 33; *Parker v. Farley*, 10 Cush. (Mass.) 281.

While malice is to be proved, the jury may infer it from evidence of the wantonness of the seizure in attachment and oppressive conduct on the part of the defendant. *Tibbler v. Alford*, 12 Fed. Rep. 264.

So where one unlawfully invading another's close, causes the occupant's arrest for forcibly defending his possession, malice may be presumed. *Casebeer v. Rice*, 18 Neb. 203.

And where an officer attached goods in A's store and locked up the store, A and B broke into the store in the night time and refused to leave, whereupon the officer complained of them for breaking and entering with intent to steal, *held*, that a jury might find that the prosecution was malicious. *Robsin v. Kingsbury*, 138 Mass. 538.

So where B, knowing, or having good reason to believe from the embarrassed condition of M, that M was insolvent, made an affidavit to that effect in an action in which M had become security for costs, M caused the arrest of B for perjury, held this was sufficient to show that M acted not only without probable cause, but with malice. *Montross v. Bradshy*, 68 Ill. 185. And in an action for the malicious prosecution of a replevin suit, evidence of the commencement of successive suits by the defendant upon the same groundless claim, is admissible to show malice. *Magner v. Renk*, 65 Wis. 364. So in an action for a malicious prosecution wherein plaintiff was charged with wilful trespass in taking timber, the value of the timber alleged to have been taken was material to show the animus of plaintiff in taking it, and of

In States where the defendant may testify for himself, he may be asked concerning his motive in the prosecution and his feelings toward the plaintiff.¹ But the plaintiff may not testify that he acted in good faith and without intent to commit the crime for which he had been prosecuted by the defendant.² Evidence of insult, oppression and duress to which plaintiff was subjected

the defendant in prosecuting him for so doing. *Olson v. Neal*, 63 Iowa 214. Where the offence charged in the criminal complaint having been the larceny of a water wheel of the value of \$300, evidence that such wheel was in fact worth only from \$2 to \$5 was admissible in the action for malicious prosecution as tending to show malice. *Woodworth v. Mills*, 61 Wis. 44; s. c., 50 Am. Rep. 135.

But the fact that plaintiff was a minor when he committed an assault and battery for which he was subsequently arrested, does not tend to show malice in his arrest. *Motes v. Bates*, 74 Ala. 374. Neither is a rejected offer to drop the prosecution for malicious mischief upon payment of costs evidence to show malice in the prosecution of that action, or of an action of larceny arising from the same transaction. *Gilliford v. Windel*, 108 Pa. St. 142. Nor is the offer to compromise a civil suit evidence either of the want of probable cause or of malice. *Emerson v. Cochran*, 111 Pa. St. 619. The failure of the proceeding against the plaintiff is not evidence of defendant's malice or want of probable cause in instituting such proceedings. *Stewart v. Sonneborn*, 98 U. S. 187. The inference that may be drawn from the verdict of plaintiff's acquittal is not sufficient evidence of malice to authorize defendant's conviction. *Ullman v. Abrams*, 9 Bush (Ky.) 738; *Garrard v. Willet*, 4 J. J. Marsh (Ky.) 628.

And the docket entry of the justice certifying that the complaint was malicious is not admissible against the defendant. *Casey v. Sevaton*, 30 Minn. 516; *Sweeny v. Perney*, 40 Kan. 102. An action for malicious prosecution cannot be sustained without showing malice on the part of the prosecutor. Want of probable cause alone is not sufficient. Malice is not an inference of law from want of probable cause. *Van Sickle v. Brown*, 68 Mo. 627; *Sharpe v. Johnson*, 59 Mo. 557. Acts of the prosecutor and circumstances connected with the transaction affirm-

atively showing actual evil intent may always be given in evidence. *Murphy v. Hobbs*, 8 Colo. 17.

Malice may be inferred from circumstances, such as the defendant's conduct and his declarations and his forwardness and activity in publishing the proceedings. Proof that the defendant never sincerely believed the plaintiff guilty of the charge for which he was prosecuted tends to show malice in the defendant, and malice may be inferred by the jury from the want of probable cause. *Bitting v. Ten Eyck*, 82 Ind. 421; s. c., 42 Am. Rep. 505; *Southwestern R. Co. v. Mitchell*, 80 Ga. 438.

1. Where the character of a transaction, as in case of malicious prosecution, depends upon the intent of a party, he may testify as to what his intent really was. *Heap v. Parrish*, 104 Ind. 36.

Where intent or motive is involved in the issue, the person to whom such intent or motive is imputed is a competent witness unless rendered incompetent by some statutory inability. *Spalding v. Lowe*, 56 Mich. 366; *Watkins v. Wallace*, 19 Mich. 57.

In an action for malicious prosecution, defendant, being permitted in this State to testify in his own behalf, may be asked on direct examination whether he made the complaint in such prosecution in good faith, believing the other party was guilty as therein charged, or was actuated by malice in making it. *Sherburne v. Rodman*, 51 Wis. 474. The defendant will be allowed to show by his own testimony that from his knowledge of the case and upon the advice of counsel, he really believed that plaintiff was guilty of the crime for which he was prosecuted. *Sparling v. Conway*, 12 Mo. App. 510; *McCormick v. Woodworth*, 47 Hun (N. Y.) 71; *Greer v. Whitfield*, 4 Lea (Tenn.) 85; *Coleman v. Henrich*, 2 Mackey (D. C.) 189; *Turner v. O'Brien*, 5 Neb. 542; *Van Sickle v. Brown*, 68 Mo. 627. *Contra*, *Goodman v. Stroheim*, 36 N. Y. Sup. Ct. 216.

2. *Turner v. O'Brien*, 11 Neb. 108.

by defendant may be given as bearing on the question of intent.¹ To prosecute for the purpose of making an example is not evidence of malice.²

Some instances of what facts will and what will not tend to prove malice are cited.³

5. Want of Probable Cause.—Though want of probable cause is a negative averment, the burden of proving it by a preponderance of the evidence falls upon the plaintiff.⁴ But because this is a

1. *Murphy v. Hobbs*, 8 Colo. 17. But in an action for vexatious suit and malicious holding to bail, *held* that the records of other actions brought by the same defendant against the plaintiff could not be given in evidence. *Ray v. Law, Pet.* (U. S.) 207.

2. The most elevated motive that can possibly be entertained for prosecuting anybody is to make an example for the benefit of the public. The motive of the prosecution testified in this case was a proper one, being the desire to deter others from committing crimes by making an example of the alleged criminal, but no one has a right to make any person an example unless he is guilty, and it will not do to proceed against him for an example or anything else unless you believe him to be guilty and have good and probable grounds upon which to base the opinion. The motive of the prosecutor, who does not want to hurt the accused, but simply wants to make him an example to deter others, is the attitude of the law itself toward offenders. *Coleman v. Allen*, 79 Ga. 637.

3. The mere fact that a creditor examined the records and was satisfied with the condition of a firm, and a short time afterwards attached its property, there being only one mortgage on the firm property when the records were examined, but several when the attachment was issued, does not prove malice. *Stansel v. Cleveland*, 64 Tex. 660.

On the issue of malice the defendant may show that the assault complained of in the prosecution was committed upon his servant and not upon himself as the complaint alleged through the mistake of the person drawing it. *Ripley v. McBarron*, 125 Mass. 272. It is proper to instruct the jury that they might take into consideration the excitement of the prosecutor in an action for assault as bearing upon the question of his malice. *Carter v. Sutherland*, 52 Mich. 597.

And the defendant may show that in-

formation had been communicated to him by others and what that information was relative to the conduct of the plaintiff in connection with the crime for which he was prosecuted, upon which information the defendant in part acted. *Anderson v. Friend*, 71 Ill. 475. But malice cannot be disproved by transactions of the party arrested of which the person making the affidavit had no knowledge or information when he made it. Neither can it be disproved by showing additional facts having no bearing on the facts set forth in the affidavit as grounds of arrest nor by matters *ex post facto*. *Josselyn v. McAllister*, 25 Mich. 45.

Neither can an unfounded prosecution be justified, or the prosecutor's malice be disproved by evidence of offenses committed by the plaintiff other than those for which he was prosecuted by the defendant. *Carson v. Edgeworth*, 43 Mich. 241.

Evidence that defendant endeavored to find out plaintiff's domicile to inform him of the attachment and prevent sacrifice of goods on sale in attachment does not disprove malice. *Scovill v. Glasner*, 79 Mo. 449. Evidence that unusual and excessive bail was required does not show defendant's malice unless it is also shown that defendant had some agency in fixing the amount of the bond. *Montgomery v. Sutton*, 58 Iowa 697.

4. *Morton v. Young*, 55 Me. 24; s. c., 92 Am. Dec. 565; *Palmer v. Richardson*, 70 Ill. 544; *Davie v. Wisher*, 72 Ill. 262; *Calef v. Thomas*, 81 Ill. 478; *Scott v. Shelor*, 28 Gratt. (Va.) 891; *Legallee v. Blaisdell*, 134 Mass. 473; *Hamilton v. Smith*, 39 Mich. 222; *Stone v. Crocker*, 24 Pick. (Mass.) 84; *Vinal v. Core*, 18 W. Va. 1; *John v. Bridgman*, 27 Ohio St. 22; *Abrath v. N. E. R. Co.*, 4 Q. B. D. 440; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544. Though it seems if the defendant plead singly the truth of the facts involved in the prosecution he thereby assumes the burden. *Morris v. Corson*, 7 Cow. (N. Y.) 281.

negative proposition it requires but little evidence to prove it.¹ Want of probable cause may be shown by the character of the evidence introduced on the trial of the criminal action.²

And on this issue evidence of the suspicious behavior of plaintiff is admissible.³

While juries may find malice from the facts that establish want of probable cause, the most express malice is not evidence of want of probable cause.⁴

As to the value of the discharge of a defendant upon preliminary examination by a committing magistrate or grand jury as evidence of want of probable cause, there seems to be some disagreement, it being generally held that such discharge is *prima facie* evidence of want of probable cause.⁵ The holding of some

1. *Grant v. Deuell*, 3 Rob. (La.) 17; s. c., 38 Am. Dec. 228; *Williams v. Van Meter*, 8 Mo. 339; s. c., 41 Am. Dec. 644; *Vinal v. Core*, 18 W. Va. 1; *John v. Bridgman*, 27 Ohio St. 22; *McCormic v. Sisson*, 7 Cow. (N. Y.) 715; *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Smith v. Ege*, 52 Pa. St. 419; *Sutton v. Anderson*, 103 Pa. St. 151; *Straus v. Young*, 36 Md. 246.

2. A witness who was present and heard the evidence upon the hearing of the charge complained of, may testify that no evidence was given in support of the criminal charge. *John v. Bridgman*, 27 Ohio St. 22. But persons who heard the evidence before the examining magistrate may not rehearse what that evidence was, because such evidence would be secondary and hearsay. The witnesses themselves should be called to testify what their evidence was before such magistrate. *Richards v. Foulke*, 3 Ohio 52. *Contra*, *Goodrich v. Warner*, 21 Conn. 432. However, the official stenographer of the court may read from his notes the testimony of a witness taken at the trial of an indictment and who was beyond the jurisdiction of the trial court for the purpose of showing want of probable cause. *Brown v. Willoughy*, 5 Colo. 1. But it is not incumbent upon the plaintiff to give in evidence all the testimony introduced before the magistrate, in order that the court may determine whether there was or was not probable cause. *Bacon v. Towne*, 4 Cush. (Mass.) 217.

3. *McRea v. Oneal*, 2 Dev. (N. Car.) 166.

4. The want of probable cause is the essential ground of this action. Other things may be inferred from this, but this cannot be inferred from anything

else, it must be established by positive and express proof; it is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the "*onus probandi*" is upon the plaintiff to show affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no ground for commencing the prosecution. *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Bitting v. Ten Eyck*, 82 Ind. 421; s. c., 42 Am. Rep. 505; *Heyne v. Blair*, 62 N. Y. 19; *Forshay v. Ferguson*, 2 Denio (N. Y.) 617; *Skidmore v. Bricker*, 77 Ill. 164; *Krug v. Ward*, 77 Ill. 603; *Caperson v. Sproule*, 39 Mo. 39; *Sharpe v. Johnston*, 76 Mo. 660; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Kidder v. Parkhurst*, 3 Allen (Mass.) 393; *Travis v. Smith*, 1 Pa. St. 234; *Marable v. Mayer*, 78 Ga. 710; *Good v. French*, 115 Mass. 201; *Levi v. Brannan*, 39 Cal. 485; *Wheeler v. Nesbit*, 24 How. (U. S.) 544; *Hurd v. Shaw*, 20 Ill. 354; *Wade v. Walden*, 23 Ill. 425; *Chapman v. Cawrey*, 50 Ill. 512; *Malone v. Murphy*, 2 Kan. 250; *Bell v. Percy*, 5 Ired. (N. Car.) 83.

Want of probable cause cannot be inferred from the existence of malice. *Marable v. Mayer*, 78 Ga. 710.

5. The refusal of the committing magistrate to bind the defendant over is very persuasive evidence that the prosecution was without probable cause. *Sharpe v. Johnson*, 76 Mo. 660; *Sharpe v. Johnson*, 59 Mo. 557; *Sappington v. Watson*, 50 Mo. 83; *Casperon v. Sproule*, 39 Mo. 39.

The verdict of a jury upon the trial of a civil action is essentially different from the discharge of a supposed criminal by the examining magistrate, or

courts to the contrary is probably based upon the facts of the case or that under the particular proceeding the examination partook largely of the nature of a trial.¹ For the acquittal of a defendant upon the trial of a criminal charge affords no evidence that such charge was preferred without probable cause.² Though

upon a bill of indictment ignored by a grand jury. Even in a criminal proceeding the final acquittal of the accused can have but little weight as evidence of probable cause compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and grand jury have the very question of probable cause to try; and the evidence on the side of the prosecution is alone examined and the proceeding is entirely "*ex parte*." Under such circumstances the refusal of the examining tribunal to hold the accused over till trial, must necessarily be very persuasive evidence that the prosecution is groundless. *Brant v. Higgins*, 10 Mo. 728.

The discharge of one charged with crime by the magistrate after a full investigation is *prima facie* evidence of want of probable cause, and throws upon the defendant the burden of proving that there was probable cause. *Josselyn v. McAllister*, 25 Mich. 45.

The discharge by a justice of the plaintiff who has been arrested and brought before him for examination, and the refusal of the grand jury to indict him, is *prima facie* evidence of a want of probable cause, but it is liable to be rebutted by proof. *Vinal v. Core*, 18 W. Va. 1.

In an action for malicious prosecution, proof that the plaintiff was discharged by the examining magistrate for want of probable cause to believe him guilty makes a *prima facie* case for the plaintiff upon the question of want of probable cause. *Frost v. Holland*, 75 Me. 108.

It is settled in this State that a discharge by the examining magistrate imports that the accusation was groundless. *Griffin v. Sellars*, 2 Dev. & B. L. (N. Car.) 492; s. c., 31 Am. Dec. 422.

The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause sufficient to throw upon the defendant the burden of proving the contrary. 2 Greenl. Ev., § 455; 2 Stark. Ev. 494; 3 Phil. Ev. 256; *Secor v. Babcock*, 2

Johns. (N. Y.) 203; *Johnson v. Marlin*, 2 *Murphy* (N. Car.) 248; *Mitchinson v. Cross*, 58 Ill. 366; *Cooper v. Utterbach*, 37 Md. 282; *Israel v. Brooks*, 23 Ill. 575; *Jones v. Finch*, 84 Va. 204; *Gould v. Sherman*, 10 Abb. Pr. (N. Y.) 411.

Upon the averment of the servant of a relative of deceased that B had stolen certain articles of the deceased, caused B's arrest, held, that B's discharge by the examining magistrate established a want of probable cause. *Boonholdt v. Sonillard*, 36 La. An. 103.

So the discharge of one brought before a United States commissioner, after examination by such commissioner, is *prima facie* evidence of want of probable cause for the arrest. *Jones v. Finch*, 84 Va. 204.

1. *Genea v. Southern Pac. R. Co.*, 51 Cal. 140; *Apger v. Woolson*, 43 N. J. L. 57; *Heldt v. Webster*, 60 Tex. 207; *Israel v. Brooks*, 25 Ill. 526; *Stone v. Crocker*, 24 Pick. (Mass.) 81.

2. The defendant's acquittal did not raise the presumption of the want of probable cause. *Griffin v. Chubb*, 7 Tex. 603; s. c., 58 Am. Dec. 85.

A verdict and judgment of acquittal certainly do not imply a want of probable cause, because such verdict may be given notwithstanding a strong suspicion, because there is not proof of full guilt. *Griffin v. Sellars*, 2 Dev. & B. L. (N. Car.) 492; s. c., 31 Am. Dec. 422.

An acquittal of a criminal charge is not evidence of the want of probable cause for the prosecution, and it is not error in a suit for malicious prosecution to refuse to instruct that a verdict acquitting the plaintiff of a criminal charge is *prima facie* evidence of his innocence. *Bitting v. Ten Eyck*, 82 Ind. 421; s. c., 42 Am. Rep. 505. The discharge of the defendant in a criminal prosecution does not raise a presumption of want of probable cause. *Heldt v. Webster*, 60 Tex. 207; *Williams v. Van Meter*, 8 Mo. 339; *Stone v. Crocker*, 24 Pick. (Mass.) 8; *Thompson v. Beacon Valley R. Co.* (Conn.), 16 Atl. Rep. 554.

some courts hold that to show such acquittal is competent but not sufficient evidence to prove want of probable cause.¹

So an acquittal by reason of the dismissal of the charge,² or the nonappearance of the prosecutor,³ or that the defendant, after instituting a prosecution, did not proceed with it;⁴ or of a technicality;⁵ or the offer to compromise,⁶ is not sufficient evidence of want of probable cause.

The conviction of the plaintiff is always evidence of probable cause, and is generally conclusive evidence of it.⁷ It may be shown, however, to overcome the conclusive character of such evidence, that such conviction was obtained wholly or chiefly by the false testimony of the defendant.⁸ The discharge of an at-

1. It is not sufficient on the part of the plaintiff to show that he was acquitted of the charge; he must prove that there was no reasonable ground for it. It is not every verdict of not guilty nor even subsequent proof of complete innocence that shows a want of probable cause in the incipient stages of a prosecution. A man's conduct may, from his folly, his neglect, or his ignorance, be such as to justify a suspicion of guilt and produce a prosecution in the course of which it may be made to appear that he is clearly innocent; but this will not authorize an action for malicious prosecution. *Grant v. Denel*, 3 Rob. (La.) 17; s. c., 38 Am. Dec. 228.

An acquittal is evidence of want of probable cause to go to the jury, but of itself and unaccompanied with any circumstances would not be sufficient. *Williams v. Van Meter*, 8 Mo. 336; s. c., 41 Am. Dec. 644.

2. The fact that the defendant had dismissed the criminal charge on which he had caused the plaintiff to be arrested is not sufficient to prove that he had not probable cause for instituting prosecution. *Flickinger v. Wagner*, 46 Md. 580.

The discharge of one who had been prosecuted for libel does not prove want of probable cause nor malice. *Staub v. Van Benthuyzen*, 36 La. An. 467. Want of probable cause does not appear from the fact of dismissal for want of prosecution or from the fact that the order of arrest was vacated. *Dorendenger v. Tschechtelin*, 12 Daly (N. Y.) 34. Nor from the entry of a *nolle prosequi*. *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Brown v. Lakeman*, 12 Cush. (Mass.) 482. But *contra*, *Wetmore v. Melliger*, 64 Iowa 741; *Green v. Cochran*, 43 Iowa 544; *Burhans v. Sanford*, 19 Wend. (N. Y.) 417; *Yocum v. Polley*, 1 B. Mon. (Ky.) 358.

3. *Purcell v. MacNamara*, 1 Campb. 199.

4. *Wallace v. Alpine*, 1 Campb. 207; *Burhans v. Sanford*, 19 Wend. (N. Y.) 417; *Whetmore v. Mellinger*, 64 Iowa 741; *contra* *Palmer v. Avery*, 41 Barb. (N. Y.) 290.

5. *Marks v. Townsend*, 97 N. Y. 590.

6. *Gilliford v. Windel*, 108 Pa. St. 142; *Emerson v. Cochran*, 111 Pa. St. 619.

7. *Parker v. Farley*, 10 Cush. (Mass.) 279; *Parker v. Huntington*, 2 Gray (Mass.) 124; *Bitting v. Ten Eyck*, 82 Ind. 421; s. c., 42 Am. Rep. 505; *Olson v. Neal*, 63 Iowa 214; *Moffatt v. Fisher*, 47 Iowa 473; *Whitney v. Peckham*, 15 Mass. 243; *Witham v. Gowen*, 14 Me. 362; *Cloon v. Gerry*, 13 Gray (Mass.) 203; *Dennehey v. Woodsum*, 100 Mass. 197; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md. 461; s. c., 1 Am. St. Rep. 409. And this although the judgment of such conviction be afterward reversed upon appeal. *Kaye v. Kean*, 18 B. Mon. (Ky.) 839; *Parker v. Farley*, 10 Cush. (Mass.) 279; *Palmer v. Avery*, 41 Barb. (N. Y.) 290; *Whitney v. Peckham*, 15 Mass. 243; *Welch v. Boston etc. R. Co.*, 14 R. I. 609; *Phillips v. Kallamazoo*, 53 Mich. 33.

Where the defendant in a criminal prosecution was found guilty but upon a new trial, a *nolle prosequi* being entered, the defendant was discharged, it was held that the action could be maintained and the first verdict was no evidence of probable cause. *Richter v. Koster*, 45 Ind. 440. *Contra*, *Goodrich v. Warner*, 21 Conn. 432; *Ash v. Marlow*, 20 Ohio 119; *Ewing v. Sanford*, 19 Ala. 605.

8. *Womack v. Circle*, 29 Gratt. (Va.) 192; *Olson v. Neal*, 63 Iowa 214; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Whitney v. Peckham*, 15 Mass. 143; *Peck v. Chouteau*, 91 Mo. 138; *Bowman v.*

tachment on its merits is conclusive as to its being issued without good cause.¹

It is *prima facie* evidence of probable cause that an indictment was found.² That a preliminary examination was waived.³ That upon the trial the jury disagreed or hesitated in the acquittal.⁴ That upon a preliminary examination the plaintiff was required to enter into recognizance.⁵ It is not evidence of probable

Brown, 52 Iowa 437; Palmer v. Avery, 41 Barb. (N. Y.) 290; Richey v. McBean, 17 Ill. 63. The verdict of guilty is strong *prima facie* evidence of probable cause but is capable of being rebutted. Payson v. Caswell, 22 Me. 212; Herman v. Brookerhoff, 8 Watts (Pa.) 240; Jones v. Kirksey, 10 Ala. 839.

1. Mitchell v. Mattingly, 1 Metc. (Ky.) 237.

Where the judgment of the magistrate by whom the plaintiff has been bound over is relied upon as evidence of probable cause, it cannot be impeached by evidence that he acted unfairly and improperly in the examination. Bacon v. Towne, 4 Cush. (Mass.) 217.

2. Peck v. Chouteau, 91 Mo. 138; Sharpe v. Johnson, 76 Mo. 660; Garrard v. Willet, 4 J. J. Marsh. (Ky.) 628; Zantinger v. Weightman, 2 Cr. Ct. Ct. 478. See *contra* Motes v. Bates, 80 Ala. 382; Crescent City Live Stock Co. v. Butchers' Union etc., 120 U. S. 141.

3. Van Sickle v. Brown, 68 Mo. 627.

4. In the case at bar the jury were unable to agree as to the guilt or innocence of the defendant. It followed, of course, that the jury or some of them must have believed the plaintiff to have been guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow because the first jury failed to convict. We think the evidence offered was admissible because it tended to show probable cause. It was not conclusive, but, like any other *prima facie* evidence, was subject to be explained. The question was not whether the plaintiff was guilty, but whether the defendant had reasonable cause to so believe. If the finding of an indictment is evidence of probable cause, or the evidence on the trial of a criminal charge is such as to cause the jury to hesitate as to an acquittal, it is evidence of probable cause. It seems to us that the inability of the jury to agree must have the same effect. Johnson v. Miller, 63 Iowa 529;

s. c., 50 Am. Rep. 758. But it cannot be shown for the purpose of proving probable cause that the grand jury deliberated some time before agreeing to return no bill and that eight of the jury were in favor of finding an indictment. Scotten v. Longfellow, 40 Ind. 23.

5. The decision of a magistrate that there is sufficient evidence to warrant requiring the accused to enter into recognizance is at least *prima facie* evidence of probable cause unless such decision has been procured by evidence known to the complainant to be false. Womack v. Circle, 29 Gratt. (Va.) 192. Such *prima facie* showing may be rebutted by other evidence. Diemer v. Herber, 75 Cal. 287.

In an action for malicious prosecution the weak presumption that exists in every case, that every public prosecution is founded on probable cause, is strengthened by the proof that the plaintiff had, after an examination by a justice, been committed to jail to answer an indictment when found, but it may be rebutted by other testimony showing that there was no probable cause for the prosecution. Hale v. Boylen, 22 W. Va. 234. The fact that the district judge held the plaintiff to bail and refused to discharge him on the accusation made by defendants and former conspirators, or that plaintiff was indicted by a grand jury for the offence they charged against him, were not conclusive evidence of probable cause. Raleigh v. Cook, 60 Tex. 438; Ricord v. Central Pac. R. Co. 15 Nev. 167; Graham v. Noble, 13 Serg. & R. (Pa.) 233; Bacon v. Towne, 4 Cush. (Mass.) 217.

Plaintiff won money from the defendant on a wager, and because he did not return such money he was arrested at defendant's instance and committed on a charge of larceny; an information charging plaintiff with such crime was dismissed for want of evidence. Held, that the commitment was only *prima facie* evidence of probable cause and was fully rebutted by other evidence. Diemer v. Herber, 75 Cal. 287.

cause that the accused was generally suspected or generally believed to be guilty of the crime charged.¹

It is doubted if an action for malicious prosecution will lie where there was a conviction before a lower court, even though such conviction was reversed on appeal.²

As to probable cause for the institution of a civil action, it is held that facts and circumstances which lead to the inference

1. Hilliard on Torts, vol. 1, p. 434; *Brainard v. Brackett*, 33 Me. 580. Neither will the character, habits, and appearance of a man and the public opinion about him, though coupled with the fact that the crime was committed where he was, amount to probable cause. *Holburn v. Neal*, 4 Dana (Ky.) 120. Evidence that certain persons had told the defendant that they believed that plaintiff had committed the crime does not tend to justify the prosecution. *Norvel v. Vogel*, 39 Minn. 107; s. c., 38 N. W. Rep. 705.

2. After a conviction by verdict, followed by sentence, it ceases to be a matter of conjecture, of argument, and of reasoning, whether guilt could rationally be inferred from the facts admitted or proved; for such a state of things cannot occur, but after full defence by the accused, with deliberation by the jury, aided by the court, upon all the evidence, as well explanatory as negative, offered by the accused; and, after all that, guilt was in fact inferred by a numerous body of men of competent understanding and integrity, and the court was also satisfied with it. As evidence of probable cause, a conviction by verdict and judgment is as convincing, and therefore ought in law to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that court, and is the highest evidence, namely, a judicial sentence of record, that apparently the accused was guilty. It is true that the law, in its benignity, allows the convict to show, on appeal to another court, that he is really not guilty. But that does not show, nor can it be shown against the facts of the first verdict and judgment, that there was no just and probable cause of accusation. *Griffis v. Sellars*, 2 Deav. & Bat. L. (N. Car.) 492; s. c., 31 Am. Dec. 422.

An action for malicious prosecution will not lie if plaintiff was convicted before a justice of the peace, but was dis-

charged on appeal, unless the conviction was procured by fraud, perjury or subornation, or was otherwise exceptional. *Phillips v. Kalamazoo*, 53 Mich. 33. In an action for malicious prosecution brought by A against B, held, that a judicial finding in the former action in favor of B and against A by the court of original jurisdiction is conclusive of probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal. *Welch v. Boston etc. R. Co.*, 14 R. I. 609. But where an accusation of felony is withdrawn, and respondent is convicted of misdemeanor included in it, but is acquitted on appeal, the conviction is not such evidence of probable cause as will defeat an action for malicious prosecution based on the charge of felony. *Labar v. Crane*, 49 Mich. 561. See also *Whitney v. Peckham*, 15 Mass. 243; *Cloon v. Gerry*, 13 Gray (Mass.) 203; *Dennehey v. Woodsum*, 100 Mass. 197; *Crescent City Live Stock Co. v. Butchers' Union etc.*, 120 U. S. 141. And in a civil action, if A brings an action upon a promissory note against B, who sets up in defence that he has paid the note, and that he has a claim in set-off against A larger than the amount of the note, and the jury returned a verdict for B under his declaration in set-off, the verdict is conclusive that A had a cause of action against B, and the latter cannot maintain an action against A for malicious prosecution founded upon such cause of action. *Dolan v. Thompson et al.*, 129 Mass. 205.

It is no defence to an action for causing plaintiff's arrest that the general term of the city court reversed the order vacating the order of arrest, that order being reversed on appeal to the court of common pleas; and that on the trial of the action in which the order was issued, verdict was directed for plaintiff therein and then set aside by the trial judge, the plaintiff thereupon dismissing his action. *Cuthbert v. Galloway*, 35 Fed. Rep. 466.

that a party instituting a suit was actuated by an honest and reasonable conviction of its justice are sufficient evidence of probable cause.¹

As illustrative of what facts may be held to show probable cause, some cases are cited in the notes.²

1. Hilliard on Torts, vol. 1, p. 435; Cloon v. Gerry, 13 Gray (Mass.) 201. Justifiable probable cause for an attachment is a belief by the attaching creditor of the existence of facts essential to the prosecution of his attachment founded on such circumstances as supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief. Spengler v. Davy, 15 Gratt. (Va.) 381.

2. In an action against the mortgagee for maliciously prosecuting the mortgagor for selling the chattels, the mortgagor may show the mortgagee's parol consent. And this being shown, the mortgagor's intent to appropriate the proceeds to his own use is immaterial. Walker v. Camp, 69 Iowa 741.

The removal from Kentucky to Indiana for the purpose of enabling the defendant to bring suit in the United States district court for Kentucky against a resident of Kentucky, is no evidence of want of probable cause; a party has the right to select his forum. Woods v. Finnell, 13 Bush (Ky.) 628. On trial of an action for malicious prosecution, in procuring the indictment of the plaintiff for perjury in making an affidavit for the removal of a cause from a justice of the peace to the circuit court, evidence that the defendants were before the grand jury not of their own motion, but in obedience to legal process, that the deputy prosecutor was attorney for one of the defendants in the civil case, and was familiar with it, and advised them that, if the facts were true as they stated them to him, there was good cause for a prosecution, was insufficient to show a want of probable cause, and a demurrer thereto was rightly sustained. Workman v. Shelly, 79 Ind. 442.

An officer of a railroad company having reasonable grounds for supposing a person had in his possession fraudulent tickets of the company, is justified in proceeding by search warrant to ascertain that fact; and the failure to find such tickets does not show that he had not sufficient ground to justify him in instituting the search; nor would the failure to find any such tickets be neces-

sarily sufficient to convince a reasonably prudent and cautious man that the suspected person had not fraudulently issued a ticket which prior to the search he was suspected of issuing; or even might not still have others in his possession, though none were found in the place which was searched. Thelin v. Dorsey, 59 Md. 539. The owner of a boat which had been taken from its moorings several times and brought back, caused the party taking it to be arrested for grand larceny. Held, that there was an entire want of probable cause, and that malice might be inferred. Wanser v. Wycoff, 16 N. Y. Supr. Ct. 187.

Proof of an arrest of a wife for rushing to the assistance of her husband in a contest with a neighbor, compelling her to answer before a magistrate in a distant town, held to warrant a finding that the prosecution was without probable cause and malicious. Thompson v. Force, 65 Ill. 370. In an action for malicious prosecution it was shown that the defendant filed with a justice of the peace an affidavit for a search warrant to search the plaintiff's house, which affidavit stated that certain goods had previously been feloniously taken, stolen and carried away by the plaintiff and that they were then concealed in the plaintiff's house; and there was ample evidence introduced on the trial tending to show that the plaintiff had reasonable and probable cause for believing that these statements were true; and the defendant himself testified on the trial, among other things, as follows: "I thought that the facts set forth in the affidavit were necessary to procure the search warrant. I believed the facts therein stated to be true at that time, and I believe so yet." And there was no evidence introduced in the case tending to show that the defendant did not have reasonable and probable cause for believing that the statements made in the affidavit were true, and nothing to show that he did not have reasonable and probable cause for commencing the supposed malicious prosecution. Held, that a verdict in the action for malicious prosecution in favor of the plain-

tiff and against the defendant is against the law and the evidence; and further *held*, that, although it was not necessary to state in the affidavit that the plaintiff stole the property, or to state who in fact did steal it, yet that the allegation contained in the affidavit that the property was feloniously stolen, taken and carried away by the plaintiff cannot constitute the basis for an action of slander or libel. *Bailey v. Dodge*, 28 Kan. 72.

In an action against a railroad corporation for malicious prosecution, the plaintiff's evidence tended to show that he entered the defendant's train at L, intending to go to S; that he had previously ridden in the same train with the same conductor a great number of times within a year or two; that, on this occasion, when the conductor asked him for his ticket, he offered a ticket of the defendant corporation which read, "L. to S. and return," on which he had already ridden from L. to S. on a previous day; that the conductor refused to accept the ticket, and demanded of the plaintiff payment of his fare; that the plaintiff replied that he had taken no money with him because he thought the ticket was good, and asked the conductor why it was not good, to which the conductor said that it was not good for a passage in that direction, and said the plaintiff must pay his fare or get off; that the plaintiff said that he did not want to walk either to L. or S., and that he would pay the fare at night, to which the conductor retorted that that was what all tramps said; that the plaintiff then offered to allow the conductor to keep the ticket as security; that the conductor refused the offer, and told the plaintiff that he would fix him when they got to S.; that the conductor, who was a railroad police officer, after informing the plaintiff that if he did not pay his fare he should arrest him, or have him arrested on arrival at S.; allowed the plaintiff to retain his position in the train until he arrived at S.; that when the train arrived at S., a police officer, who had been previously notified by the conductor, entered the train, and at the conductor's request arrested the plaintiff, before he left or attempted to leave the car; that the conductor afterwards made a complaint against the plaintiff for evading the payment of fare by leaving the car without having paid his fare; and that the plaintiff was tried on this complaint, the conductor being a witness, and was

acquitted. *Held*, that there was evidence that the complaint was made without probable cause. *Kruevitz v. Eastern R. Co.*, 143 Mass. 228.

Evidence given at the trial under one complaint is inadmissible in justification of another complaint. *Falvey v. Faxon*, 143 Mass. 284; *Sutton v. McConnel*, 45 Wis. 269. As mere conversion of property is not larceny, proof of facts amounting only to conversion cannot establish probable cause. *Turner v. O'Brien*, 5 Neb. 542. The defendant having possession of cattle, as he supposed rightfully, he was accosted in the highway and the cattle wrested from his possession by violence and tumult; this was held sufficient probable cause for him to cause the arrest of the plaintiff. *Murphy v. Martin*, 58 Wis. 276.

In a suit for malicious prosecution by B against D, the magistrate before whom a complaint against B had been made was called by B and testified: "D was at my office with C; the latter said he had seen the stolen property in possession of B; my recollection is that C said they were D's property; I then recommended the complaint be made." This evidence was uncontradicted. *Held*, that there was sufficient evidence of probable cause to justify the court in ordering a nonsuit. *Bernar v. Dunlap*, 94 Pa. St. 329. An officer attached all the goods in a store occupied by A on a writ against him, and A delivered the key of the store to the officer, who closed and locked it. A few days after the store was closed A and B broke and entered it in the night time, and were found there by the officer; and they refused to leave when requested by the officer and resisted his attempt to expel them, claiming a right to remain there. The officer thereupon procured their arrest and made a complaint against them for breaking and entering his store with intent to steal. A, who was the owner of the goods attached and a lessee of the store and lived in a tenement over it, was known to the officer. B was not known to the officer, but offered to him a writing as evidence of his right to be in the store. *Held*, in an action by A and B against the attaching officer for malicious prosecution, that the evidence would warrant a finding that the prosecution was without probable cause and malicious. *Bobsin v. Kingsbury*, 138 Mass. 538.

In an action for malicious prosecution the following facts appeared: The plaintiff was the tenant of the defend-

X. DAMAGES.—In actions for malicious prosecution, the plaintiff may recover for injury to his reputation, injury to his body and his mental distress, and injury to his property.¹

It being an action analogous to that of slander, the rule in estimating damages to the reputation is the same as in actions for slander or libel.²

The plaintiff may recover for any hurt to his person, for loss of his liberty, for the risk he may have been exposed to in life or health; and also for the mental strain, anxiety, injury to his feelings and the annoyance he has undergone.³

ant under a lease which gave the lessee the right to make such alterations "as do not injure the existing buildings, or impair their strength, or affect any insurance thereon, but no others," and the lessee covenanted not to use the building in any manner that shall be "liable to endanger or affect any insurance on said building, or to increase the premium thereof. The lessee removed a rear wall of the leased building. The lessor was notified by his insurer that the insurance was thereby terminated, and he paid an additional premium to have it continue; and, acting under the advice of counsel, brought an action of ejectment against the lessee (which was the alleged malicious prosecution), and judgment was entered for the lessee. There was conflicting evidence of experts, put in by each side, without objection on the question whether the risk was injuriously affected by the change. *Held*, that there was no evidence to be submitted to the jury of want of probable cause in bringing the ejectment suit. *Allen v. Codman*, 139 Mass. 136.

In a suit for damages for wrongfully and maliciously suing out an attachment, the fact that defendant had, before applying for the writ, heard that some other creditor was about to attach the property, constitutes of itself no ground of defence. *Carothers v. McIlhenny*, 63 Tex. 138.

Where a person was arrested on the charge of malicious mischief for cutting a hedge, and was acquitted, the evidence not showing that the prosecutor had reason to believe that the defendant acted with malice in cutting the hedge, the jury was justified in finding that the arrest was procured without probable cause. *Gale v. Bohanan*, 73 Iowa 501; s. c., 35 N. W. Rep. 599.

Plaintiff's son stole coal and deposited it where plaintiff kept his coal and where it was found soon after. Plaintiff informed defendant that he knew

nothing of the crime and was innocent thereof, but defendant caused his arrest. It was ascertained that plaintiff was innocent and knew nothing of the theft. Defendant being sued for malicious prosecution, it was held that plaintiff could not recover, as his possession of recently stolen property was probable cause for believing him guilty of the larceny. *McDonald v. Atlantic etc. R. Co. (Ariz.)*, 21 Pac. Rep. 338.

1. *Sutherland on Damages*, vol. 3, p. 703. The elements of damages are the expenses of the plaintiff, if any, in and about the prosecution complained of to protect himself; his loss of time; his deprivation of liberty, and the loss of the society of his family; the injury to his fame; personal mortification, and the smart and injury of the malicious arts and acts and oppression of the parties. *Hamilton v. Smith*, 39 Mich. 222.

2. *Sheldon v. Carpenter*, 4 N. Y. 578; *Fagnan v. Knox*, 40 N. Y. Sup. Ct. 41. But if the plaintiff disclaims any special damages for injury to his character, the defendant cannot attack such character either to rebut the evidence of malice or in mitigation of damages. *Smith v. Hyndman*, 10 Cush. (Mass.) 554.

Where the defendants were arrested for larceny, one of them brought his action for malicious prosecution. *Held*, the defendant could not be allowed to prove the bad character of the other defendant. *Armstrong v. Grogan*, 5 Sneed (Tenn.) 108.

3. In an action of malicious prosecution, mental suffering, not arising directly from bodily suffering and injury to the feelings, constitute elements of actual or compensatory damages. *Parkhurst v. Masteller*, 57 Iowa 474.

It is not necessary in an action like this to prove actual damages to the party arrested; deprivation of liberty and injury to reputation, feelings and person, will support a verdict for the

He may also recover all damages suffered which may be more properly called pecuniary damages and which are the direct and actual results of the wrongful act or the consequential damages naturally flowing therefrom.¹

Upon the question of punitive damages there is the same difference of opinion as to damages arising in this class of cases as

plaintiff. *Hogg v. Pnickety*, 16 S. Car. 387.

Where both the plaintiff and his wife were arrested, the fact that while in jail the plaintiff was kept separate from his wife (it being lawful for the jailor so to keep him) may be considered by the jury in assessing compensatory damages. *Spear v. Hiles*, 67 Wis. 350. But the fact that plaintiff's wife was made sick by the prosecution complained of is too remote for special damages. *Hampton v. Jones*, 58 Iowa 317. Where a female was maliciously prosecuted for perjury, and suffered in her health in consequence, and was rendered insane, an increased recovery was on that account sustained. *Plath v. Braunsdorff*, 40 Wis. 107.

But where partners sue for torts committed on them as a firm, no damages can be given for any injury to the private feelings of the plaintiffs. The act complained of must affect the joint business or trade of the copartnership. *Donnell v. Jones*, 13 Ala. 490. So, too, compensation is to be given to the plaintiff for indignity which has been put upon him. *McWilliams v. Hoban*, 42 Md. 56. And such indignity may consist simply in being arraigned in court as a criminal. *Fagnan v. Knox*, 40 N. Y. Supr. Ct. 41.

1. The amount of money actually paid out in and about the defence of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly and maliciously, and without probable cause, sued out the writ of attachment and caused the same to be levied in the manner charged. The business of the appellant had been hitherto prosperous, his credit and financial reputation good, and all were destroyed by the malicious acts of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of the financial credit and reputation or mete out no measure of punishment to the guilty party, who wantonly and maliciously

destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business credit reputation of the appellant, the law will require him to make good the loss sustained. *Chapman v. Kirby*, 49 Ill. 211; *Lawrence v. Hagerman*, 56 Ill. 68; s. c., 8 Am. Rep. 674; *Rice v. Miller*, 70 Tex. 613; *Krug v. Ward*, 77 Ill. 603.

The plaintiff is entitled to recover not only the costs and expenses attending the defence of the groundless suit, without reference to taxable costs, including counsel fees, but also consequential damages, which naturally and approximately result therefrom. *Closson v. Staples*, 42 Vt. 209; *Woods v. Finnell*, 13 Bush (Ky.) 628; *Smith v. Smith*, 20 Hun (N. Y.) 559.

Where a defendant was kept out of the use of a mine by an action of forcible entry and detainer, maliciously instituted by the plaintiff, it was held that the measure of damages was the reasonable use of the premises for the time the plaintiff had been out of the possession, and for any permanent injury to his leasehold interest sustained by reason of the mine caving in, or otherwise getting out of repair through the failure of the party to use ordinary care during the time he held possession. *Moffatt v. Fisher*, 47 Iowa 473.

Where a merchant was maliciously procured to be adjudged a bankrupt, he was permitted to recover the value of his stock of goods, of which he was deprived, damages for the breaking up of his business, and the destruction of his credit, and the value of his own time, was also held to be a fair charge, as he had been obliged to give his attention to the proceedings instituted against him, and thus not able to pursue his business. *Sonneborn v. Stewart*, 2 Woods (N. S.) 599; *Stewart v. Sonneborn*, 98 U. S. 187.

A merchant may recover damages for loss of credit consequent upon an

in others of the same nature, the majority of courts holding that such damages may be awarded,¹ while others hold that they are

attachment suit. *Kennedy v. Meacham*, 18 Fed. Rep. 312. If the unlawful seizure by attachment was made in good faith, the jury should find for the plaintiff actual damages only, but if they should find that the seizure was made in bad faith and maliciously, they may assess proper punitive damages in addition to actual damages proved. *Tibbler v. Alford*, 12 Fed. Rep. 262.

Attorney's Fees.—The plaintiff is entitled to recover his attorney's fees expended in defending the groundless suit, but not the expenses of prosecuting the action of malicious prosecution, those expenses not being deemed the natural and proximate consequence of the wrong complained of. *Krug v. Ward*, 77 Ill. 603; *Stopp v. Smith*, 71 Pa. St. 285; *Marshall v. Betner*, 17 Ala. 832; *Lawrence v. Hagerman*, 56 Ill. 68; s. c., 8 Am. Rep. 674; *Hicks v. Foster*, 13 Barb. N. Y. 663. And the plaintiff may prove as an element of damages, the amount of expense incurred for attorney's fees, in defending the criminal charge, without showing that the same has been actually paid. *Walker v. Pittman*, 108 Ind. 341; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Ziegler v. Powell*, 54 Ind. 173; *Coleman v. Allen*, 79 Ga. 637. *Contra*, as to attorney's fees, see *Stewart v. Sonneborn*, 98 U. S. 187; *Kennedy v. Meacham*, 18 Fed. Rep. 312.

Defendant on *ex parte* application had by means of an injunction, kept plaintiff out of certain coal lands for a year, the measure of damages held to be the value of the use of the property for business. *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

While the jury may allow the plaintiff counsel fees which he has expended in freeing himself from the malicious action, they are not bound to do so. *Gregory v. Chambers*, 78 Mo. 294.

Plaintiff may recover his costs in defending the criminal prosecution. *Wanfle v. McLellan*, 51 Wis. 484.

The plaintiff may recover so much of his expenditures made in defending the action held to be malicious, as were reasonably laid out and expended. *Eastin v. Bank of Stockton*, 66 Cal. 123; s. c., 56 Am. Rep. 77.

But he cannot recover for a loss in the sale of goods caused by an assignment which he was driven to make by

such prosecution. *Donnell v. Jones*, 13 Ala. 490.

And generally for this wrong the injured party is entitled to adequate compensation covering all the elements of the particular injury. Therefore the jury, in considering the amount, will consider the nature of the prosecution, and its natural effects on reputation, credit and private feelings; the incidental consequences of arrest, holding to bail, or of interference with property; the consequential loss of time, and any other loss, as the expense of defending. Malice is of the gist of the action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject. *Sutherland on Damages*, vol. 3, p. 707. *McWilliams v. Hoban*, 42 Md. 56.

The plaintiff, however, may not show his surroundings and treatment while in prison, as the defendant is not liable for the conduct of public officials, over whom he has no control. *Zebley v. Storey* (Pa.), 12 Atl. Rep. 569.

Plaintiff may recover his expense in protecting himself, his loss of time, deprivation of liberty and the society of his family, the injury to his fame and his personal mortification. *Hamilton v. Smith*, 39 Mich. 222.

1. Exemplary Damages.—Exemplary damages may be given in an action for malicious prosecution. *Lytton v. Baird*, 95 Ind. 349; *Jerman v. Stewart*, 12 Fed. Rep. 266; *Brown v. Evans*, 17 Fed. Rep. 912.

In addition to damages for injury to the feelings, exemplary damages may be allowed in a proper case, strictly by way of punishment. *Parkhurst v. Masteller*, 57 Iowa 474.

Punitive damages may be assessed in an action for malicious prosecution, if the actual malice is shown, or a design to injure plaintiff, or fraud, or oppression. *Vinal v. Core*, 18 W. Va. 1.

In fixing exemplary damages for malicious prosecution, the jury should exercise a fair and reasonable discretion, keeping in view the nature of the wrong committed and the enormity or otherwise of such aggravating circumstances as may be shown, rather than the measure of compensation to the plaintiff. *Frankfurter v. Bryan*, 12 Ill. App. 549.

improper.¹ One, however, is not liable for vindictive damages if he merely approves of an unlawful arrest made by one acting in his behalf, after he has learned of such arrest.²

It is proper to enquire concerning the financial condition of the defendant for the purpose of enabling the jury to measure the punishment in the way of damages.³

Where no actual damage has been sustained, no exemplary damages can be recovered.⁴

The measure of damages for the malicious prosecution of an attachment suit is not necessarily the measure awarded in an action of trover for the conversion of the goods attached.⁵

The jury may take into consideration all the circumstances of the case, and award such damages as will not only be a compensation for the wrong and indignity sustained in consequence of the wrongful act, but may also award exemplary or punitive damages as a punishment for such act. *McWilliams v. Hoban*, 42 Md. 56; *Stewart v. Cole*, 46 Ala. 646.

An employer is liable to exemplary damages for the acts of his agent. *Malloy v. Bennet*, 15 Fed. Rep. 371.

A plaintiff may recover actual and exemplary damages against a defendant who has maliciously sued out and levied writs of attachment. *Rice v. Miller*, 70 Tex. 613.

Plaintiff may show express malice in aggravation of damages. *Chapman v. Dodd*, 10 Minn. 350; *Ives v. Bartholomew*, 9 Conn. 309. Exemplary damages may be awarded against a corporation. *International etc. R. Co. v. Telephone etc. Co.*, 69 Tex. 277.

1. In an action for malicious prosecution, damages may be awarded for actual pecuniary loss sustained, the peril occasioned in regard to personal liberty, the injury to plaintiff's person and liberty, and the injury to his feelings and reputation; but punitive damages are not consistent with reason and justice, and should not be allowed. But if a want of probable cause appears, the jury, in estimating the damages, may properly consider the degree of malignity displayed by the prosecutor. *Murphy v. Hobbs*, 8 Col. 130.

It is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum as a punishment for the wrong. *Wilson v. Bowen*, 64 Mich. 133. See generally EXEMPLARY DAMAGES, vol. 7, p. 448.

2. *Rosenkrans v. Barker*, 115 Ill. 331; *Grund v. Van Vleck*, 69 Ill. 478.

3. *Renfro v. Prior*, 22 Mo. App. 402; *Peck v. Small*, 35 Minn. 465; *Spear v. Hiles*, 67 Wis. 350; *Brown v. Evans*, 17 Fed. Rep. 912; *Whitfield v. Westbrook*, 40 Miss. 311; *Weaver v. Page*, 6 Cal. 681; *Coleman v. Allen*, 79 Ga. 637.

4. Where no actual damage is suffered, surely no exemplary damages can be allowed. Exemplary damages can never constitute the basis of a cause of action for real or substantial damages suffered by the plaintiff; and, when given, they are given only in addition to the real and actual damages suffered and recovered by him; and when given they are not given upon any theory that the plaintiff has any just right to recover them, but only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts, in the private action brought by the plaintiff, for the recovery of the real damages suffered by him. No right of action for exemplary damages, however, is ever given to any private individual who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrongdoer. If he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all. *Schippel v. Norton*, 38 Kan. 567. But it is held that in an action for malicious arrest or civil process neither express malice nor actual damages need be proved. *Hogg v. Pinckney*, 16 S. Car. 387.

5. *Burton v. St. Paul etc. R. Co.*, 33 Minn. 189. Consequential damages may be recovered for the injury to the business credit of the plaintiff, and

When an action is founded upon the malicious prosecution of a part of a number of counts in an information, the plaintiff, in order to recover his actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of such part from those incident to the other counts.¹

The defendant may show, by way of mitigation, that what he did was done without malice, and that he had a right to suppose there was reasonable cause for his action.²

But the fact that the plaintiff might have shortened the time of his imprisonment by availing himself of a preliminary examination which he had waived, need not be considered in mitigation unless it appear by affirmative proof that his motive in thus waiving such examination and exposing himself to continued imprisonment was to enhance damages.³

It is well settled that the plaintiff's bad character may be shown in mitigation.⁴

Damages arising out of the malicious prosecution of a suit cannot be pleaded as a set off to an action or contract, nor *vice versa*.⁵

As to what amount of verdict may be allowed to stand, of course, must depend upon the circumstances and surroundings of each case.⁶

expenses incident to the former suit *Lawrence v. Hagerman*, 56 Ill. 68; *Woods v. Fennell*, 13 Bush. (Ky.) 628; *Kennedy v. Meacham*, 18 Fed. Rep. 312.

In an action for damages for wrongful attachment, the fact that the goods attached were subsequently returned to the debtor must be considered in mitigation. *McFadden v. Whitney et al.* (N. J.), 18 Atl. Rep. 62.

In an action for maliciously suing out and levying a writ of attachment, when exemplary damages are sought, plaintiff can show his loss of credit and prospective profits. *Kaufman v. Armstrong* (Tex.), 11 S. W. Rep. 1048.

1. The defendant cannot by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two. *Boogher v. Bryant et al.*, 86 Mo. 42.

2. *Bradner v. Faulkner*, 93 N. Y. 515; *Heyne v. Blair*, 62 N. Y. 19; *Galloway v. Burr*, 32 Mich. 332; *Pullen v. Glidden*, 68 Me. 559; *Lamb v. Galland*, 44 Cal. 609. But while proof of defendant's good faith is admissible to mitigate punitive damages, it cannot

be considered to mitigate compensatory damages, including those allowed for injury to the feelings. *Fenelon v. Butts*, 53 Wis. 344.

3. *King v. Colvin*, 11 R. I. 582.

4. *Fitzgibbon v. Brown*, 44 Me. 167; *Sears v. Hathaway*, 12 Cal. 277; *Chambers v. Upton*, 34 Fed. Rep. 473; *Blizard v. Hays*, 46 Ind. 166; *Israel v. Brooks*, 23 Ill. 526; *Obrien v. Frasier*, 47 N. J. L. 349; s. c., 54 Am. Rep. 170; *Rosenkrans v. Barker*, 115 Ill. 331.

5. *West v. Hayes*, 104 Ind. 251.

6. In an action for causing arrest and detention from Friday till Monday, a verdict for \$3,500 will not be set aside as excessive. *Cuthbert v. Galloway*, 35 Fed. Rep. 466. Where plaintiff, a respectable woman, was arrested for forcible entry into a house of defendant, an alleged assault, and was committed to jail with disorderly women, and required to give sureties of the peace without trial, and the arrest was proved without probable or reasonable cause, in order to keep her away from the house until defendant could put her things out and tear down the house, a verdict of \$4,000 is not manifestly excessive. *Clarke v. American Dock & Impr. Co.*, 35 Fed. Rep. 478.

MALPRACTICE.—(See ABORTION.)

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I. Definition.—Malpractice (*Mala Praxis*) is bad or unskilful practice in a physician or other professional person whereby the health of the patient is injured.

Wilful malpractice takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care, as in the case of criminal abortion.

Negligent malpractice comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires, as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

Ignorant malpractice is the administration of medicines calculated to do injury, which do harm, which a well educated and scientific medical man would know were not proper in the case.¹

II. Care, Skill and Diligence.—(a) *Duty to Exercise Reasonable and Ordinary Care, Skill and Diligence.*—Physicians, surgeons and dentists, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill and diligence, but that is the extent of their liability.²

1. 2 Bouv. L. Dict. 139; Elwell Malpractice, 198 and 243.

2. Landon v. Humphrey, 9 Conn. 209; Ritchey v. West, 23 Ill. 385; McNevins v. Lowe, 40 Ill. 209; Kendall v. Brown, 74 Ill. 232; Barnes v. Means, 82 Ill. 379; Holtzman v. Hoy, 19 Ill. App.

459; Utley v. Burns, 70 Ill. 162; Fisher v. Niccolls, 2 Ill. App. 484; Quinn v. Donovan, 85 Ill. 194; Long v. Morrison, 14 Ind. 595; Peck v. Martin, 17 Ind. 115; Gramm v. Boener, 56 Ind. 497; Jones v. Angell, 95 Ind. 376; Tefft v. Wilcox, 6 Kan. 46; Branner v. Stor-

mont, 9 Kan. 51; Small v. Howard, 128 Mass. 131; 35 Am. Rep. 363; Hitchcock v. Burget, 38 Mich. 501; Hesse v. Knippel, 1 Mich. N. P. 109; Getchell v. Hill, 21 Minn. 464; Getchell v. Lindley, 24 Minn. 265; Howard v. Grover, 28 Me. 97; Simonds v. Henry, 39 Me. 155; Patten v. Wiggin, 51 Me. 594; Ballou v. Prescott, 64 Me. 305; Leighton v. Sargent, 31 N. H. 119; Ely v. Wilbur, 49 N. J. L. 685; Carpenter v. Blake, 60 Barb. (N. Y.) 488; 50 N. Y. 696; 10 Hun (N. Y.) 358; 75 N. Y. 12; Bellinger v. Craigue, 31 Barb. (N. Y.) 534; Carpenter v. Blake, 17 N. Y. Sup. Ct. 358; Barton v. Govan, 42 Hun (N. Y.) 655; Gallaher v. Thompson, Wright (Ohio) 466; Craig v. Chambers, 17 Ohio St. 253; Boydston v. Giltner, 3 Oreg. 118; Heath v. Glisan, 3 Oreg. 64; McCandless v. McWha, 22 Pa. St. 261; Potter v. Warner, 91 Pa. St. 362; Haire v. Reese, 7 Phila. (Pa.) 138; Fowler v. Sergeant, 1 Grant's Cas. (Pa.) 355; Braunberger v. Cless (Pa.), 4 Am. Law Reg. (N. S.) 587; Wood v. Clapp, 4 Sneed (Tenn.) 65; Alder v. Buckley, 1 Swan (Tenn.) 69; Graham v. Gautier, 21 Tex. 111; Hathorn v. Richmond, 48 Vt. 557; Briggs v. Taylor, 28 Vt. 180; Reynolds v. Graves, 3 Wis. 416; Gates v. Fleischer, 67 Wis. 504; Perivnowsky v. Freeman, 4 F. & F. 977; Jones v. Fay, 4 F. & F. 525; Rich v. Pierpont, 3 F. & F. 35; Seare v. Prentice, 8 East 48; Slater v. Baker, 2 Wils. 359; Lamphier v. Phipos, 8 C. & P. 475.

Negligence in Examination of Alleged Lunatic.—Physicians, in making a statutory examination of a person alleged to be insane, with a view to his confinement if they decide it necessary, do not act in a judicial capacity, and are liable for a lack of ordinary care and prudence in making their examination. A judge approving a certificate given under such circumstances is not liable to prosecution, as his duty is purely judicial. Ayers v. Russel, 3 N. Y. Supp. 338.

Physicians cannot be made liable for the insufficiency of methods pursued in reaching their conclusion as to sanity, but only for their falsehood; and defendants may show precisely the circumstances under which they acted, and such evidence is admissible in mitigation of damages, even if it fail to justify their action. Pennell v. Cummings, 75 Me. 163.

Deceit—Intrusion in Case of Confinement.—A physician took an unprofes-

sional, unmarried man to attend a woman in confinement when there was no real need of his services. The patient and her husband made no objection to his presence because they believed him to be a medical associate of the doctor. *Held*, that the physician and the intruder were both liable in damages for the deceit practiced. De May v. Roberts, 46 Mich. 160; 41 Am. Rep. 154.

Consent to Operation.—Two surgeons performed an operation on a woman apparently with her consent. The patient died and her husband brought an action for malpractice, alleging that there was no consent to the operation. *Held*, that the burden of proof was upon the plaintiff, as the party who allows a surgical operation to be performed is presumed to have consented to it. If the surgeons performed the operation with due care and skill, they are not responsible for the result. State v. Housekeeper, 70 Md. 162.

Physicians Attending Cases of Infectious Disease.—A physician who is attending cases of infectious disease is bound to take such precaution as experience may have shown to be necessary to prevent the communication of the infection, and where a physician was told that if he was attending cases of smallpox his services would be dispensed with, and he promised not to attend such cases, but did so, and communicated the disease, it was *held* proper to admit evidence of such statement to the physician, to reduce the amount claimed in an action by him for treatment during the illness. Piper v. Menifee, 12 B. Mon. (Ky.) 465.

Skill Required of One Not a Physician.—"A person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances." Higgins v. McCabe, 126 Mass. 13.

Evidence.—Under an allegation that "the defendant wrongfully, negligently, and unskillfully performed said amputation," evidence is admissible showing that "the point of amputation was too high, and that the danger of death was somewhat increased by the selection of that point." Wright v. Hardy, 22 Wis. 348.

Limitation of Action.—An action against a physician for negligence in his treatment of a patient is within the provisions of Code Civ. Proc. N. Y.,

The burden of proof is upon the plaintiff in an action for malpractice to show that there was a want of due care, skill and diligence,¹ and also that the injury was the result of such want of care, skill and diligence.²

(b) *What Constitutes Reasonable and Ordinary Care, Skill and Diligence.*—The reasonable and ordinary care, skill and diligence which the law requires of physicians and surgeons is such as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases.³

§ 383, requiring "an action to recover damages for a personal injury resulting from negligence" to be brought within three years, and this although the physician was treating the patient under a contract. *Burrell v. Preston*, 7 N. Y. Supp. 177. Compare *Staley v. Jameson*, 46 Ind. 159; *Burns v. Barenfield*, 84 Ind. 43.

1. *Holtzman v. Hoy*, 19 Ill. App. 459; *Baird v. Morford*, 29 Iowa 531; *Vanhooover v. Berghoff*, 90 Mo. 487; *Craig v. Chambers*, 17 Ohio St. 253; *State v. Housekeeper*, 70 Md. 162; *Leighton v. Sargent*, 31 N. H. 119.

2. *Getchell v. Hill*, 21 Minn. 464.

3. *Hathorn v. Richmond*, 48 Vt. 557; *Wilnot v. Howard*, 39 Vt. 447; *Uteley v. Burns*, 70 Ill. 162; *Ritchie v. West*, 23 Ill. 385; *Almond v. Nugent*, 34 Iowa 300; *Tefft v. Wilcox*, 6 Kan. 46; *Small v. Howard*, 128 Mass. 131; 35 Am. Rep. 363; *Patten v. Wiggin*, 51 Me. 594; *West v. Martin*, 31 Mo. 375; *Leighton v. Sargent*, 31 N. H. 119; *Heath v. Glisan*, 3 Oreg. 64; *Graham v. Gautier*, 21 Tex. 111.

"The true measure is that ordinarily exercised in the profession by the members thereof as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole; not that exercised by the *thoroughly educated*, nor yet that exercised by the *moderately educated*, nor merely of the *well educated*, but the *average* of the thorough, the well and the moderate—all, in education, skill, diligence, etc." *Smothers v. Hanks*, 34 Iowa 286. See also *Hitchcock v. Burgett*, 38 Mich. 501.

In *McCandless v. McWha*, 22 Pa. St. 261, the court said that the degree of skill required was that "which ordinarily characterizes the profession," but in a preceding portion of the opinion it was said that it was such skill "as *thoroughly educated* surgeons ordinarily employ," and the language of the

opinion as a whole would seem to indicate that the latter statement is the test which the court intended to prescribe. See also *Haire v. Reese*, 7 Phila. (Pa.) 138.

Failure to Give Instructions.—A patient who had been properly treated for a broken leg was discharged before it had regained its strength without giving him proper instructions as to its care. The surgeons were held liable for negligence in not giving the instructions, the patient having subsequently lost his leg because he used it improperly. *Beck v. German Klinik* (Iowa), 43 N. W. Rep. 617. See also *Carpenter v. Blake*, 60 Barb. 485; 50 N. Y. 696; 10 Hun (N. Y.) 358; 75 N. Y. 12.

Dentist Using Chloroform.—A dentist in using chloroform is only bound to look to its natural and probable effects. *Bogle v. Winslow*, 5 Phila. (Pa.) 136.

"Reasonable and Ordinary"—Equivalent Words.—The following expressions have been held equivalent to the expression reasonable and ordinary as applied to the care, skill and diligence to be exercised by a physician or surgeon; "average skill" in *Carpenter v. Blake*, 60 Barb. (N. Y.) 488; "fair knowledge and skill" in *Jones v. Angell*, 95 Ind. 376. "Ordinary care and skill are used in their common acceptance." *Heath v. Glisan*, 3 Oreg. 64.

Evidence.—In an action for malpractice in surgery, defendant may show by experts that the treatment he gave was such as a surgeon of ordinary knowledge and skill would have given. *Quinn v. Higgins*, 63 Wis. 664.

Upon a question made as to the degree of professional skill possessed by a surgeon, as compared with that ordinarily possessed by the profession in general, the opinion of the physician with whom such surgeon studied his profession is not competent evidence. *Leighton v. Sargent*, 31 N. H. 119.

(c) *Effect of Locality Upon Standard of Care and Skill.*—The locality in which a physician or surgeon practices is to be taken into account. One practicing in a small town or sparsely settled country district is not to be expected to exercise the care and skill of one residing in and having the opportunities afforded by a large city. He is bound to exercise the average degree of skill possessed by the profession in such localities generally.¹

(d) *Different Schools.*—The law does not favor any particular school of medicine and the treatment of a physician is to be tested by the principles of that school to which he belongs.²

(e) *Adoption of Latest Methods and Appliances.*—Physicians and surgeons should keep abreast of the times and make use of the latest and most improved methods and appliances, having regard to the locality and general practice of the profession, and it is for the jury to decide from the particular circumstances of each case whether the physician or surgeon has fulfilled his duty in this respect.³ A departure from approved methods of practice resulting in injury to the patient will render the medical practitioner liable, however honest the intention and expectation of benefit to the patient may be.⁴

(f) *Duration of Attendance.*—If a physician or surgeon be sent for to attend a patient, the effect of his responding to the

1. In *Gramm v. Boener*, 56 Ind. 497; *WORDEN, J.*, said: "It seems to us that physicians or surgeons practicing in small towns, or rural or sparsely populated districts, are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will not do, as we think, to say that if a physician or surgeon has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practices, it will be sufficient. There might be but few practicing in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say that because one possessed and exercised as much skill as the other, he could not be chargeable with the want of reasonable skill." *Kelsey v. Hay*, 84 Ind. 189.

In addition to the above regard must also be had to the advanced state of the profession at the time of the treatment. *Small v. Howard*, 128 Mass. 131; *Gates v. Fleischer*, 67 Wis. 504; *Smothers v. Hanks*, 34 Iowa 286; *Almond v. Nugent*, 34 Iowa 300; *Haire v. Reese*, 7 Phila. (Pa.) 138; *Nelson v. Harrington*, 72 Wis. 591.

2. *Bowman v. Woods*, 1 Greene

(Iowa) 441; *Patten v. Wiggin*, 51 Me. 594; *Heese v. Knippel*, 1 Mich. N. P. 109; *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1; *Williams v. Poppleton*, 3 Oreg. 139.

Clairvoyants do not constitute a school, since they have no fixed principles or formulated rules for the treatment of disease. They are under a duty to treat their patients with the ordinary skill and knowledge of physicians in good standing practicing in their vicinity. *Nelson v. Harrington*, 72 Wis. 591.

Skill Required of Empirics.—One not a regular physician, holding himself out as capable of treating particular maladies, is bound to exercise the skill and care usually possessed and employed by the general physician in the treatment of such maladies. *Musser v. Chase*, 29 Ohio St. 577. See also *Rudock v. Lowe*, 4 F. & F. (Eng.) 519.

3. *McCandless v. McWha*, 22 Pa. St. 261; *Vanhooser v. Berghoff*, 90 Mo. 487.

4. *Carpenter v. Blake*, 60 Barb. (N. Y.) 488; 50 N. Y. 696; 10 Hun (N. Y.) 358; 75 N. Y. 12; *Lamphier v. Phipor*, 8 C. & P. 475; *Seare v. Prentice*, 8 East 348; *Slater v. Baker*, 2 Wils. 359.

call, in the absence of any special agreement, will be an engagement to attend to the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient, and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease.¹

III. Errors of Judgment.—Physicians and surgeons are bound to give their patients the benefit of their best judgment, but they are not liable for a mere error of judgment.² An error of judgment may be so gross, however, as to be inconsistent with reasonable care, skill and diligence.³

IV. No Implied Warranty to Cure.—There is no implied warranty on the part of a physician that he will effect a cure,⁴ and he can be held as a guarantor of success only in virtue of an express agreement.⁵

1. *Dale v. Donaldson*, 48 Ark. 188; *Ritchey v. West*, 23 Ill. 385; *Ballou v. Prescott*, 64 Me. 305; *Potter v. Virgil*, 67 Barb. (N. Y.) 578; *Barber v. Martin*, 62 Me. 536; *Bemus v. Howard*, 3 Watts (Pa.) 255.

Duty of Veterinary Surgeon—Evidence.—In an action to recover damages caused by the alleged negligence and unskillfulness of a veterinary surgeon in gelding a colt, *held* that instructions to the jury that it was the duty of the defendant to give the colt such continued further attention, after the operation, as the necessity of the case required, in the absence of special agreement or reasonable notice to the contrary, were correct, though the declaration only alleged a want of care and skill with reference to the operation itself. Evidence that other colts, gelded by defendant at the same time, had died, having been received, it was error not to allow defendant to testify as to the cause of death. *Williams v. Gilman*, 71 Me. 21.

2. *Tefft v. Wilcox*, 6 Kan. 46; *Patten v. Wiggin*, 51 Me. 594; *Vanhooser v. Berghoff*, 90 Mo. 487; *Leighton v. Sargent*, 27 N. H. 460; *Carpenter v. Blake*, 60 Barb. (N. Y.) 488; 50 N. Y. 696; 10 Hun (N. Y.) 358; 75 N. Y. 12; *Wells v. World's Disp. M. Assoc.*, 45 Hun (N. Y.) 588; *Williams v. Poppleton*, 3 Oreg. 139.

On the trial the appellants asked the court to instruct the jury "that if they believe the defendants used ordinary skill and care in the treatment of plaintiff's hand, and made a mistake in judgment, then the defendants are not liable for the result of such mistake under the law." This instruction the court re-

fused to give as asked, but gave it with the following modification: "*Provided*, the defendants in making up their judgment did not disregard the well settled rules and principles of medical science." *Fisher v. Nicolls*, 2 Ill. App. 484.

Physician Advising Sanitary Precautions.—Paper may be removed from the walls of rooms in which smallpox patients have been sick, if in the opinion of the attending physician it has become so soiled and besmeared with small pox virus as to make its removal necessary; and an action of trespass will not lie by the owner of the building against a physician for advising or directing such removal. 1874. *Seavey v. Preble*, 64 Me. 120.

Advice as to Extent of Injury.—A surgeon having been employed by a railway company to examine a passenger who had sustained an injury in a collision on their line, and he having, so far as he could see or judge, on his own statement of his injuries, told him that they were so slight that he accepted a small sum in compensation, *held*, even assuming that his injuries were greater, there was no ground of action. *Pimm v. Roper*, 2 F. & F. 783.

3. *West v. Martin*, 31 Mo. 375; *Howard v. Grover*, 28 Me. 97.

4. *Tefft v. Wilcox*, 6 Kan. 466; *Heese v. Knippel*, 1 Mich. N. P. 109; *Getchell v. Hill*, 21 Minn. 464; *O'Hara v. Wells*, 14 Neb. 403; *Leighton v. Sargent*, 27 N. H. 460; *Craig v. Chambers*, 17 Ohio St. 253; *Bliss v. Long*, *Wright* (Ohio) 351; *Grindle v. Rush*, 7 Ohio, pt. 2, 123; *Haire v. Reese*, 7 Phila. (Pa.) 138; *Lamphier v. Phiposs*, 8 C. & P. (Eng.) 475.

5. *Ely v. Wilbur*, 49 N. J. L. 685;

V. Consultation with Others.—If a physician or surgeon is not competent or feels that he is not competent to treat a case, it is his duty to recommend the employment of another, but if he is competent and so considers himself, and is in doubt concerning the case, he should use his best judgment as to consultation with other physicians or surgeons.¹

The refusal to accept the assistance of another in the treatment of a case imposes no higher duty upon a physician or a surgeon.²

VI. Gratuitous Services.—The fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill and diligence.³

VII. Contributory Negligence of Patient or Attendant.—If the fault or negligence of a patient or his attendant contribute to the patient's injury, he cannot recover for malpractice by the physician or surgeon,⁴ and this is true in a case where the natural tempera-

Grindle v. Rush, 7 Ohio, pt. 2, 123; *Gallaher v. Thompson*, Wright (Ohio) 466; *Smith v. Hyde*, 19 Vt. 54.

An allegation that a surgeon was engaged "to set and reduce the said fracture . . . and to tend it, and cure and heal the same for a fee, and the said defendant entered upon such retainer and employment," implies no more than that the surgeon would bring to bear a reasonable degree of care and skill as a surgeon in the undertaking. *Hoopingarner v. Levy*, 77 Ind. 455. See also *Vanhoozer v. Berghoff*, 90 Mo. 487; *Reynolds v. Graves*, 3 Wis. 416.

1. *Mallen v. Boynton*, 132 Mass. 443.
Evidence.—In an action for malpractice it is competent for the defendant to show that he employed another skillful surgeon to assist him. *Jones v. Angell*, 95 Ind. 376.

2. *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 668.

3. *McNevin v. Lowe*, 40 Ill. 209 (limiting *Ritchey v. West*, 23 Ill. 385).

The fact that for eighteen months a physician had forborne to assert a claim for compensation for his attendance and treatment might, in an action for malpractice, and especially in a doubtful or balanced case, be urged with great force as in the nature of an admission of neglect or want of skill; as evidence of a consciousness on the part of the physician that he was not entitled to pay for his services and that they were worthless. It makes a collateral issue, upon which the defendant is called upon to give explanatory or contradictory evidence, and by which

the jury may be embarrassed in their deliberations. *Baird v. Gillett*, 47 N. Y. 186.

4. *Lower v. Franks*, 115 Ind. 334; *Chamberlain v. Porter*, 9 Minn. 260; *West v. Martin*, 31 Mo. 375; *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 668; *McCandless v. McWha*, 22 Pa. St. 261; *Reber v. Herring*, 115 Pa. St. 599; *Haire v. Reese*, 7 Phila. (Pa.) 138.

Disobedience of Instructions.—“If the patient, by refusing to adopt the remedies or comply with the directions of the physicians, frustrates or defeats the endeavors of the physician, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctly to himself. *Jones v. Angell*, 95 Ind. 376. See also *O'Hara v. Wells*, 14 Neb. 403.

Information Given Patient by Surgeon About Injury.—“The information which a surgeon may give to a patient concerning the nature of his malady is a circumstance that should be considered by the jury in determining the question whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not. *Geiselman v. Scott*, 25 Ohio St. 86.

Refusal to Allow Experiment to Remedy Surgeon's Mistake.—A surgeon had been called to treat a dislocated arm, which he failed to do in a proper manner. Other surgeons were consulted, and one of them proposed placing the patient under the influence of an anæsthetic and attempting to reduce the dislocation. This the patient's father refused to allow. *Held*, that he was not bound to do so, and that evidence of his

ment or physical weakness of the patient are the contributing causes of injury.¹

Where the injury attributable to the fault of the patient can be separated from that of the physician, the former may recover for so much of the injury as is due to the fault of the latter.²

When a patient, relying on his own judgment, gives directions as to his treatment he cannot claim damages of the physician for the consequences.³

The burden of proof to show contributory negligence is upon the defendant in an action for malpractice.⁴

VIII. Partnership Liability.—Where physicians or surgeons engage in practice as partners all are liable for malpractice by any member of the firm.⁵

refusal could have no effect to mitigate the damages. *Chamberlin v. Morgan*, 68 Pa. St. 168. See also *Fowler v. Sergeant*, 1 Grant's Cas. (Pa.) 355.

Pleading.—The allegations were "that the appellants were practicing physicians and surgeons, and as such undertook to set a broken arm of the infant son of the appellee; that by reason of their unskillfulness, negligence and want of care in treating the broken arm it became inflamed and mortified and had to be amputated." *Held*, that the averments were sufficient to show that the appellee and his injured son were without fault, and that their negligence did not contribute to the result. *Scudder v. Crossan*, 43 Ind. 343.

Case Treated by Another Physician.—Where a surgeon treated a fractured limb improperly and injury resulted, *held*, that he was liable notwithstanding that another surgeon who subsequently attended the case might have discovered the error and relieved the patient. *Hathorn v. Richmond*, 48 Vt. 557.

1. *Simonds v. Henry*, 39 Me. 155; *Haire v. Reese*, 7 Phila. (Pa.) 138; *Bogle v. Winslow*, 5 Phila. (Pa.) 136.

Ill Health Due Only in Part to Malpractice.—Where the ill health of a patient was due partly to malpractice and partly to a disease from which the patient was suffering at the time of treatment and for which she was not being treated, *held*, that the patient could recover for the malpractice, and in awarding the damages the jury must distinguish the effects of the different causes. *Gates v. Fleischer*, 67 Wis. 504.

Insanity of Patient.—"As most of the insane are under compulsory medical

treatment, they cannot be assumed to occupy the same moral and fiduciary relations to their medical attendants as do the sane. They are not bound to co-operate with their medical attendants in securing a cure in their own persons, as sane patients are, and their neglect or unwillingness to do so cannot be imputed to them as contributory negligence in an action for malpractice, any more than to a child. And yet, since insanity at law is a term of variable significance, covering very different shades of mental unsoundness, I am not prepared to say that there could not be a phase of it in which a patient might be capable of such negligence as would amount to contributory wrong on his part." *People ex rel. Norton v. N. Y. Hospital*, 3 Abb. N. C. 229, 259.

Evidence.—In an action against a surgeon for alleged malpractice, there being no allegation under which the testimony became material, evidence "as to the weakness of the bones of the plaintiff's family" was *held* to be inadmissible. *West v. Martin*, 31 Mo. 375.

2. *Hibbard v. Thompson*, 109 Mass. 286; *Wilmot v. Howard*, 39 Vt. 447.

3. *Gramm v. Boener*, 56 Ind. 497; *Hancke v. Hooper*, 7 Car. & P. (Eng.) 8.

4. *Gramm v. Boener*, 56 Ind. 497. A contrary rule is adopted in Iowa. *Baird v. Morford*, 29 Iowa 531.

5. *Hyrne v. Erwin*, 23 S. Car. 226; 55 Am. Rep. 15; *Whittaker v. Collins*, 34 Minn. 209.

Declarations by a Partner After Employment Ceases.—If one partner had administered an improper prescription or neglected to do something proper, the other would have been answerable for his acts or omissions. But for

IX. Action Barred by Recovery for Services.—A recovery by a physician or surgeon for his services will bar a future action for malpractice,¹ but in some of the States it is held that if the recovery be by confession or default it is not a bar.²

X. Malpractice as a Defence to a Suit for Services.—See PHYSICIANS AND SURGEONS.

XI. Pleading.—It is a sufficient allegation in a pleading to allege that a person was retained as a physician or surgeon and entered upon the cure.³ It is not a misjoinder to join a count in the declaration that the defendant "maliciously" pretended that he could effect a cure with intent to defraud.⁴ A counter claim for malpractice may be set up to defeat an action or reduce a claim for services by a physician in a suit in justice's court.⁵

XII. Evidence.—(a) *General Skilfulness.*—In an action for malpractice alleging want of skill and neglect it is competent to show the skilfulness and learning of the defendant.⁶

(b) *Failure to Effect a Cure.*—The mere failure to effect a cure raises no presumption of a want of proper care, skill and diligence.⁷

opinions expressed by the one in the absence of the other, after the employment was at an end, as to the propriety of the treatment or the results attained, the absent partner is not responsible. *Boor v. Lowery*, 103 Ind. 468.

Recommendation of Another Physician.—A surgeon for a railroad company being about to leave town recommended another surgeon in case the latter's services were needed during the former's absence. Held, that the regular surgeon did not, by his recommendation, render himself liable for the acts of the one recommended by him. *Hitchcock v. Burgett*, 38 Mich. 501.

1. *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Blair v. Bartlett*, 75 N. Y. 150; *Gates v. Preston*, 41 N. Y. 113.

2. *Resseque v. Byers*, 52 Wis. 650; 38 Am. Rep. 775; *Skyles v. Bonner*, 1 Cin. Super. Ct. 464; *Goble v. Dillon*, 86 Ind. 327; 44 Am. Rep. 308.

3. *Hanselman v. Carstens*, 60 Mich. 187; *Peppin v. Shepherd*, 11 Price (Eng.) 400.

In action for malpractice rendering amputation of plaintiff's leg necessary, the judge instructed the jury "that if the jury believe from the evidence that the defendants were guilty of negligence, carelessness or inattention in their treatment of the plaintiff's wounds, by which the plaintiff was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." In giving this instruction the court erred. The defendants are not sued for causing bodily pain and suffering by their neg-

ligence and carelessness. They are sued for alleged malpractice by which amputation became necessary. *Moor v. Teed*, 3 Cal. 190.

4. *Cadwell v. Farrell*, 28 Ill. 438.

5. *Howell v. Goodrich*, 69 Ill. 556.

6. *Leighton v. Sargent*, 27 N. H. 460. Where the plaintiff introduces evidence of the skill and reputation of an expert who has been called to show improper treatment by the defendant, the same witnesses may be asked as to the skilfulness and reputation of the defendant. *Vanhooser v. Berghoff*, 90 Mo. 487.

Where the defendant has introduced evidence of his general skilfulness the plaintiff may produce evidence to show that he was not a regularly educated physician and surgeon. *Grannis v. Branden*, 5 Day (Conn.) 260; 5 Am. Dec. 143.

It is not improper to ask a witness, in order to rebut the charge of negligence, if in treating the case he exercised the best judgment and skill of which he was capable. *Fisher v. Nicolls*, 2 Ill. App. 484.

A number of the courts have refused to allow evidence of general skilfulness as a defence to an action for malpractice. *Holtzman v. Hoy*, 19 Ill. App. 459; *Carpenter v. Blake*, 60 Barb. (N. Y.) 488; 50 N. Y. 606; 10 Hun (N. Y.) 358; 75 N. Y. 12; *Williams v. Poppleton*, 3 Oreg. 139; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376.

7. *Tefft v. Wilcox*, 6 Kan. 46; *Haire v. Reese*, 7 Phila. (Pa.) 138.

(c) *Medical Works as Evidence*.—See vol. 2, 467m.

(d) *Expert Evidence*.—See PHYSICIANS AND SURGEONS.

(e) *Hypothetical Questions*.—The plaintiff may put to a witness a hypothetical case founded upon the facts constituting the alleged malpractice and ask him whether they indicate proper care, skill or diligence,¹ but it is improper to include any supposition not borne out by the evidence.²

(f) *Exhibition of Injured Limb to Jury*.—In an action against a surgeon for malpractice in the treatment of an injured limb it is proper to allow the plaintiff to exhibit the limb to the jury.³

XIII. Damages—(a) *Who May Recover*.—A patient who has suffered injury on account of a physician's malpractice may recover though the physician was summoned and paid by another.⁴

A husband may recover damages against a surgeon for causing the death of his wife through unskillfulness in performing an operation.⁵

(b) *For What Damages May be Recovered*.—In an action for malpractice damages may be recovered for pain and suffering produced by the negligence or want of skill of the physician,⁶ and also for the loss of time and expense incurred on account of the improper treatment.⁷ Regard is also to be had to the nature of the injury, whether it be temporary or permanent, and also to the situation and condition of the injured party.⁸

Success as a Criterion of Skill.—The fact that a fractured limb is shorter after the recovery of the patient is not *prima facie* evidence of a want of skill in the surgeon who attended the case. *Piles v. Hughes*, 10 Iowa 579.

The success that attends a surgical operation, though not conclusive, is a circumstance from which the skill may be inferred. *Alder v. Buckley*, 1 Swan (Tenn.) 69.

1. *Olmsted v. Gere*, 100 Pa. St. 127; *Mayo v. Wright*, 63 Mich. 32. There is no objection to asking an expert witness what, assuming the testimony to be true without summarizing it in the question, his opinion is as to the treatment. *Wright v. Hardy*, 22 Wis. 348; *Gates v. Fleischer*, 67 Wis. 504.

2. *Reber v. Herring*, 115 Pa. St. 599; *Mayo v. Wright*, 63 Mich. 32.

3. *Fowler v. Sergeant*, 1 Grant's Cas. (Pa.) 355. Where a suit was brought a number of years after the injury it was held proper to refuse to allow the plaintiff to exhibit the injured limb to the jury. *Carstens v. Hanselman*, 61 Mich. 426.

4. *Nugent v. Boston etc. R. Co.*, 80 Me. 62; *Gladwell v. Steggall*, 5 Bing. N. C. 733; 35 E. C. L. 392.

Under the *Indiana* acts 1879, p. 160,

a married woman may sue alone for injury caused by malpractice. *Barnett v. Leonard*, 66 Ind. 422.

5. *Cross v. Guthery*, 2 Root (Conn.) 90; 1 Am. Dec. 61.

6. *Tefft v. Wilcox*, 6 Kan. 46; *Wenger v. Calder*, 78 Ill. 275; *Chamberlain v. Porter*, 9 Minn. 260. When the action is by husband, master or parent of the patient for individual loss the suffering of the patient cannot be taken into consideration. *Gaston v. Bd. Coms. Marion Co.*, 3 Ind. 497.

7. *Stone v. Evans*, 32 Minn. 243; *Tefft v. Wilcox*, 6 Kan. 46.

Evidence of Loss of Support.—In an action by a husband and wife for improper treatment of a felon where there was no allegation of loss of services of the wife, evidence that the husband was an invalid depending on his wife for support cannot be introduced. *Twombly v. Leach*, 11 Cush. (Mass.) 397.

Expense of Doctoring a Horse.—In a suit to recover for an injury done to a horse, through the unskillfulness of the defendant, the expense of doctoring and taking care of it cannot be recovered, unless declared for as special damage. *Patten v. Libbey*, 32 Me. 378.

8. *Chamberlain v. Porter*, 9 Minn. 260; *Tefft v. Wilcox*, 6 Kan. 46. For

(c) *Amount of Damages.*—It is not competent, in an action for malpractice, to show declarations of the physician indicating ignorance for the purpose of increasing the damages.¹

An instruction to a jury, in a case where no wilful negligence has been shown, that they may find a verdict for any sum they see fit, up to the amount claimed in the complaint, if they believe that the defendant was wilfully negligent, is improper.²

(d) *Compromise Verdicts.*—What are termed compromise verdicts are not looked upon with favor in malpractice cases. Each party has a right to insist that the jury, and each juror, shall render a verdict, if at all, literally "according to the law and the evidence as given on the trial."³

XIV. Survival of Actions.—An action for malpractice does not survive the death of either party unless there be some special injury to property involved.⁴

XV. Criminal Liability.—See ABORTION.—A physician or surgeon may be held criminally responsible for his malpractice, but only in case of the grossest ignorance or criminal inattention.⁵

If a medical man, through gross ignorance or inattention, cause the death of a patient he is guilty of manslaughter,⁶ or if death

a peculiar case involving exemplary damages, see *Brooke v. Clark*, 57 Tex. 105.

1. *Grannis v. Branden*, 5 Day (Conn.) 260; 5 Am. Dec. 143.

Excessive Damages.—The question as to amount of damages belongs to the jury. In relation thereto they have a very broad discretion. The general rule has been that a new trial will not be granted in an action of this kind for excessive damages, unless they are so clearly excessive as to indicate that the jury acted from prejudice, partiality or corruption, or were misled as to the measure of damages. That the jury assessed higher damages than the court would have assessed is no reason why the verdict should be set aside. *Kelsey v. Hay*, 84 Ind. 189.

2. *Wenger v. Calder*, 78 Ill. 275.

3. *Boydston v. Giltner*, 3 Oreg. 118.

"It is the duty of each juror carefully and patiently to canvass and consider the evidence, in all its bearings, with an honest and conscientious effort to reconcile any difference that may exist between him and his fellow jurors, as to the truth of the matters put in issue, and with a willingness to adopt the views of his fellow jurors, when he can see that they accord with the law and the evidence. But it would be a gross wrong to one or the other of these parties to carry the spirit of compromise

to the extent of yielding to that which you do not believe to be true, and to render a verdict merely for the sake of compromise, that you do not believe to be in accordance with the truth." *Heath v. Glisan*, 3 Oreg. 64.

4. *Boor v. Lowrey*, 103 Ind. 468; *Vittum v. Gilman*, 48 N. H. 416; *Jenkins v. French*, 58 N. H. 532; *Wolf v. Wall*, 40 Ohio St. 111; *Lattimore v. Simmons*, 13 Serg. & R. 183; *Chamberlain v. Williams*, 2 M. & S. 408. *Compare Long v. Morrison*, 14 Ind. 595.

5. *State v. Hardister*, 38 Ark. 605; *Rex v. Van Butchell*, 3 Car. & P. 629; *Rex v. Williamson*, 3 Car. & P. 635; *Rex v. Long*, 4 Car. & P. 308.

6. *Com. v. Pierce*, 138 Mass. 165; *State v. Hardister*, 38 Ark. 605; *Tessymond's Case*, 1 Lewin 169; *Ferguson's Case*, 1 Lewin 181; *Rex v. Simpson*, *Willcock Med. Prof.*, pt. 2, ccxxvii; *Webb's Case*, 2 Lewin 106, 211; *Rex v. Senior*, 1 Moody 346; *Rex v. Williamson*, 3 C. & P. 635; *Rex v. Long*, 4 C. & P. 308, 423; *Rex v. Spiller*, 5 C. & P. 333; *Queen v. Spilling*, 2 Moo. & R. 107; *Reg. v. Whitehead*, 3 C. & K. 202; *Reg. v. Crick*, 1 F. & F. 519; *Reg. v. Crook*, 1 F. & F. 521; *Reg. v. Markus*, 4 F. & F. 356; *Reg. v. Chamberlain*, 10 Cox C. C. 486; *Reg. v. McLeod*, 12 Cox C. C. 534; *Reg. v. Spencer*, 10 Cox C. C. 525.

MALPRACTICE—MALTREATMENT—MAN.

does not follow but the patient be injured, he is guilty of a misdemeanor.¹

Some of the State courts have held that if a physician treats a patient in good faith and to the best of his ability, and death or injury ensues, he is not criminally liable.²

MALT.—See INTOXICATING LIQUORS, vol. 11, p. 567.

MALTREATMENT.—Synonymous with bad treatment.³

MAN.—1. Includes all human beings or any human being, whether male or female, as in the expressions "offences against man, manslaughter, material man, remainderman, warehouseman, and, perhaps, bondsman."

2. Restricted to males, adults, as in alderman, assemblyman, congressman, jurymen.

3. In feudal law, a vassal.⁴

1. *Greenvelt's Case*, 1 *Ld. Raym.* 213; *Rex v. Long*, 4 C. & P. 398.

2. *State v. Schultz*, 55 *Iowa* 628; *Rice v. State*, 8 *Mo.* 561; *Com. v. Thompson*, 6 *Mass.* 134 (dis. in 138 *Mass.* 165).

3. *Com. v. Hackett*, 2 *Allen (Mass.)* 142. Maltreatment does not imply, necessarily, conduct that is either wilfully or grossly careless. Results from ignorance, negligence or wilfulness. This, at least, is the meaning as applied to the treatment of a wound by a surgeon.

4. *Anderson's L. Dict.*

Word "Man" Includes a Woman.—In *Silver v. Ladd*, 7 *Wall. (U. S.)* 219, in construing a benevolent statute of the government, made for the benefit of its citizens, and inviting and encouraging them to settle on its distant public lands, the words "single man" and "married man" may, especially if aided by the context and other parts of the statute, be taken in a generic sense. It was held, accordingly, that the fourth section of the act of congress of 27th September, 1850, granting, by way of donation, lands in Oregon Territory to "every white settler or occupant—American half breed Indians included," embraced within the term single man an unmarried woman.

In *Smith v. Allen*, 31 *Ark.* 271, *ENGLISH, C. J.*, observes: "Section 7, *Gantt's Digest*, provides that: 'When any man shall die, leaving minor children and no widow, and his estate shall not be above the value of \$300, his entire estate shall pass to and vest in his minor children for their support and education, and the (probate) court shall not be required to appoint an administrator on such estate.' In this case a woman died leaving a minor child and

no husband, and her estate was not above \$300. By statutory rule of construction, the word man in the above section includes a woman, and the word children includes a child.

When It Does Not Include Woman.—The representation of the People act, 1867, giving the franchise to every "man" possessed of a certain qualification, does not enfranchise women, because, although (by 13 and 14 *Vict.*, ch. 21) "in all acts words importing the masculine gender shall be deemed and taken to include 'females,' the word 'man,' in the ordinary and popular sense of words, is used in contradistinction to the word 'woman.'" *Wilberf. Stat. Law* 123, *citing Chorlton v. Lings*, *L. R.*, 4 C. P. 374.

In its most extended sense the term includes not only the adult male sex of the human species, but women and children. Examples: "Of offences against man, some are more immediately against the king, others more immediately against the subject." 1 *Hawk. Pl. Cr.*, ch. 2, § 1.

"Offences against the life of 'man' come under the general name of homicide, which, in our law, signifies the killing of a man by a man." 1 *Hawk. Pl. Cr.*, ch. 8, § 2.

It was considered in the civil or Roman law that although man and person are synonymous in grammar, they had a different acceptation in law; all persons were men, but all men—for example, slaves—were not persons, but things. *Bouv. L. Dict.*

"Man, Dog or Cat in a Statute."—In 3 *Edw.* 1, ch. 4, the words "man, dog or cat" include all animals escaping alive from a wreck. 2 *Inst.* 167.

"Man and Wife" Same as "Husband

MANAGE.—To direct; control; govern; administer; oversee.¹

MANAGER.—A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs.²

and Wife.—In *Clancy v. Clancy*, 33 N. W. (Mich.) 889-892, plaintiff and defendant entered into the following agreement: "An article of agreement made and entered into by and between Mrs. Mary McCarthy, of Chicago, Ill., and Dennis Clancy, of Detroit, Mich. We mutually and jointly from now henceforth and forever, agree to live as *man and wife*, but each party retains the right to buy, sell or transfer their respective properties without question of the other party. Mrs. Mary McCarthy, Dennis Clancy. Witness H M, E M." The court held that this was not an agreement for marriage. MORSE, J., (dissenting) observes: "My brethren would make this contract an agreement of concubinage, against the consent of the woman, simply because the word *man* is used instead of 'husband.' This is the gist of the opinion of Mr. JUSTICE SHERWOOD: 'I cannot so regard it in its language or its intent; and even if I thought either party so intended when it was made. I should consider it, in the absence of any fraud upon the part of the other party, my duty under the law, and in the interest of purity and justice, to hold them as legally married,' etc. I can see no material difference between the use of the word 'man' in this contract and the word 'husband.' The counsel for defendant attempted to make a distinction between the meaning of the two words, and my brother Sherwood seems to have followed this play upon words in his opinion. I find the common acceptance of the term 'man and wife' in every day life, and even in our best literature to be the same as 'husband and wife.' And its use is by all odds the most common. Webster gives as one of his definitions of 'man,' 'a married man, a husband,' quoting a line from Addison, 'Every wife ought to answer for her man.' The intent of this contract was one of marriage; and, although that word is not used, the essence of it is there."

1. Anderson's L. Dict.

Under the Laws of Connecticut, 1885, ch. 110, providing (section 81) that conservators "shall have the charge of," and (section 84) that they "shall man-

age" the estates of their wards, such conservators have power by virtue of their appointment, and without first obtaining authority from the court of probate, to lease the premises of their wards, for what, in view of all the circumstances, is a reasonable time. *Palmer v. Cheseboro*, 10 Atl. Rep. (Conn.) 508.

Manage an Estate.—The words "to manage an estate" in a will give, in common parlance, as well as legal acceptance, no authority to part with the entire interest. *Roosevelt v. Heirs of Fulton*, 7 Cow. (N. Y.) 81.

"Manage and Superintend".—The words "managed" and "superintended" as used in the Sole Traders' act (1 Comp. L. 223) are synonymous. The husband cannot direct, conduct or control the business in which the wife is engaged, or any part of it. *Youngworth v. Jewell*, 15 Nev. 45.

Managed Carelessly and Negligently.—In *Smith v. Old Colony and Newport R. R. Co.*, 10 R. I. 22, DUFFEE, J., observes in the opinion of the court: "In regard to the sufficiency of the declaration, with some variation of phraseology in the different counts, it alleges, in effect, that the defendants, while using their locomotive engine and other rolling stock on their road, *so carelessly and negligently managed* the same that the plaintiff's cotton mill was set on fire by sparks from said locomotive engine. The point made is, that the injury complained of is occasioned by careless management, not of the engine, but of the fire in the engine. We think, however, that the same meaning is conveyed by the language used as would be conveyed by the language suggested. The management of an engine consists in part of the management of the fire which generates the motive force of the engine."

2. Bouv. L. Dict. Also one of the persons appointed on the part of the house of representatives to prosecute impeachments before the senate.

In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company is vested in a board of direc-

MANAGING AGENT of a foreign corporation, upon whom service of process can be made, see 8 Am. & Eng. Encyc. of Law, p. 386.

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tors. In other private corporations, such as railroad companies, canal and coal companies, etc., these officers are called "managers." Being agents, when their authority is limited they have no power to bind their principal beyond such authority. *Bouv. L. Dict.*; *Salem Bank v. Gloucester Bank*, 17 Mass. 29.

An ambiguous word, since it may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a particular contract or job, in which latter case he is like a fellow workman. *Murphy v. Smith*, 19 C. B., N. S. 366.

Managing Owner of Ship.—The managing owner of a ship is one of several co-owners, to whom the others, or those of them who join in the adventure, have delegated the management of the ship. He has authority to do all things usual and necessary in the management of the ship and the delivery of the cargo, to enable her to prosecute her voyage and earn freight, with the right to appoint an agent for the purpose. It seems that it is a question to be decided in each case, whether a managing owner has

been appointed by all his co-owners or only by some of them, and consequently whether he has power to bind all of them or only some of them." He binds those whose agent he is; he binds nobody besides. *Per BOWEN, J.*, in *Frazer v. Cuthbertson*, 6 Q. B. Div. 93. See also *Coulthurst v. Sweet*, L. R., 1 C. P. 649; *Rap. & La. Law Dict.*

Managing Agent.—An agent having general supervision over the affairs of a corporation. *Upper Mississippi Trans. Co. v. Whittaker*, 16 Wis. 235; *Reddington v. Mariposa Land etc. Co.*, 19 Hun (N. Y.) 408; *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 371; where it was held that such agent need not have charge of the whole business of the corporation. *Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.*, 31 Fed. Rep. 295; *Emerson v. Auburn & Owasco Lake R. Co.*, 13 Hun (N. Y.) 151; *Brewster v. Mich. Central R. Co.*, 5 How. (N. Y.) 183; *Flynn v. Hudson R. Co.*, 6 How. (N. Y.) 308; *Doty v. Mich. Central R. Co.*, 8 Abb. (N. Y.) 427; *R. H. & L. R. Co. v. N. Y. L. E. & W. R. Co.*, 48 Hun (N. Y.) 190; *Tuchband v. C. & A. R. Co.*, 115 N. Y. 437.

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I. DEFINITION.—A writ of mandamus is a command issuing from a court of law of competent jurisdiction in the name of the State or sovereign directed to some inferior court, officer, corporation or person requiring them to do some particular thing therein specified, and which appertains to their office or duty.¹

1. 3 Blacks. Com., 110; 4 Bacon Abr. 495; Page v. Clopton, 2 Va. Law J. 560.

Mandamus is a writ commanding the performance of some act or duty therein specified, in the performance of which the applicant for the writ is interested, or by the nonperformance of which he is aggrieved or injured. As a preventive remedy simply, it is never used. Its use is confined to those occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. *Legg v. Mayor of Annapolis*, 42 Md. 203.

CAMPBELL, J.: Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subjected to serious injustice. It is from its very nature a remedy that cannot be hampered by any narrow or technical bounds. The right coupled with the necessity of such a vindication of it supports the jurisdiction, and the court, in using its discretion, while careful not to use this writ when it is not essential, will apply it where it is. *Twas etc. R. Co. v. Judge*, 44

Mich. 479; s. c., 11 Am. & Eng. R. Cas. 584.

HOLT, J.: Ordinarily, however, the use of the writ of mandamus is to compel an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law. *Com. v. Boone County Court*, 82 Ky. 632.

MARSHALL, C. J.: A mandamus is a suit within the meaning of the constitution, for it is a litigation of a right in a court of justice seeking a decision. *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Homes v. Jennison*, 14 Pet. (U. S.) 540.

It is the supplementary remedy when the party has a clear right and no other appropriate redress in order to prevent a failure of justice. 12 Peters d. Abr. 438 (309); *Rex v. Baker*, Burr. 1267; *People v. Hatch*, 33 Ill. 9; *Lewis v. Whittle*, 77 Va. 415; *Ottawa v. People*, 48 Ill. 233; *School Inspectors of Peoria v. People*, 20 Ill. 525.

In *England*, the writ of mandamus is defined to be a command issuing in the king's name from the court of king's bench and directed to any persons, corporation or inferior court of judicature

II. ORIGIN AND NATURE OF THE REMEDY.—The origin of mandamus was to prevent disorder from a failure of justice and defect of police. It was formerly a common law prerogative writ, issued only from the king's bench, where the sovereign was considered to be personally present to prevent a failure of justice and where there was no other adequate legal remedy to enforce the performance of a duty in which the complaining party was interested.¹

Although it still retains in England, and even in this country, some of the characteristic features of the original prerogative writ,² it is no longer regarded as a criminal procedure, but is strictly civil in its character,³ and there seems to be a growing tendency to divest it of its prerogative features and to treat it in the nature of a writ of right.⁴

In most of the States the writ is now regarded in the nature of an ordinary action between the parties, and as being a writ of right to the extent to which the party applying for it shows himself entitled to this particular kind of relief.⁵

within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant to right and justice. *Ex parte Crane*, 5 Pet. (U. S.) 190.

1. *State v. Williams*, 69 Ala. 311; *King v. University*, 1 W. Black. 552; *Rex v. Baker*, 3 Burr. 1265; *Donklyn Co. v. District Co. Court*, 23 Mo. 449; *Rex v. Severn etc. R. Co.*, 2 B. & Ald. 646; *Rex v. Windham*, 1 Cowp. 377.

Originally a mandamus was a mandate issued directly by the king of England to his subject, ordering the performance of some specified act. It was in no sense a judicial writ. Such mandates have long since become obsolete. Any such mandate was called originally a mandamus; but gradually a mandate ceased to be called a mandamus, and this name was applied to a judicial writ issued by the king's bench in the name of the king. In this court the king originally sat in person, and when he ceased to do so, yet by a fiction of the law he was still presumed to be present. At first these writs were issued by the king's bench only in cases in which the king or the public at large was interested, and for these reasons this writ was called a prerogative writ and was regarded as not issued of strict right, but only at the will of the sovereign. But in modern times even in England there is a tendency to treat this writ, a writ of right, and to strip

it of its prerogative character. In this country it has lost its prerogative nature and is regarded very much as a writ of right and in the nature of an ordinary suit between parties, when the aggrieved party shows himself entitled to this kind of relief. See *Gilman v. Bassett*, 33 Conn. 298; *Asberry v. Bearers*, 6 Tex. 457; *Com. v. Dennison*, 24 How. (U. S.) 66.

2. *People v. Hatch*, 33 Ill. 134; *People v. Board of Met. Police*, 26 N. Y. (12 Smith) 316; *Chamberlain v. Warburton*, 1 Utah 267; *School Inspectors of Peoria v. People*, 20 Ill. 525; *Moody v. Fleming*, 4 Ga. 115; s. c., 48 Am. Dec. 210; *State v. Gracey*, 11 Nev. 223.

3. *Com. v. Dennison*, 24 How. (U. S.) 66; *Brown v. Crego*, 29 Iowa 321; *People v. Board of Supervisors*, 27 Cal. 656; *State v. Williams*, 69 Ala. 311; *McBane v. People*, 50 Ill. 503; *State v. Bailey*, 7 Iowa 390; *Judd v. Driver*, 1 Kan. 455; *Chamberlain v. Warburton*, 1 Utah 267; *State v. Jennings*, 56 Wis. 113; *Williamsport v. Com.*, 90 Pa. St. 498. Compare *State v. Bruce*, 1 Treadw. Const. (S. Car.) 165. Mandamus is a civil remedy. *State v. Williams*, 69 Ala. 311.

4. *Fisher v. Charleston*, 17 W. Va. 595; *Kendall v. U. S.*, 12 Pet. (U. S.) 524.

5. *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Com. v. Dennison*, 24 How. (U. S.) 66; *Fisher v. Charleston*, 17 W. Va. 595; *Kentucky v. Dennison*, 24 How. (U. S.) 66; *People v. Lewis*, 28 How. (N. Y.) Pr. 159; *Asberry v. Bearers*, 6

1. **Mandamus and Injunction Distinguished.**—A writ of mandamus in name and nature and at common law is something of a mandatory nature.¹ It is a writ requiring the person, court or officer to do some particular thing therein specified which pertains to their office or duty. Injunction is wholly a preventive remedy. If the injury be already done, the writ can have no operation, for it cannot be applied correctly so as to remove it. It is not used for the purpose of punishment or to compel persons to do right, but simply to prevent them from doing wrong.² Mandamus is a writ of a moving nature, the proper writ to enforce obedience to an act of the legislature, and hence only proper to compel quiescence when an act is itself mandatory of something negative where it specially directs the not doing of a thing which might be natural or otherwise proper.³

2. **What Courts May Issue Mandamus.**—The power to issue the writ of mandamus is a branch of the common law, and any court on which common law jurisdiction has been conferred is authorized to issue the writ.⁴ In some of the States this power is exercised by the courts of last resort, sometimes as part of their original jurisdiction fixed by the organic law of the State, and in other cases only in aid of their appellate powers.⁵ The federal

Tex. 457; *Gilman v. Bassett*, 33 Conn. 298; *State v. Commrs. of Jefferson Co.*, 11 Kan. 66; *Haymore v. Yadkin Co. Commrs.*, 85 N. Car. 268. See *contra*, *School Inspectors of Peoria v. People*, 20 Ill. 525; *Mayor etc. of Savannah v. State*, 4 Ga. 26; *Moody v. Fleming*, 4 Ga. 115; s. c., 48 Am. Dec. 210; *People v. Hatch*, 33 Ill. 9; *People v. Ferris*, 76 N. Y. 326; *People v. Board of Police*, 26 N. Y. 316; *People v. Judge of Super. Court*, 41 Mich. 31; *Ottawa v. People*, 48 Ill. 233.

In *Com. v. Dennison*, 24 How. (U. S.) 66, TANY, C. J., said: "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and it is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown and was subject to regulations and rules which have long since been disused. But the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

1. *Crawford v. Carson*, 35 Ark. 577.

2. *Sherman v. Clark*, 4 Nev. 138.

3. *People v. Inspectors of State Prison*, 4 Mich. 187; *Washington University v. Green*, 1 Md. Ch. 97; *Crawford v. Carson*, 35 Ark. 565; *Blake-*

more v. Glamorganshire R. Co., 1 Myl. & K. 154; *Atty. Gen. v. New Jersey R. & T. Co.*, 2 Green Ch. 136. See *Legg v. Mayor of Annapolis*, 42 Md. 203.

A mandamus can only be issued to compel a party to act when it was his duty to act without it. *People v. Gilmore*, 5 Gilm. (Ill.) 242.

The writ of mandamus cannot take the place of an injunction. It is no ground of demurrer that plaintiff mistakes his remedy, in adopting proceedings by mandamus to effect the purpose of an injunction; but in such case the court should, of its own motion, dismiss the petition, unless it be reformed and transferred to the equity docket. *Crawford v. Carson*, 35 Ark. 565.

4. *Chumasero v. Potts*, 2 Mont. 242; see *State v. Pierce county (Wis.)*, 37 N. W. Rep. 231; *State v. Minneapolis E. R. Co. (Minn.)*, 41 N. W. Rep. 465; *Jacks v. Day*, 15 Cal. 91; *Jack v. Moore*, 66 Ala. 184. Compare *Shields v. State (Ala.)*, 6 So. Rep. 271; *Shepard v. Second District Court*, 1 Utah 340. Equity has nothing to do with the writ. *Gay v. Gilmore*, 76 Ga. 725.

5. *McCreary v. Rogers*, 35 Ala. 298; *U. S. v. Schurz*, 102 U. S. 378; *Chumasero v. Potts*, 2 Mont. 242; *Maxwell v. Burton*, 2 Utah 595; *State v. Tracy*, 94 Mo. 217; see *Com. v. Raroux*, 36 Pa. St. 262; *People v. County Commrs.*

courts may issue writs of mandamus when necessary to the exercise of their jurisdiction, but they have no authority to issue them as original writs in any case.¹

3. When Issued.—To entitle a party to a writ of mandamus he must be dispossessed of a clear legal right to have exercised an office or a franchise or to have a service performed by the party to whom he seeks to have the writ directed,² and no legal specific

(Colo.), 19 Pac. Rep. 892; *State v. McCullough*, 3 Nev. 202.

The supreme court of the District of Columbia is authorized to issue the writ of mandamus as an original process in cases where, by the principles of the common law, the petitioner is entitled to it. *U. S. v. Schurz*, 102 U. S. 378.

Minn. Laws 1881, ch. 40, amending Gen. St. 1878, ch. 80, § 13, takes from the supreme court original jurisdiction in mandamus, except in cases then pending, and in cases where the writ is to be directed to a district court, or a judge thereof in his official capacity. *State v. Burr*, 28 Minn. 40.

In *Arkansas*, the supreme court has general superintending control over all inferior courts of law or equity; in aid of which it can issue, hear and determine writs of mandamus. *McCreary v. Rogers*, 35 Ark. 298; see *Howell v. Crutchfield*, Hempst. 99.

In *California*, an application for a writ of *mandate* to the surveyor general should be made in the superior court. *Johnson v. Reichart* (Cal.), 18 Pac. Rep. 858.

In *Kentucky*, a mandamus is of original and not appellate jurisdiction, unless it is for the revision and correction of a judicial decision, and cannot be awarded by the court of appeals except for such revision, etc. *Morgan v. The Register*, Hard. (Ky.) 609; *Daniel v. Warren County Court*, 1 Bibb (Ky.) 496; Hard. (Ky.) 610; *Craig v. Adair*, 1 Bibb (Ky.) 310, 311; *Hardin v. Register*, 6 Litt. (Ky.) 28. To the contrary, *Simpson v. Thomas*, Sneed (Ky.) 254.

In *Louisiana*, the supreme court issues a *procedendo* or *mandamus* only to courts acting judicially, and where an appeal lies from a final judgment. *State v. Judge*, 14 La. An. 483.

It issues only as auxiliary to its appellate jurisdiction. *State v. Judge of the Sixth District*, 12 La. An. 405; *State v. Judge of the Fifth District*, 12 La. An. 513.

In *Missouri*, the jurisdiction of the supreme court to issue an original man-

damus is not dependent on its appellate jurisdiction in the same matter. *State v. Tracy*, 94 Mo. 217.

In *Texas*, the constitution does not confer upon the supreme court original jurisdiction in cases of mandamus. *International R. R. Co. v. Comptroller*, 36 Tex. 641.

1. *McIntyre v. Wood*, 7 Cranch 504; *Marbury v. Madison*, 1 Cranch 49; *Gràham v. Norton*, 15 Wall. 427; *Bath County v. Amy*, 4 Chicago Legal News 209.

2. *State v. Kavanaugh*, 24 Neb. 506; *Bayard v. U. S.*, 126 U. S. 246; *Shim v. Kentucky C. R. Co.*, 85 Ky. 177; *Tarver v. Commrs. Court of Tallapoosa*, 17 Ala. 527; *Lewis v. Whittle*, 77 Va. 415; *Union Church v. Sanders*, 1 Houst. (Del.) 100; s. c., 63 Am. Dec. 187; *Peck v. Booth*, 42 Conn. 271; *People v. Mayor of Chicago*, 51 Ill. 17; *People v. Salomon*, 46 Ill. 415; *People v. Glaun*, 70 Ill. 232; *People v. Johnson*, 100 Ill. 537; *People v. Masonic etc. Assoc.*, 98 Ill. 635; *State v. Herron*, 29 La. An. 848; *Pack v. Supervisors of Presque Isle Co.*, 36 Mich. 377; *Houghton Co. v. Auditor General*, 36 Mich. 271; *Loomis v. Rogers Township*, 53 Mich. 135; *People v. Supervisors of Greene Co.*, 64 N. Y. 600; *People v. Brooklyn*, 1 Wend. (N. Y.) 318; s. c., 19 Am. Dec. 502; *People v. Hoyt*, 66 N. Y. 606; *Dutton v. Hanover*, 42 Ohio St. 215; *State v. Supervisors of Washington*, 2 Chand. (Wis.) 250; *Cook v. Peacham*, 50 Vt. 231. *Ex parte Barnwell*, 8 S. Car. 264; *Com. v. Mitchell*, 82 Pa. St. 343; *State v. Gruber v. County Commrs.* (S. Car.), 9 S. E. Rep. 692; *Free Press Association v. Nichols*, 45 Vt. 7; *Commrs. v. People*, 66 Ill. 339; *Springfield etc. R. Co. v. County Court Clerk*, 74 Ill. 27; *People v. Trustees of Schools*, 86 Ill. 613; *People v. Oldtown*, 88 Ill. 202; *State v. New Haven etc. Co.*, 45 Conn. 331; *State Board of Education v. West Point*, 50 Miss. 638; *Sabine v. Rounds*, 50 Vt. 74; *Taylor v. Taylor*, 29 Gratt. (Va.) 765; *Milliner's Admr. v. Harrison*, 32 Gratt. (Va.) 422; *Townes v.*

remedy to which he can resort to compel the performance of this duty.¹

Nichols, 73 Me. 515; Borough of Easton v. Lehigh Water Co., 97 Pa. St. 554; People v. Hatch, 33 Ill. 9; People v. Lieb, 85 Ill. 484; People v. Klokke, 92 Ill. 134; Butler v. Supervisors of Saginaw Co., 26 Mich. 22; Elizabeth v. Essex Co. Court, 49 N. J. L. 626; State v. Douglas County Commrs., 18 Neb. 506; Hulse v. Marshall, 9 Mo. App. 148. *Ex parte* Hughes, 114 U. S. 147; Leavitt v. Detroit Superior Judge, 52 Mich. 595. *Ex parte* Shandies, 66 Ala. 134; People v. Chicago, 51 Ill. 17; Atty. Gen. v. New Bedford, 128 Mass. 312; Burnsville Turnpike Co. v. State (Ind.), 20 N. E. Rep. 421; James v. Commrs. of Bucks, 13 Pa. St. 72; Com. v. Cuncannon, 3 Brewst. (Pa.) 344; Com. v. Thompson, 1 Leg. Chron. (Pa.) 137; Hulse v. Marshall, 9 Mo. App. 148; State v. Garesché, 3 Mo. App. 526; People v. Dubois, 33 Ill. 9; Menard v. Hood, 68 Ill. 121; People v. Chicago etc. R. Co., 55 Ill. 95; People v. Illinois Cent. R. Co., 62 Ill. 510; Universal Church v. Trustees, 6 Ohio 446; State v. Hershisher v. Kinkaid, 23 Neb. 641; State v. Nicholson Pavement Co., 35 N. J. L. 396; People v. Supervisors of New York, 18 Abb. (N. Y.) Pr. 8; State v. Jacobus, 26 N. J. L. (2 Dutch.) 135; State v. Warren etc. Co., 32 N. J. L. 439; People v. Board of Apportionment, 5 Thom. & C. (N. Y.) 382; State v. Justices, 2 Ired. (N. Car.) L. 430; Williams v. Judge etc., 27 Mo. 225; U. S. v. Bank of Alexandria, 1 Cranch C. C. 7; Silverthorne v. Warren R. Co., 33 N. J. L. (4 Vroom) 372. *Ex parte* Good, 19 Ark. 410; People v. Easton, 13 Abb. (N. Y.) Pr. N. S. 159; City of Elizabeth v. Court of Common Pleas (N. J.), 9 Atl. Rep. 752; People v. Corporation, 1 Wend. (N. Y.) 318; Parker v. Anderson, 2 Patt. & H. (Va.) 38. *Ex parte* Conway, 4 Ark. 302; Fitch v. Diarmid, 26 Ark. 482; Weavel v. Loshier, 1 Johns. (N. Y.) Cas. 241; Price v. Shelby Circuit Court, Hard. (Ky.) 254; White v. U. S., 1 Black 500; Alexander v. Saunders, 23 Ark. 630; State v. Harper, 30 S. Car. 586; State v. Whitesides, 30 S. Car. 579. It will not be granted to settle a mere fancy question. People v. Masonic etc., 98 Ill. 635.

In State v. Supervisors of Washington, 2 Chand. (Wis.) 250, JACKSON, J., said: "A writ of mandamus is the highest judicial writ known to our

constitution and laws, and according to the long approved and well established authorities, only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be and which can be performed, and where there is no other specific legal remedy. Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus cannot rightfully issue."

Mandamus will lie against the board of directors of a chamber of commerce to restrain them from depriving a member of the association of his franchise. State v. Chamber of Commerce, 20 Wis. 63.

1. Basham v. Carroll, 44 Ark. 284; State v. Nicholson Pavement Co., 35 N. J. L. 396; People v. Olds, 3 Cal. 167; People v. Supervisors of Greene, 12 Barb. (N. Y.) 217; Napier v. Poe, 12 Ga. 170; People v. Thompson, 25 Barb. (N. Y.) 73; Trustees v. State, 11 Ind. 205; Cincinnati R. Co. v. Clinton, 1 Ohio St. 77; Reading v. Com., 11 Pa. St. 196; Parker v. Anderson, 2 Patt. & H. (Va.) 38; People v. Brooklyn, 1 Wend. (N. Y.) 318; Spraggins v. Co. Court Cooke (Tenn.), 160; Tarver v. Commrs. Court of Tallapoosa, 17 Ala. 527; Peck v. Booth, 42 Conn. 271; State v. Herron, 29 La An. 848; People v. Solomon, 46 Ill. 415; People v. Mayor of Chicago, 51 Ill. 17; People v. Glann, 70 Ill. 232; People v. Masonic etc. Soc., 98 Ill. 635; People v. Johnson, 100 Ill. 537; s. c., 39 Am. Rep. 63; Morgan v. Monmouth etc. R. Co., 26 N. J. L. (2 Dutch.) 99; Green v. Wood, 35 Barb. (N. Y.) 653; Clark v. Miller, 47 Barb. (N. Y.) 38; Com. v. Clark, 6 Phila. (Pa.) 408; Cullem v. Latimer, 4 Tex. 329; Matter of White River Bank, 23 Vt. 478; *Ex parte* Williamson, 8 Ark. 424; *Ex parte* Nelson, 1 Cow. (N. Y.) 417; Mayor etc. of Savannah v. State, 4 Ga. 26; U. S. v. Bank of Alexandria, 1 Cranch C. Ct. 7; People v. Judges, 1 Dougl. (Mich.) 319; Williams v. Judge etc., 27 Mo. 225; State v. Justices, Dudley (Ga.) 37; State v. Board of Commrs., 25 Ind. 210; *Ex parte* Barnes (Ala.), 4 So. Rep. 769; *Ex parte* Cheatham, 6 Ark. 531; *Ex parte* South etc. R. Co., 65 Ala. 599; Queen v. Hull etc. R. Co., 6 Ad. & E. N. S. 70; Queen v. Derby, 7 Ad. & E. 419; King v. Mayor of Colchester, 2 Term Rep. 260; King v.

- Bishop of Durham, Burr. 567; Wilkins v. Mitchell, 3 Salk. 229; King v. Bank of England, Doug. 524; *Ex parte* Williamson, 8 Ark. 424; Peratta v. Adams, 2 Cal. 504; Flagley v. Hubbard, 22 Cal. 34; Early v. Mannix, 15 Cal. 149; *Ex parte* Lynch, 2 Hill (N. Y.) 45; Boyce v. Russell, 2 Cow. (N. Y.) 444; American Asylum v. Phoenix Bank, 4 Conn. 172; s. c., 10 Am. Dec. 112; People v. Hatch, 33 Ill. 9; Excelsior etc. Assoc., v. Riddle, 91 Ind. 84; Fogle v. Gregg, 26 Ind. 245; People v. Hawkins, 46 N. Y. 9; Louisville etc. R. Co. v. State, 25 Ind. 177; Shelby v. Hoffman, 7 Ohio St. 450; State v. County Judge, 5 Iowa 380; Marshall v. Sloan, 35 Iowa 445; State v. Police Jury, 29 La. An. 146; State v. Judge of Sixth District, 9 La. An. 288; State v. Judge of Fourth District, 8 La. An. 92; People v. Starr, 55 How. (N. Y.) Pr. 388; People v. Chenango Co., 11 N. Y. 563; Succession of Macarty, 2 La. An. 979; People v. Wood, 35 Barb. (N. Y.) 653; People v. Booth, 49 Barb. (N. Y.) 31; St. Louis County Court, v. Sparks, 10 Mo. 118; Lexington v. Mullikin, 7 Gray (Mass.) 280; Olson v. Muskegon Circuit Court, 49 Mich. 85; Smith v. Burton, 48 Mich. 643; People v. New York, 10 Wend. (N. Y.) 393; Ward v. County Court, 50 Mo. 401; Mansfield v. Fuller, 50 Mo. 338; State v. Engleman, 45 Mo. 27; Com. v. Commrs. of Allegheny, 16 Serg. & R. (Pa.) 317; James v. Commrs. of Bucks, 13 Pa. St. 72; Heffner v. Com., 28 Pa. St. 108; Justices v. Munday, 2 Leigh (Va.) 165; s. c., 21 Am. Dec. 604; State v. Supervisors of Sheboygan, 29 Wis. 79; State v. Fuller, 18 S. Car. 246; Smith v. Judge, 17 Cal. 547; Ludlum v. Fourth District Court, 9 Cal. 8; Goodwin v. Glazer, 10 Cal. 333; Cowell v. Buckelew, 14 Cal. 640; Smith v. Judge Twelfth Dist., 17 Cal. 548; Cradall v. Amador Co., 20 Cal. 72; People v. Moore, 29 Cal. 428; Clark v. Crane, 57 Cal. 634; People v. McLane, 62 Cal. 616; People v. Bartlett, 40 Cal. 143; Kimball v. Union Water Co., 44 Cal. 173; Clark v. Minnis, 50 Cal. 509; *Ex parte* Jones, 1 Ala. 15; State v. Taylor, 19 Wis. 566; Marshall v. State, 1 Ired. 72; State v. Judge of Sixth District Court, 12 La. An. 342; State v. Judge of Second District Court, 10 La. An. 204; Leland v. Rose, 19 La. An. 415; State v. Morgan, 12 La. 118; *Ex parte* Hutt, 14 Ark. 368; State v. McAuliffe, 48 Mo. 112; Byrne v. Harbinson, 1 Mo. 225 (2nd ed., 160); *Ex parte* Goolsby, 2 Gratt. (Va.) 575; *Ex parte* Bostwick, 1 Cow. (N. Y.) 143; Jansen v. Davison, 2 Johns. (N. Y.) Cas. 72; People v. Judge of Superior Court, 32 Mich. 190; Davidson v. Washburn, 56 Ala. 596; *Ex parte* Grant, 53 Ala. 16; Clark v. Minnis, 50 Cal. 509; Mayberry v. Bowker, 14 Nev. 336; State v. Curler, 4 Nev. 445; *Ex parte* Garlington, 26 Ala. 170; *Ex parte* Rowland, 26 Ala. 133; *Ex parte* Small, 25 Ala. 74; *Ex parte* Elston, 25 Ala. 72; People v. Sexton, 24 Cal. 78; State v. McCrillus, 4 Kan. 250; Poindexter v. Greenlow, 84 Va. 441; State, Charleston C. & C. R. Co. v. Whitesides, 30 S. Car. 579; State v. Trenton Board of Health, 49 N. J. L. 349; Lewis v. Whittle, 77 Va. 415; Cleveland v. Board of Finance of Jersey City, 39 N. J. L. 629; People v. Easton, 13 Abb. (N. Y.) Pr. N. S. 159; People v. State Ins. Co., 19 Mich. 392; People v. Corporation, 1 Wend. (N. Y.) 318; Parker v. Anderson, 2 Patt. & H. (Va.) 38; *Ex parte* Stickney, 48 Ala. 160; Fitch v. Diarmid, 26 Ark. 482; Mansfield v. Fuller, 50 Mo. 338; People v. Hawkins, 46 N. Y. 9; People v. Wood, 2 Abb. (N. Y.) Pr. 90; Williams v. Clayton (Utah), 21 Pac. Rep. 398; Arrington v. Van Houton, 44 Ala. 284.
- Union Church v. Saunders, 1 Houst. (Del.) 100; s. c., 63 Am. Dec. 187; State v. Supervisors of Washington, 2 Chand. (Wis.) 250; Cook v. Peacham, 50 Vt. 231; *Ex parte* Barnwell, 8 S. Car. 264; Com. v. Mitchell, 82 Pa. St. 343; Dutten v. Hanover, 42 Ohio St. 215; People v. Hayt, 66 N. Y. 606; People v. Supervisors of Greene Co., 64 N. Y. 600; People v. Brooklyn, 1 Wend. (N. Y.) 318; s. c., 19 Am. Dec. 502; Board of Police v. Grant, 9 Smed. & M. (Miss.) 77; s. c., 47 Am. Dec. 102; Loomis v. Rogers Township, 53 Mich. 135; People v. Supervisors of Presque Isle Co., 36 Mich. 377; Houghton Co. v. Auditor Gen., 36 Mich. 271; King v. Water Works Co., 6 Ad. & El 355; *Ex parte* Trapnall, 6 Ark. 9; s. c., 42 Am. Dec. 676; Territory v. Shearer, 2 Dak. 332; Babcock v. Goodrich, 47 Cal. 488; Moody v. Fleming, 4 Ga. 115; s. c., 48 Am. Dec. 210; *Ex parte* Virginia Commrs., 112 U. S. 177; Justices v. Munday, 2 Leigh (Va.) 165; s. c., 21 Am. Dec. 604; Taylor v. Salt Lake Co. Court, 2 Utah 405; Arberry v. Bearers, 6 Tex. 457; s. c., 55 Am. Dec. 791; Com. v. Rosseter, 2 Binn. (Pa.) 360; s. c., 4 Am. Dec. 451; People v. Thompson, 25 Barb. (N. Y.) 73; State v. Graves, 19

a. Issued in the Discretion of the Court.—Mandamus is issued or withheld in the discretion of the court, and the court, in issuing it, will be governed by what seems to be necessary and proper to be done in the premises for the purposes of justice.¹ The dis-

Md. 351; s. c., 81 Am. Dec. 639; State v. Rightor, 36 La. An. 112; James v. Bucks, 13 Pa. St. 72; Mobile etc. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Reading v. Com., 11 Pa. St. 196.

The court will not award a mandamus, when full relief can be had by appeal, writ of error or otherwise. *Ex parte* South etc. R. Co., 65 Ala. 599; State v. Megown, 89 Mo. 156; *Ex parte* South etc. R. Co., 65 Ala. 599; People v. Lott, 42 Hun (N. Y.) 408; Hemphill v. Collins, 117 Ill. 396; State v. Justices of Moore, 2 Ired. 430; State v. Justices, Dudley (Ga.) 37; Goings v. Mills, 1 Pike 11; *Ex parte* Jones, 1 Ala. 15; Spraggins v. County Court, Cooke (Tenn.) 160; People v. Brooklyn, 1 Wend. (N. Y.) 318; State v. McGrath, 92 Mo. 355; authorities cited in United States v. Bayard, 5 Mackey (D. C.) 428; Aspen v. Aspen etc. Co., 10 Colo. 191; People v. New York Police Commrs., 107 N. Y. 235; Excelsior Mut. Aid Assoc. v. Riddle, 91 Ind. 84; People v. McLane, 62 Cal. 616; McDaniel v. King, 89 N. Car. 29; Levy v. Yoto County Superior Court, 66 Cal. 292; Moon's Admr. v. Wenford (Va.), 4 S. E. 572; Commrs. Boone County v. State, 38 Ind. 193; *Ex parte* Clements, 50 Ala. 459; State v. Common Pleas, 38 N. J. L. 182.

Mandamus does not lie to enforce a disputed stipulation to settle a case even though money has been paid thereunder. The parties to the stipulation are entitled to have the fact as to the settlement tried on a regular issue before a jury; and if the validity of the stipulation is contested it should be brought into the case by plea and not by motion. Leavitt v. Judge of Superior Court, 52 Mich. 595.

The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as is necessary to procure solicitors to conduct the suit for her, and when this right is denied by the chancellor, at any time before final alimony is set apart to her, a mandamus will be awarded from the supreme court, to compel him to make the necessary order as there is no other adequate and specific remedy. *Ex parte* King, 27 Ala. 387.

In mandamus the relator who seeks to compel a board of education to award him the contract for erecting a school building must show a clear legal right in himself. It is not enough to show defects in the title of another to whom the contract has been awarded. Ross v. Board of Education, 42 Ohio St. 374.

Mandamus will not lie to compel the issue of an execution, on the ground that an appeal has not been properly perfected, where the appeal from the judgment has been allowed, and the appeal bond approved by order of the trial court, as the jurisdiction of the supreme court has thereby attached, and a defect in the appeal can be reached by a motion to strike from the docket and files. People v. Adams (Colo.), 22 Pac. Rep. 826.

Mandamus is not to be denied merely because the relator may have a remedy by action for damages. People v. Taylor, 1 Abb. (N. Y.) Pr., N. S. 200; 30 How. Pr. 78.

Quo Warranto.—It is a decisive answer to an application for a mandamus that there was another remedy by information in the virtue of a *quo warranto*. People v. Supervisors of Greene, 12 Barb. (N. Y.) 217; People v. Corporation of New York, 3 Johns. Cas. (N. Y.) 79; Anderson v. Colson, 1 Neb. 172; Bonner v. State of Georgia, 7 Ga. 473; State v. Rodman, 43 Mo. 256; St. Louis County Court v. Sparks, 10 Mo. 118; Underwood v. White, 27 Ark. 382; State v. Gasconade County Court, 25 Mo. App. 446; R. v. Bankes, 2 Bun. 1454; R. v. Mayor of Colchester, 2 T. R. 259; R. v. Budle, 3 A. & E. 467; R. v. Mayor of Oxford, 6 A. & E. 349; R. v. Mayor of Winchester, 7 A. & E. 215; R. v. Mayor of Chester, 1 M. & S. 102; R. v. Atwood, 4 B. & Ad. 481; R. v. Derby, 7 A. & E. 419; R. v. Phippen, 7 A. & E. 966; *Ex parte* Mowry, 3 E. & B. 718; Anderson v. Colson, 1 Neb. 172.

Trover or detinue, or an action of trover or detinue. R. v. Hull & Selby R. Co., 6 Q. B. 70.

1. Sherburne v. Horn, 45 Mich. 160; Lamphere v. Grand Lodge of United Workmen, 47 Mich. 429; People v. Su-

cretion, however, of the court to grant or refuse the writ is not absolute, but governed by legal rules, and its exercise is subject to review.¹

b. When Duties Are Not Discretionary.—The writ will issue to compel the exercise of official discretion or judgment, but the mandate will contain no direction as to the manner in which the duty shall be performed. The proper function of the writ is merely to set in motion. It will, therefore, in a proper case, be allowed to command action, but never to control discretion.²

supervisors of Westchester, 15 Barb. (N. Y.) 607; *People v. Perry*, 13 Barb. (N. Y.) 206; *Com. v. Commrs. of Phila.*, 1 Whart. (Pa.) 1; *People v. Hatch*, 33 Ill. 134; *Com. v. Commrs. of Allegheny*, 16 S. & R. (Pa.) 317; *People v. Curyea*, 16 Ill. 547; *People v. Ketchum*, 72 Ill. 212; *People v. Ill. Cent. R. Co.*, 62 Ill. 510; *People v. Forquer, Breese* (Ill.) 104; *Free Press Assoc. v. Nichols*, 45 Vt. 7; *Belcher v. Treat*, 61 Me. 577; *Davis v. County Commrs.*, 63 Me. 396; *State v. Commrs. of Phillips Co.*, 26 Kan. 419; *Dennison v. Genesee Circuit Judge*, 37 Mich. 281; *People v. Dowling*, 55 Barb. (N. Y.) 197; s. c., 37 How. (N. Y.) Pr. 394; *People v. Hatch*, 33 Ill. 134; *Ex parte Stickney*, 48 Ala. 160; *McMillen v. Smith*, 26 Ark. 613; *Ex parte Hayes*, 26 Ark. 510; *Black v. Auditor*, 26 Ark. 237; *Woodman v. Somerset*, 24 Me. 151; *Goings v. Mills*, 1 Ark. 11; *People v. Supervisors of Richmond*, 22 How. (N. Y.) Pr. 275; *Water Commrs. v. Common Council of East Saginaw*, 33 Mich. 164; *State v. Anderson Co.*, 28 Kan. 67; *Drew v. Russell*, 47 Vt. 250.

Cases may arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief. *Oakes v. Hill*, 8 Pick. (Mass.) 47; *Commrs. of Highways v. People*, 99 Ill. 587.

"Courts are not bound to grant writs of mandamus in all cases where it may seem proper; but may exercise a discretionary power, as well in granting as refusing, as where the end of it is merely a private right." SMITH, J., in *People v. Forquer, Breese* (Ill.) 104.

So, where an action is pending in which the same questions might be tried, and that a determination on the summary process might affect the rights of persons who have no opportunity to be heard, mandamus will not

be granted. *Oakes v. Hill*, 8 Pick. (Mass.) 46.

A final order laying out a road was made by three supervisors on an appeal from an order of commissioners of highways determining not to lay out the road. Thereupon the damages from the laying out and opening of the road were assessed by a jury before a justice of the peace. Subsequently, a judge of the circuit court awarded the common law writ of *certiorari* to bring in review before the circuit court all these proceedings concerning the proposed road, and the writ was duly issued and served. Pending the *certiorari* proceeding it was sought to compel by mandamus the highway commissioners to levy and certify a tax to pay the damages so assessed for opening the road, and to open the road. It was held that all proceedings under the assessment of damages, or the order laying out the road, were stayed by the service of the writ of *certiorari*, so there was no clear duty on the part of the highway commissioners pending the *certiorari* proceeding to do the act sought to be coerced. It was therefore a very proper exercise of a sound discretion to deny the writ of mandamus. *Commrs. of Highways v. People*, 99 Ill. 587.

1. *People v. Common Council*, 78 N. Y. 56.

2. *Fowler v. Peirce*, 2 Cal. 167; *McDougall v. Bell*, 4 Cal. 177; *Price v. Sacramento Co.*, 6 Cal. 255; *People v. Santa Barbara Co.*, 14 Cal. 102; *McCauley v. Brooks*, 16 Cal. 35; *Bowers v. Sonoma Co.*, 32 Cal. 66; *People v. Lake Co.*, 33 Cal. 487; *Lewis v. Barclay*, 35 Cal. 213; *Francis Co. Co. v. Manhattan Ins. Co.*, 36 Cal. 283; *Ex parte Cage*, 45 Cal. 248; *Spinger v. Green*, 46 Cal. 73; *People v. Sexton*, 37 Cal. 532; *Tilden v. Sacramento Co.*, 41 Cal. 68; *People v. Pratt*, 28 Cal. 166; *Cariaga v. Dryden*, 29 Cal. 307;

If a discretion is abused and made to work injustice, it may be controlled by mandamus.¹

c. When Duties Are Purely Ministerial.—Mandamus lies to compel performance of duties purely ministerial in their nature, and so clear and specific as not to call for the exercise of any discretion in their performance.² It is specially applicable to subordi-

Sprague v. Fawcett, 53 Cal. 408; Berryman v. Perkins, 55 Cal. 483; Cosner v. Colusa Co., 58 Cal. 274; Magee v. Sup. Calaveras Co., 10 Cal. 376; San Francisco Gas Co. v. Supervisors, 11 Cal. 43; Draper v. Noteware, 7 Cal. 278; Union Colony v. Elliott, 5 Cal. 371; Com. v. Park, 32 Leg. Int. (Pa.) 412; s. c., 2 W. N. C. (Pa.) 124; Com. v. Pittsburgh, 22 Pitts. L. J. (Pa.) 149; *Ex parte* School Directors of Manheim, 5 Clark (Pa.) 400; Miller v. Canal Commrs., 21 Pa. St. 23; Com. v. Mitchell, 2 P. & W. (Pa.) 517; Republica v. Guardians of the Poor, 2 Dall. (Pa.) 224; s. c., 1 Yeates (Pa.) 476.

1. Village of Glencoe v. People, 78 Ill. 382; Moody v. Fleming, 4 Ga. 115; s. c. 48 Am. Dec. 210; Com. v. Boone Co. Court, 82 Ky. 632; State v. Megown, 89 Mo. 156; People v. Perry, 13 Barb. (N. Y.) 206; Gray v. Bridge, 11 Pick. (Mass.) 189.

Mandamus will not lie to control the judgment or discretion of an inferior court; for this in effect would be to substitute the opinion of the superior for that of the inferior court. Barksdale v. Cobb, 16 Ga. 13; High on Extr. Leg. Rem., §§ 171, 176, 156; Randall, Petitioner, 11 Allen (Mass.) 474; People v. Montgomery, 18 Wend. (N. Y.) 633; People v. Onondaga Common Pleas, 8 Wend. (N. Y.) 509; Gilbert v. Judges of Niagara, 3 Cow. (N. Y.) 59; *Ex parte* Basset, 2 Cow. (N. Y.) 458; *Ex parte* Johnson, 3 Cow. (N. Y.) 371; *Ex parte* Bacon, 6 Cow. (N. Y.) 392; *Ex parte* Benson, 7 Cow. (N. Y.) 363; *Ex parte* Koon, 1 Den. (N. Y.) 644; People v. Supervisors of New York, 1 Hill (N. Y.) 362; Hutchinson v. Commrs. of the Canal Fund, 25 Wend. (N. Y.) 692; People v. Superior Court, 19 Wend. (N. Y.) 701; People v. New York Common Pleas, 19 Wend. (N. Y.) 113; People v. Judges of Chautauque, 1 Wend. (N. Y.) 73.

In State v. Kendall, 15 Neb. 262, LAKE, Ch. J., said: "Though courts may require inferior tribunals to exercise judgment given them, or to proceed to the discharge of any of their

functions, they cannot control judicial discretion."

The supreme court will not control the discretion of the court below only in cases where there is a refusal to exercise it or a flagrant abuse of it. Moody v. Fleming, 4 Ga. 115; s. c., 48 Am. Dec. 210; Harwell v. Armstrong, 11 Ga. 329; Loyless v. Howell, 15 Ga. 556.

A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and however erroneous its decision may be, it cannot be compelled by mandamus to alter its determination. Hoole v. Kinkead, 16 Nev. 217.

Mandamus will not lie to control the discretion vested in a public board. Com. v. Mitchell, 2 P. & W. (Pa.) 517; Republica v. Guardians of the Poor, 2 Dall. (Pa.) 224; s. c., 1 Yeates (Pa.) 476; Miller v. Canal Commrs., 21 Pa. St. 23; Com. v. Park, 32 Leg. Int. (Pa.) 412; s. c., 2 W. N. C. (Pa.) 124; Com. v. Pittsburgh, 22 Pitts. L. J. (Pa.) 149; *Ex parte* School Directors of Manheim, 5 Clark (Pa.) 400.

2. Secretary v. McGarrahan, 9 Wall. (U. S.) 208; U. S. v. Lawrence, 3 Dall. (U. S.) 42; U. S. v. Spurz, 102 U. S. 407; Kendall v. United States, 12 U. S. 54; Decatur v. Paulding, 14 Pet. (U. S.) 497; Kendall v. Stokes, 3 How. (U. S.) 87; Commrs. of Patents v. Whiteley, 4 Wall. (U. S.) 522; *Ex parte* Davenport, 6 Pet. (U. S.) 661; Poultney v. Lafayette, 12 Pet. (U. S.) 472; *Ex parte* Many, 14 How. (U. S.) 24; U. S. v. Boutwell, 3 McArthur (U. S.) 172; U. S. v. Key, 3 McArthur (U. S.) 337; *Ex parte* Selma etc. R. Co., 46 Ala. 423; *Ex parte* Banks, 28 Ala. 28; Hamilton v. Tutt, 65 Cal. 57; Union Colony v. Elliott, 5 Colo. 371; Mayor v. Morgan, 7 Mart., N. S. (La.) 1; s. c., 18 Am. Dec. 232; State Board of Liquidators, 23 La. An. 388; State v. Shaw, 23 La. An. 790; State v. Police Jury, 29 La. An. 146;

nate judicial tribunals requiring them to exercise their judicial functions by rendering some judgment in cases legally before them, where there would be a failure of justice from a delay or refusal to act.¹

Mandamus should not be issued, as a general rule, in cases where the right of the relator depends upon holding an act of the

Braconier v. Packard, 136 Mass. 50; Burns v. Bender, 36 Mich. 195; Buchoz v. Pray, 37 Mich. 512; Martin v. Ingham, 38 Kan. 641; State v. Judges of Salem Pleas, 4 Halst. (N. Y.) 246; Dawson v. Thurston, 2 Hen. & M. (Va.) 132; Manus v. Given, 7 Leigh (Va.) 689. *Re Woffenden*, 1 Ariz. 237; State v. Burgoyne, 7 Ohio St. 153; State v. Lafayette County Court, 41 Mo. 222; s. c., 41 Mo. 545; State v. Howard Co. Court, 41 Mo. 247; State v. Texas Co. Court, 44 Mo. 230; Chicago R. Co. v. Wilson, 17 Ill. 128; Com. v. Court of Sessions, 2 Pick. (Mass.) 414; Beck v. Johnson, 43 Mo. 117; Boone Co. v. Todd, 3 Mo. 140 (2nd ed. 103); Houghton Co. v. Attorney General, 36 Mich. 271; Randolph v. Stanaker, 13 Gratt. (Va.) 533; State v. Ames, 31 Minn. 440; State v. Secretary of State, 33 Mo. 293; Swan v. Gray, 44 Miss. 393; State v. Hudson, 13 Mo. App. 61; Judges of Oneida C. P. v. People, 18 Wend. (N. Y.) 79; People v. Judges, 21 Wend. (N. Y.) 20; People v. New York C. P., 19 Wend. (N. Y.) 113; *Ex parte* Bacon, 6 Cow. (N. Y.) 392; *Ex parte* Benson, 7 Cow. (N. Y.) 263; Howland v. Eldredge, 43 N. Y. 457; People v. Board of Police, 19 N. Y. 188; s. c., 26 Barb. (N. Y.) 481; *Ex parte* Black, 1 Ohio St. 30; Runkle v. Com., 97 Pa. St. 328; Citizens' Bank of Steubenville v. Wright, 6 Ohio St. 318; Johnson v. Campbell, 39 Tex. 83; Morley v. Power, 5 Lea (Tenn.) 691; Queen v. Old Hall, 10 Ad. & E. 248; Queen v. Harland, 8 Ad. & E. 826; King v. Justices of Cambridge, 1 Dowl. & R. 325; Madison Co. Court v. Alexander, 1 Miss. 523; Cuthbert v. Lewis, 6 Ala. 262; Manor v. McCall, 5 Ga. 522; Com. v. Bunn, 71 Pa. St. 405; Com. v. Justices, 2 Va. Cas. 499; D'Arcy v. Judge of Fourth District Ct. of Orleans, 25 La. An. 622; State v. Bordelon, 6 La. An. 68; Hommerich v. Hunter, 14 La. An. 225; Ney v. Richard, 15 La. An. 603; Dubordieu v. Butler, 49 Cal. 522; Attorney General v. City Council of Lawrence, 111 Mass. 90; School District v. McKenzie, 30 Mich. 353; Commonwealth v. Justices of Fairfax Co., 2 Va. Cas. 9; Madison

Co. Court v. Alexander, 1 Miss. 523; State v. Texas Co. Court, 44 Mo. 230; State v. Robinson, 1 Kan. 188; State v. Demaree, 80 Ind. 519; Ottawa v. People, 48 Ill. 233; Barksdale v. Cobb, 16 Ga. 13; Freeman v. Selectmen of New Haven, 34 Conn. 406; People v. Sexton, 37 Cal. 532; School Directors v. Anderson, 45 Pa. St. 388; People v. Grand Co. Commrs., 6 Colo. 202; Danville v. Blackwell, 80 Va. 38; Williams v. Saunders, 5 Coldw. (Tenn.) 60; State v. County Judge, 7 Clarke (Iowa) 186; State v. Bailey, 7 Clarke (Iowa) 390; Magruder v. Swann, 25 Md. 173; United States v. Guthrie, 17 How. (U. S.) 284; Postmaster Gen. v. Trigg, 11 Pet. (U. S.) 173; Jack v. Moore, 66 Ala. 184.

In *State v. Kendall*, 15 Neb. 262, LAKE, Ch. J., said: "The only acts which courts can rightfully control by this writ are such as are purely ministerial, and with which nothing like judgment or discretion is connected," *citing* U. S. v. Seaman, 17 How. (U. S.) 225; U. S. v. Guthrie, 17 How. (U. S.) 284; State v. Governor, 22 Wis. 110; People v. Contracting Board, 27 N. Y. 378.

Ministerial Duty Defined.—A ministerial duty on the part of a public officer, the discharge of which may be compelled by mandamus is some duty imposed expressly by law, not by contract, or which arises necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative. *State, Charleston C. & C. R. Co. v. Whitesides*, 30 S. Car. 579.

1. *Kleiber v. McManus*, 66 Tex. 48; *People v. Swift*, 59 Mich. 529; *Morgan v. Fleming*, 24 W. Va. 186; *Pettigrew v. Washington Co.*, 43 Ark. 33; *Fredrick v. Mecosta Co. Circuit Judge*, 52 Mich. 529; *State v. Whittett*, 61 Wis. 351; *Com. v. Hampden*, 2 Pick. (Mass.) 414; *Springfield v. Hampden*, 4 Pick. (Mass.) 68; *Strong v. Petitioner*, 20 Pick. (Mass.) 484; *Johnson v. Randall*, 7 Mass. 340; *Nelson v. Justices*, 1 Coldw. (Tenn.) 207; *State v. Justice, Dudley (Ga.)* 37; *Carpenter v. Bristol Commrs.*, 21 Pick. Mass.) 258; *People v. Judge*, 1 Mich. 359.

legislature unconstitutional.¹ Or where the facts are of a character to establish a want of jurisdiction.² Nor will it lie to compel a person to undo an act which the law has compelled him to do, and he has done.³ So it will not issue to compel one to do that which he has been enjoined from doing.⁴ Nor will it issue to compel the performance of a mere service.⁵

The writ contemplates the necessity of indicating the precise thing to be done; it is not adapted to cases calling for continuous action, varying according to circumstances.⁶ And it may issue in all actions when it is a proper remedy, except in replevin, detinue, and actions for the recovery of real property.⁷ But it cannot be made to answer the office of a plea to a pending suit, nor of an action at law to recover specific property, or for the abuse of process.⁸ So mandamus should never be issued on the mere consent of the parties. Consent in such cases creates the presumption of fraud, and, when unsupported by evidence, cannot form the basis of a valid judgment.⁹

4. Statutory Remedy.—Where the statute provides a plain, speedy and adequate remedy, mandamus will not be awarded.¹⁰

1. *People v. Stephens*, 2 Abb. (N. Y.) Pr. N. S. 348; *Hall v. Supervisors*, 20 Cal. 591.

On a summary hearing, on a petition for a mandamus, the court will not decide the constitutionality of a law involving the interests of third persons. *Smyth v. Titcomb*, 31 Me. 272.

2. *People v. Commrs. etc. of Seward*, 27 Barb. (N. Y.) 94.

3. *Maxwell v. Burton*, 2 Utah 595; *Rice, Barton etc. Machine Co. v. Worcester*, 130 Mass. 575; *Deane v. Greene County Supervisors*, 66 How. (N. Y.) Pr. 461; *State v. Matley*, 17 Neb. 564. See *State v. Hanna*, 97 Ind. 469; *State v. Internal Improvement Fund Trustees*, 20 Fla. 402; *Smithee v. Mosely*, 31 Ark. 425.

Mandamus will not lie to compel the division and allotment of a fund already divided and allotted. *Spiritual Atheneum Society v. Randolph*, 58 Vt. 192.

4. *People v. Ulster County Supervisors*, 30 Hun (N. Y.) 146. Compare *Clews v. County of Lee*, 2 Woods 474; *Smith v. Commrs. etc.*, 2 Woods 596.

5. *Bailey v. Oviatt*, 46 Vt. 627.

6. *Diamond Match Co. v. Powers*, 51 Mich. 145.

No relief will be given save that asked for specifically. *School District v. Lauderbaugh*, 80 Mo. 190.

A writ of mandamus ordering town authorities to pay certain warrants, or levy a tax for that purpose, is improper. The command should be limited to one

of the requirements. *State v. Trustees etc.*, 61 Mo. 155.

7. *Brown v. Crego*, 29 Iowa 322.

8. *Murphy v. State*, 59 Ala. 639.

9. *State v. Burbank*, 22 La. An. 379.

10. *Fogle v. Gregg*, 26 Ind. 345; *Louisville etc. R. Co. v. State*, 25 Ind. 177; *State v. Supervisors of Sheboygan*, 29 Wis. 79; *Com. v. Mifflintown*, 2 Leg. Gaz. (Pa.) 75; *Com. v. Clark*, 6 Phila. (Pa.) 498; *Yuengling v. County Commrs.*, 2 Leg. Chron. (Pa.) 350; *Justices v. Munday*, 2 Leigh (Va.) 165; *Louisville etc. R. Co. v. State*, 25 Ind. 177; *Marshall v. Sloan*, 35 Iowa 445; *State v. Baltimore Co. Commrs.*, 46 Md. 621; *Ex parte Mackey*, 15 S. Car. 322; *Board of Commrs. v. Hicks*, 2 Ind. 527; *Pickell v. Owen*, 66 Iowa 485; *State v. Rightor*, 36 La. An. 200; *Territory v. Cavanaugh*, 3 Dak. 325; *People v. State Ins. Co.*, 19 Mich. 392. Compare *Winters v. Burford*, 6 Coldw. (Tenn.) 328.

Certain territory, which geographically belonged to the district township of P, having been attached to the independent district of E by the concurrent action of the two boards, two-thirds of the electors residing therein united in a petition for its restoration. The board of P granted and that of E refused the prayer of the petition. Code Iowa, § 1798, provides that such territory *shall*, upon such petition, be restored to the township to which it geographically belongs by the concurrent action of the boards of directors of the respective

The mere fact that the statute provides a remedy does not, however, supersede the remedy by mandamus. The relator must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject matter of his application; and if it be doubtful whether such statutory remedy will afford him a complete remedy, the writ should issue.¹

5. Statutory Rights.—Mandamus lies to enforce rights given by statute.² But not to compel a ministerial officer to perform an act in execution of a statute which is void.³

6. Equitable Relief.—Where the right is clear and specific and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose of enforcing specific relief. It is the inadequacy and not the mere absence of all other legal remedies and the danger of a failure of justice without it that must usually determine the propriety of this writ, and it is not excluded by other legal remedies which are not adequate to secure the specific relief needed nor by the existence of a specific remedy in equity.⁴

But where the relators have resorted to a court of chancery in such a manner as gives to that court full jurisdiction to adjust and enforce the rights of all the parties interested in the controversy it will be improper for the appellate court, on an application

districts. *Held*, that the remedy of the petitioners was fixed by Code Iowa, § 1829, and was by appeal to the county superintendent, and not by mandamus. *Barnett v. Independent Dist. of Earlham*, 73 Iowa 134.

1. *Freemont v. Crippen*, 10 Cal. 211; *State v. Wright*, 10 Nev. 167; *Etheridge v. Hall*, 7 Port. (Ala.) 47; *In re Trustees of Williamsburgh*, 1 Barb. (N. Y.) 34; *Babcock v. Goodrich*, 47 Cal. 488; *People v. State Treasurer*, 24 Mich. 469.

By a remedy at law such as will operate as a bar to mandamus is understood such a remedy as will enforce a right or the performance of a duty, and unless it reaches the end intended and actually compels a performance of the duty in question, it is not an adequate remedy within the meaning of the rule. *High on Extraordinary L. Rem.*, § 17; *Overseers of Porter Twp. v. Overseers of Jersey Shore*, 82 Pa. St. 275.

Mandamus will not lie to compel a public officer to do an act not clearly commanded by law. *Puckett v. White*, 22 Tex. 559. Or against an officer where the object is not to compel him to do what the statute orders him to do, but to compel him to do what it is claimed the statute ought to order him

to do, in pursuance of a previous contract with the State, as that would be to sue the State on its contracts. *Marshall v. Clark*, 22 Tex. 23.

2. *Golden Canal Co. v. Bright*, 6 Colo. 144; *People v. Westford*, 53 Barb. (N. Y.) 555. See *Morse v. Williamson*, 35 Barb. (N. Y.) 472.

When a statute imposes a specific duty, either in express terms or by a fair and reasonable implication, and there is no other specific and adequate remedy, a mandamus may be awarded to compel the performance of the duty. *People v. State Ins. Co.*, 19 Mich. 392. *Compare Winters v. Burford*, 6 Coldw. (Tenn.) 328.

A mandamus, sought against an officer on the ground of a statutory duty, must be to compel the very duty enjoined by the statute. Under a statute requiring a board to provide a dwelling for servants, a mandamus does not lie to compel them to repay a servant rent he has paid during their neglect to provide a dwelling. *People v. Commrs. of Emigration*, 22 How. (N. Y.) Pr. 291.

3. *State v. Tappan*, 29 Wis. 664; *State v. Mayor etc.*, 43 N. J. L. 542.

4. *La Grange v. State Treasurer*, 24 Mich. 469; *People v. New York*, 10 Wend. (N. Y.) 395; *People v. State*

for mandamus, to undertake to settle the questions involved in that suit in the mode desired.¹ The proceeding in equity must, however, afford as effectual a remedy as that by mandamus.²

But a chancery decree will not be set aside on a mere motion, and if so set aside mandamus lies to vacate the action, but without prejudice to the right which any party may have had to proceed in a regular way.³

7. Remedy by Indictment.—A remedy by criminal prosecution or an action on the case for neglect of duty will not supersede that by mandamus, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual.⁴

Treasurer, 23 Mich. 499; Klokke v. Stanley, 109 Ill. 192; Tawas etc. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

In *People v. New York*, 10 Wend. (N. Y.) 375, NELSON, J., said: "The proposition is, I believe, universally true that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice. By legal remedy is meant a remedy at law, and though the party might seek redress in chancery, that, of itself, is not a conclusive objection to the application. That may and should influence the court in the exercise of the discretion which they possess granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction. Nor does the fact that the party is liable to indictment and punishment of his omission to do the act, to compel a performance of which this writ is sought, constitute any objection to the granting of the writ. The principle which seems to lie at the foundation of applications for this writ and the use of it is that, whenever a legal right exists, the party is entitled to a legal remedy, and when all others fail the aid of this may be invoked." And see *Com. v. Commrs. of Allegheny*, 32 Pa. St. 218.

1. *People v. Warfield*, 20 Ill. 164; *School Inspectors of Peoria v. People*, 20 Ill. 531; *People v. Salomon*, 46 Ill. 419; *People v. Wiant*, 48 Ill. 264; *Queen v. Pitt*, 10 Ad. & E. 272; *Hardcastle v. Maryland etc. R. Co.*, 32 Md. 32; *King v. Wheeler*, Lee's Ca. temp. H. 99.

Where a bill in chancery has been filed and is still pending, on the trial of which the question whether fraudulent votes were cast and carried, the question of removal of a county seat is

necessarily involved, and the court has competent jurisdiction to correct the vote and settle the question; the supreme court of Illinois will not determine the question as to which point is the county seat on an application for a writ of mandamus, but will leave the circuit court to determine the question in the chancery suit. *People v. Wiant*, 48 Ill. 264.

2. Upon the application of the commissioners of the South Park in Chicago for a mandamus to compel the county clerk of Cook county to receive and file an estimate made by the commissioners of the amount of money required for park purposes, and to place that amount in the proper tax warrants to be collected from the payers of the district as provided in an act of the legislature on that subject, it was held that the writ of mandamus ought to be awarded, notwithstanding the pendency of a suit in chancery, by which the county clerk and the commissioners were sought to be enjoined at the instance of a property owner interested from doing the same act which it was sought by the writ of mandamus to have done. The chancery suit would be final only as between the immediate parties to it, and a decree would not bar a suit of the same nature by each property owner, and thus the commissioners might be delayed indefinitely in the performance of their duties. So it was considered more complete justice could be done by means of the writ of mandamus, and it was awarded. *People v. Salomon*, 51 Ill. 37.

3. *York v. Ingham*, 57 Mich. 421.

4. *Fremont v. Crippen*, 10 Cal. 215; *In re Trenton Water Power Co.*, Spen. (N. J.) 659; *King v. Severn & Wye R. Co.*, 2 Barn. & Ald. 644; *Queen v. Eastern Counties R. Co.*, 10 Ad. & E.

8. Enforcement of Contracts.—The superior court has no jurisdiction by mandamus to compel the performance of executory contracts.¹ It is an appropriate remedy to compel public officers to perform specific duties imposed by law; but the duties to be coerced arising out of a contract require time for its performance, and must of necessity involve in some degree the exercise of discretion, or, what is the same thing, judgment in the management of the business to which the contract refers.² It is only practicable by mandamus to compel the performance of specific acts where the duty to discharge them is clear and well defined, and when no element of discretion is involved in the performance.³

9 Unliquidated Damages.—Mandamus will not lie to compel the payment of unliquidated damages.⁴

10. Useless and Unlawful Acts.—It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it will prove unavailing. And whenever it is apparent to the court that the object sought is impossible of attainment, either through want of power on the part of the persons against whom the extraordinary jurisdiction of the court is invoked, or for other sufficient cause, or that the granting of the writ would necessarily be, fruitless, the court will refuse to interfere. It must, in other words, be fatal to every such application, where the uncontested facts show, satisfactorily and clearly, that it is practically not within the power of the respondent to perform the act required. The solemn mandate of a court of justice should never be invoked to an end that is obviously useless.⁵

531; *R. v. Rayn*, 6 A. & E. 400. Compare *R. v. Commrs. of Dean Enclosure*, 2 M. & S. 85; *R. v. Severn & Wye R. Co.*, 2 B. & Ald. 646. See *R. v. Bristol*, 6 T. R. 168.

A mandamus lies where there is no other remedy at law, and it is no objection to the granting of it that the party asking the aid of such process may resort to a court of equity, or that the adversary may be punished criminally for omitting to do the act to compel the performance of which the mandamus is asked for. *People v. New York*, 10 Wend. (N. Y.) 393.

1. *State v. New Orleans & Carrollton R. Co.*, 37 La. An. 589; *People v. Dulaney*, 96 Ill. 504; *Benson v. Paull* 6 El. & Bl. 273; *Parrott v. Bridgeport* 44 Conn. 180; *Bailey v. Oviatt*, 46 Vt 627; *State v. Zanesville etc. Turnpike Co.*, 16 Ohio St. 308; *State v. Howard Co. Court*, 39 Mo. 375; *State v. Republican River Bridge Co.*, 20 Kan. 404; *State v. New Orleans etc. R. Co.*, 37 La. An. 589; *State v. Republican River Bridge Co.*, 20 Kan. 404; *Wyckoff v. Farlee*, 13 N. J. L. (1 Green) 261.

A mandamus proceeding being an action at law in Illinois, when it is made to appear that the petitioners seeking thereby to enforce a contract are only a part of the firm with which the contract is made, relief will be denied. *Dement v. Rokker* (Ill.), 19 N. East. Rep. 33.

2. *People v. Dulaney*, 96 Ill. 504.

3. *People v. Ketchum*, 72 Ill. 212; *Belcher v. Treat*, 61 Me. 577; *Sherburne v. Horn*, 45 Mich. 160; *People v. Hatch*, 33 Ill. 134; *People v. Guryea*, 16 Ill. 547.

4. *Governor v. Justices etc.*, 19 Ga. 97.

5. *Cook v. Candee*, 52 Ala. 109; *Clark v. Crane*, 57 Cal. 629; *Lamar v. Wilkins*, 28 Ark. 34; *Roberts v. Smith*, 63 Ga. 213; *People v. Dulaney*, 96 Ill. 503; *Cristman v. Peck*, 90 Ill. 150; *People v. Chicago etc. R. Co.*, 55 Ill. 95; *Price v. Walker*, 44 Iowa 458; *Bassett v. School Directors*, 9 La. An. 513; *Williams v. County Commrs.*, 35 Me. 345; *Woodbury v. County Commrs.*, 40 Me. 304; *State v. Vanarsdale*, 42 N. J. L. 536; *State v. Hoboken*, 40 N. J. L.

Thus it will not issue to command an act restrained by an injunctive order.¹ Nor will it issue to compel the performance of an act which respondent has expressed his willingness to do.²

11. Omissions of Duty.—To justify the issuance of the writ to enforce the performance of an act by a public officer, two things must concur; the act must be one the performance of which the law specially enjoins as a duty resulting from an office and an actual omission on the part of the respondent to perform it. It is incumbent on the relator to show not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application.³

152; *People v. Supervisors of Westchester*, 15 Barb. (N. Y.) 607; *Colonial etc. Co. v. Supervisors of N. Y.*, 24 Barb. (N. Y.) 166; *People v. Tremain*, 17 How. (N. Y.) Pr. 142; *People v. Dutchess etc. R. Co.*, 58 N. Y. 153; *Universalist Church v. Trustees*, 6 Ohio 445; s. c., 27 Am. Dec. 267; *Lacoste v. Duffy*, 49 Tex. 767; s. c., 30 Am. Rep. 122; *State v. Perrine*, 5 Vroom (N. J.) 254; *People v. Hayt*, 66 N. Y. 666; *Milwaukee Malt Extract Co. v. Chicago etc. R. Co.*, 73 Iowa 98; *People v. Tremain*, 29 Barb. (N. Y.) 96; *Com. v. Supervisors*, 29 Pa. St. 121; *State v. Comptroller General*, 4 Rich. N. S. 185; *O'Hara v. Powell*, 80 N. Car. 103; *In re Bristol & N. S. R. Co.*, 3 Q. B. D. 10; *Queen v. Norwich Savings Bank*, 9 Ad. & E. 729. See *State v. City of New Orleans*, 34 La. An. 469; *State v. Bowden*, 18 Fla. 17; *Ex parte Shandies*, 66 Ala. 134; *Ex parte Du Bose*, 54 Ala. 278; *State v. Hoboken*, N. J. L. 152; *Bail v. Lappins*, 3 Oreg. 55; *People v. Commrs. of Emigration*, 27 Barb. (N. Y.) 562; *De Haas v. Newaygo Circuit Judge*, 46 Mich. 12; *Gruener v. Moore County Judge*, 6 Colo. 526; *State v. Kispert*, 21 Wis. 387; *People v. Miller*, 39 Hun (N. Y.) 557; *Ackerman v. Desha County*, 27 Ark. 457; *State v. Perrine*, 34 N. J. L. 254; *Springfield v. Highway Commrs. of Hampden*, 6 Pick. (Mass.) 501; *Gillespie v. Wood*, 4 Humph. (Tenn.) 437.

A writ of mandamus will not be awarded for the performance of an act which for any reason has become unlawful to be performed. So the writ will not be allowed to compel the village authorities to make special assessments to pay judgments of condemnation when more than five years have elapsed after dismissal of the proceedings. *People v. Hyde Park*, 117 Ill. 462.

Where a collector is required by law to pay all taxes collected by him into the state or a county treasury, an order of an inferior tribunal requiring him to pay taxes over to a particular person not the treasurer is without authority of law, and a mandamus will not be awarded to enforce it, although itself final until reversed. *Ross v. Lane*, 3 Smed. & M. (Miss.) 695.

1. *State v. Kispert*, 21 Wis. 387; *Ohio & Indiana R. Co. v. Commrs.*, 7 Ohio St. 278; *Ex parte Fleming*, 4 Hill. 581. Compare *State v. Dubuclet*, 26 La. An. 127.

2. *People v. Dulaney*, 96 Ill. 503.

3. *State v. Gracey*, 11 Nev. 233; *State v. Carney*, 3 Kan. 88; *State v. Dubuclet*, 24 La. An. 16; *State v. Burbank*, 22 La. An. 298; *Commrs. of Pub. Sch. v. Co. Commrs. of A Co.*, 20 Md. 449.

It is contrary to the policy of the law that mandamus should issue, where its sole purpose and effect is to relieve the party seeking it from the consequences of his own mistakes or omissions. *Klokke v. Stanley*, 109 Ill. 192.

When it is shown, *prima facie*, that from error or omission of duty the judge of an inferior tribunal has denied an order essential to a speedy execution of its decrees or judgments, a rule *nisi* will be awarded, and, on the return of the rule, if no good cause is shown why it was refused, a peremptory mandamus will be awarded. *Ex parte Sebert*, 67 Ala. 349.

Mandamus will not be granted in anticipation of a defect of duty or error in conduct. *Commrs. of Pub. Sch. v. Co. Commrs. of A County*, 20 Md. 449; *State v. Rising*, 15 Nev. 164.

But in *Atty. Gen. v. Boston*, 123 Mass. 460, it is held that when the officers against whom the writ is sought have clearly manifested a determina-

12. Demand and Refusal.—The general rule is admitted to be that a demand and refusal is necessary.¹ Previous to the making of the application to the court for the writ to command the performance of a particular act, an express and distinct command or request to perform it must be made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied, it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the court for the purpose of compelling him.² This is true as a general rule, and it is more especially true where the proceeding has relation to private rights or interests. But it is manifest that there are cases affecting public officers or duties when the idea of a literal demand and refusal does not have place, there being no one particularly empowered to demand, as it does not affect individual interests, but the law—the official duty—is in the place of it, and omission or neglect is refusal.³ And especially is this true when

tion to disregard their duty by refusing to perform the act in question, the court is not obliged to wait until the evil is done before granting relief. See also *Brunswick v. Duve*, 59 Ga. 803.

1. *State v. Adams*, 19 Nev. 370; *Crandall v. Amador Co.*, 20 Cal. 72; *Jefferson Co. v. Arrghi*, 51 Miss. 667; *R. v. Bristol R. Co.*, 4 Q. B. 162; *R. v. Frost*, 8 A. & E. 822; *R. v. Brecknock Canal Navigation*, 3 A. & E. 217; *R. v. Stoke Damarel*, 5 A. & E. 584; *R. v. Wilts & Berks Canal Nav.*, 3 A. & E. 477; *R. v. Priors Ditton Inclosure Co.*, 4 Jur. 103; *R. v. Trustees of Cheadle Highway*, 7 Jur. 373; *Ex parte Winfield*, 3 A. & E. 614; *State Bd. of Education v. West Point*, 50 Miss. 646; *State v. Schaack*, 28 Minn. 358; *State v. Slick*, 86 Ind. 501; *Coit v. Elliott*, 28 Ark. 294; *State v. York Co. School District*, 8 Neb. 92; *State v. Ramsey*, 8 Neb. 286; *Le Roux v. Bay Circuit Judge*, 45 Mich. 416; *In re Whitney*, 3 N. Y. Supp. 838; *State v. Gibbs*, 13 Fla. 55; *Payne v. Perkerson*, 56 Ga. 672.

The writ will not be granted to compel the corporate authorities of a village or other body to do an act it has never been asked to do. The petition should show a demand for performance of the act and a refusal. *People v. Hyde Park*, 117 Ill. 462. See *State v. Cheraw etc. R. Co.*, 16 S. Car. 524; *Welsh v. Wayne Circuit Judge* (Mich.), 43 N. W. Rep. 573. Compare *State v. Cordozo*, 5 S. Car. 297; *Alexander v. McDowell*, 67 N. Car. 330; *State v. Hull*, 17 Minn. 429; *Bryson v. Spauld-*

ing, 20 Kan. 427; *Leonard v. House*, 15 Ga. 473; *Lewis v. Henley*, 2 Ind. 332.

A demand and a refusal to act must precede a request for a writ of mandamus. *People v. Hyde Park*, 117 Ill. 462.

2. *Tap. on Mand.* 382; *Chance v. Temple*, 1 Iowa 189; *Oroville etc. R. Co. v. Plumas Co.*, 37 Cal. 354; *Crandall v. Amador Co.*, 20 Cal. 72; *People v. Romero*, 18 Cal. 90; *Jefferson Co. v. Arrghi*, 51 Miss. 667; *Lee Co. v. State*, 36 Ark. 276; *State v. Schaack*, 28 Minn. 358. But see *Com. v. Commrs. of Allegheny*, 37 Pa. St. 237.

Where a town, when authorized by the legislature, refused to aid in the construction of a railroad, and the prosecutors sought to compel them by mandamus, but omitted to aver that the selectmen of the town had been requested to perform this duty or had refused to perform it, *held*, that a failure to allege the refusal was fatal to the application. *Douglas v. Chatham*, 41 Conn. 211.

3. *State v. County Judge*, 7 Iowa 186; *Com. v. Commrs. of Allegheny*, 37 Pa. St. 237; *Atty. Gen. v. Boston*, 123 Mass. 460; *State v. Bailey*, 7 Iowa 390; *Chumaseo v. Potts*, 2 Mont. 242.

In a proceeding by mandamus to compel defendants to levy a tax for the payment of a judgment against the town of Algona, no demand was shown to have been made upon defendants to levy the tax, but the record clearly showed an intention upon their

the respondent has done an act which he calls a performance but which the law says is not such.¹

And where the duty may be performed by either of two individuals it must be shown that there has been a refusal on the part of each.² The refusal must be either in direct terms or by conduct from which a refusal can be conclusively implied. It is not necessary that the word refuse or any equivalent of it should be used, but there should be enough from the whole of the facts to show to the court that for some improper reason compliance is withheld, and a distinct determination not to do what is required.³

13. Laches.—When the demands for which mandamus is sought have become stale, public policy is against extending the remedy to such cases.⁴ The writ will not issue after an action is barred by statute, where the delay is unexplained.⁵

14. Notice.—Mandamus will not issue without notice in some form to the defendant or a waiver of notice by appeal.⁶ So a judgment rendered against a party in his absence without legal notice will be set aside by mandamus.⁷

part not to levy the tax. *Held*, that where the record clearly discloses an intention upon the part of the respondents not to perform the act required it was not necessary that a demand should be made. *Palmer v. Stacy*, 44 Iowa 340.

1. *State v. County Judge*, 7 Iowa 186.

2. *R. v. Bishop of London*, 13 East 419.

3. *State v. County Judge*, 7 Iowa 186.

4. *State v. Paterson*, Newark etc. R. Co., 43 N. J. L. 505; *Walcott v. Mayor*, 51 Mich. 249; *Smith v. Eaton Co.*, 56 Mich. 217; *Chinn v. Trustees etc.*, 82 Ill. 236. See *State v. Jennings*, 48 Wis. 549; *People v. French*, 12 Abb. (N. Y.) N. Cas. 156; *Gray v. Saginaw Circuit Judge*, 49 Mich. 628; *True v. Melvin*, 43 N. H. 503; *State v. Parish Judge of Iberville*, 29 La. An. 809; *Mitchell v. Boardman (Me.)*, 10 Atl. Rep. 452.

An applicant for mandamus should exercise due diligence. *Territory v. Potts*, 3 Mont. 364; *Coit v. Elliott*, 28 Ark. 294.

Mandamus to compel the amendment of a judgment for the defendant in replevin so as to require return of the property, was denied where the application was not made until several terms of court after execution had been satisfied, nor until a new judge was elected. *Gray v. Saginaw Circuit*

Judge, 49 Mich. 628. Compare *State v. Cordoza*, 5 S. Car. 297.

In *People v. Seneca Com. Pleas*, 2 Wend. (N. Y.) 264, the delay was only for a year, the supreme court refused the writ. They said: "Here has been a delay of a year since the happening of the errors complained of, and the fact of the party's having been advised that his remedy was by writ of error furnishes no excuse. This court will not by mandamus disturb proceedings in which parties have so long acquiesced."

Mandamus was not allowed to enforce the payment of a claim for salary where the relator first elect to sue in assumpsit but left the action undetermined and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the appellate court. *Walcott v. Mayor*, 51 Mich. 249.

5. *People v. Chapin*, 104 N. Y. 96.

6. *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. Rep. 602; *Waterworks v. Albany Mayor's Court*, 12 Wend. (N. Y.) 292; *Brosius v. Reuter*, 1 Hir. & J. (Md.) 480; *Crumley v. McKinney (Tex.)*, 9 S. W. Rep. 157.

An alternative writ of mandamus may, under Code Civil Proc. N. Y., § 2068, be granted without notice. *People v. Board of Supervisors*, 3 N. Y. Supp. 751.

7. *People v. Bacon*, 18 Mich. 247.

III. AGAINST INFERIOR COURTS—1. Generally.—Superior courts have the general superintending control over all inferior courts of law or equity, in aid of which it can issue, hear and determine writs of mandamus; and this writ may always be issued in the sound legal discretion of the court whenever the failure or refusal of the inferior tribunal to act, in a matter in which its duty to do so is plain, may deprive or bar anyone of a legal or equitable right.¹

2. Discretion of Inferior Courts.—If an inferior tribunal has a discretion and proceeds to exercise it, then its discretion should not be controlled by mandamus,² but if the subordinate public agent,

1. *McCreary v. Rogers*, 35 Ark. 298. *Ex parte King*, 27 Ala. 387; *Ex parte Banks*, 28 Ala. 28; *San Francisco Gas Co. v. Supervisors*, 11 Cal. 43; *Martin v. Ingham*, 38 Kan. 641; *Draper v. Noteware*, 7 Cal. 278; *Fowler v. Pierce*, 2 Cal. 167; *McDougall v. Bell*, 4 Cal. 177; *People v. Sexton*, 24 Cal. 78; *Price v. Sacramento Co.*, 6 Cal. 255; *McCauley v. Brooks*, 16 Cal. 35; *People v. Lake Co.*, 33 Cal. 487; *Lewis v. Barclay*, 35 Cal. 213; *Spinger v. Green*, 46 Cal. 73; *People v. Pratt*, 28 Cal. 166; *Sprague v. Fawcett*, 53 Cal. 408; *Berryman v. Perkins*, 55 Cal. 483; *United States v. Seaman*, 17 How. (U. S.) 225; *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *Castello v. St. Louis Circuit Court*, 28 Mo. 259.

Mandamus is the appropriate remedy to set the machinery of the courts to which it is addressed in motion, but it will not direct the performance of any particular judicial act. *People v. Judge of Wayne Co.*, 1 Mich. 359; *State v. St. Louis Court of Appeals*, 87 Mo. 374; *Roberts v. Holsworth*, 5 Hals. (N. J.) 57; *Queen v. Justices of Middlesex*, 9 Ad. & E. 540; *Sturgis v. Joy*, 2 El. & Bl. 739; *King v. Hewes*, 3 Ad. & E. 725. *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49; *King v. Justices of Suffolk*, 5 Nev. & Mon. 139; *Miltenberger v. St. Louis Co. Court*, 50 Mo. 172; *People v. Russell*, 46 Barb. (N. Y.) 27; *Dickson v. Judge of Second Circuit*, 4 Mo. 286; *Gunn's Admr. v. Pulaski Co.*, 3 Ark. 427; *Beebe v. Judge of Sixth District Court*, 28 La. An. 905; *State v. Judge of Third District Court*, 32 La. An. 800; *Ex parte Loring*, 94 U. S. 418; *Ex parte Flippin*, 94 U. S. 348; *Ex parte Sawyer*, 21 Wall. (U. S.) 235; *Sprague v. Fawcett*, 53 Cal. 408; *State v. Judges of Civil District Court*, 34 La. An. 1114; *Kleiber v. McManus*, 66 Tex. 48; *Union Colony v. Elliott*, 5 Col. 371; *Barksdale v. Cobb*, 16 Ga. 13; *U. S. v. Commrs.*, 5

Wall. (U. S.) 563; *United States v. Shurz*, 102 U. S. 407; *Heilbron v. Tulare County Superior Court*, 72 Cal. 96; *Ex parte Chambers*, 10 Mo. App. 240; *People v. McRoberts*, 100 Ill. 458; *People v. Sexton*, 37 Cal. 532; *Mogan v. Fleming*, 24 W. Va. 186; *Brem v. Arkansas County Court*, 9 Ark. 240. Compare *People v. Pearson*, 1 Scam. (Ill.) 458.

Thus, if the judge of an inferior court captiously refuses to hold a court, he may be compelled to do so; and the rule applies equally to all officers, whether strictly judicial or not, if invested with a discretion. *Warren Co. Court v. Daniel*, 2 Bibb. (Ky.) 573; *Ohio Co. Court v. Newton*, 79 Ky. 267; *Hull v. Supervisors of Oneida*, 19 Johns. (N. Y.) 259; *Com. v. Boone Co. Court*, 82 Ky. 632; *State v. Negowan*, 89 Mo. 156. But mandamus will not lie to command an inferior tribunal to do that which it could not legally do without such mandate. *State v. Judge*, 15 Ala. 740.

2. *Union Colony v. Elliott*, 5 Col. 371; *Freeman v. Selectman of New Haven*, 34 Conn. 406; *Barksdale v. Cobb*, 16 Ga. 13; *Ottawa v. People*, 48 Ill. 233; *State v. Demaree*, 80 Ind. 519; *State v. Robinson*, 1 Kan. 188; *State v. Board of Liquidators*, 23 La. An. 388; *State v. Rightor*, 32 La. An. 1305; *State v. Second District Judge*, 32 La. An. 1306; *State v. Ames*, 31 Minn. 440; *Burns v. Bender*, 36 Mich. 195; *Swan v. Gray*, 44 Miss. 393; *Bracoonier v. Packard*, 136 Mass. 50; *Gilbert v. Judges of Niagara*, 3 Cow. (N. Y.) 59. *Ex parte Bassett*, 2 Cow. (N. Y.) 458; *Ex parte Johnson*, 3 Cow. (N. Y.) 371; *Ex parte Bacon*, 6 Cow. (N. Y.) 392; *People v. Judges*, 1 Wend. (N. Y.) 73; *Ex parte Benson*, 7 Cow. (N. Y.) 363; *People v. Onondaga Common Pleas*, 8 Wend. (N. Y.) 509; *People v. Montgomery Common Pleas*, 18 Wend. (N. Y.) 633; *People v. New*

whether it be invested with both judicial and ministerial functions, or only with the former, refuses to act in any way or entertain a question as to which it has a discretion, and which the law has enjoined upon its consideration, then obedience to the law should be enforced by mandamus and the agent compelled to act, if there is no other legal remedy; but in such a case its discretion or judgment must be left free to act and cannot be controlled in a particular direction.¹

York Common Pleas, 19 Wend. (N. Y.) 113; *Ex parte* Koon, 1 Den. (N. Y.) 644; *People v. Supervisors of New York*, 1 Hill (N. Y.) 362; *Hutchinson v. Commrs. of the Canal Fund*, 25 Wend. (N. Y.) 692; *People v. Superior Court*, 19 Wend. (N. Y.) 701; *Ex parte* Black, 1 Ohio St. 30; *Runkle v. Com.*, 97 Pa. St. 318; *Morley v. Power*, 5 Lea (Tenn.) 691; *State v. Webber* (Minn.) 949; *Judges v. People*, 18 Wend. (N. Y.) 79; *overruling People v. Superior*, 5 Wend. (N. Y.) 114; *Ex parte* Bailly, 2 Cow. (N. Y.) 429; *Ex parte* Nelson, 1 Cow. (N. Y.) 417; *Gilbert v. Judges of Niagara Co.*, 3 Cow. (N. Y.) 59; *Ex parte* Davenport, 6 Pet. (U. S.) 661; *U. S. v. Lawrence*, 3 Dall. (U. S.) 42; *Poultny v. Lafayette*, 12 Pet. (U. S.) 472; *Postmaster General v. Trigg*, 11 Pet. (U. S.) 173; *Ex parte* Railway Co., 101 U. S. 711; *Ex parte* Burtis, 103 U. S. 238; *Ex parte* Many, 14 How. (U. S.) 24; *Ex parte* Taylor, 14 How. (U. S.) 3; *Ex parte* Roberts, 6 Pet. (U. S.) 216; *Ex parte* Montgomery, 24 Ala. 98; *Ex parte* Opdyke, 62 Ala. 68; *Ex parte* Hays, 26 Ark. 510; *Gunn's Admr. v. Pulaski Co.*, 3 Ark. 427; *Ex parte* Henry, 24 Ala. 638; *State v. Van Ness*, 15 Fla. 317; *State v. Norton*, 20 Kan. 506; *State v. Court of Common Pleas*, 38 N. J. L. 182; *Ex parte* Johnson, 25 Ark. 614; *People v. Judge*, 41 Mich. 5; *People v. Judge of Superior Court*, 40 Mich. 169; *People v. St. Joseph Circuit Judge*, 39 Mich. 21; *People v. Marquette Circuit Judge*, 38 Mich. 244; *Taylor v. Osceola Circuit Judge*, 30 Mich. 99; *People v. Judge of Probate*, 16 Mich. 204; *People v. Williams*, 55 Ill. 178; *People v. Wayne Circuit Judge*, 41 Mich. 551; *People v. Montcalm Circuit Judge*, 41 Mich. 550; *Chicago etc. R. Co. v. Genesee Circuit Judge*, 40 Mich. 168.

The subordinate tribunal will be left free to give its best judgment. *State v. St. Louis Court*, 87 Mo. 374; *State v. Lafayette Co. Court*, 41 Mo. 222; *Trainer v. Porter*, 45 Mo. 338. *Ex parte*

Nelson, 1 Cow. (N. Y.) 417; *People v. Ulster Judges*, Coleman 117; *Ex parte* Bostwick, 1 Cow. (N. Y.) 143; *Bank of Columbia v. Sweeny*, 1 Pet. (U. S.) 567; *Moody v. Fleming*, 4 Ga. 115.

And where an inferior jurisdiction, having a discretion, has exercised it, the superior court will not interfere by mandamus. *Ex parte* Bassett, 2 Cow. (N. Y.) 458; *Ex parte* Nelson, 1 Cow. (N. Y.) 417; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *Ex parte* Bailey, 2 Cow. (N. Y.) 479; *Ex parte* Benson, 7 Cow. (N. Y.) 363. Unless it be clearly shown that such discretion has been abused. *Commrs. v. Lynah*, 2 McCord, (S. Car.) 170.

1. *McCreary v. Rogers*, 35 Ark. 298; *Taylor v. Salt Lake County Court*, 2 Utah 405; *Doolittle v. Cabell County Court*, 28 W. Va. 158; *Ex parte* Shandies, 66 Ala. 134; *Ex parte* Mahone, 30 Ala. 49; *Ex parte* Echols, 39 Ala. 698; *Ex parte* Harris, 52 Ala. 87; *Ex parte* Selma etc. R. Co., 46 Ala. 423; *State v. Secretary of State*, 33 Mo. 293; *People v. Collins*, 7 Johns. (N. Y.) 549; *Ex parte* Davenport, 6 Pet. (U. S.) 661; *Citizens' Bank of Steubenville v. Wright*, 6 Ohio St. 318; *People v. Judges*, 21 Wend. (N. Y.) 20; *People v. New York Common Pleas*, 19 Wend. (N. Y.) 113; *Kendall v. U. S.*, 12 Pet. (U. S.) 534; *Ex parte* Benson, 7 Cow. (N. Y.) 363; *Queen v. Old Hall*, 10 Ad. & E. 248; *Queen v. Harland*, 8 Ad. & E. 826; *Ex parte* Bacon, 6 Cow. (N. Y.) 392; *King v. Justices of Cambridgeshire*, 1 Dow. & Ry. 325; *Ex parte* Banks, 28 Ala. 28; *Howland v. Eldredge*, 43 N. Y. 457; *Barksdale v. Cobb*, 16 Ga. 13; *People v. Sexton*, 37 Cal. 532; *People v. Adam*, 3 Mich. 427; *Swan v. Gray* (Mass.), 44 Miss. 393; *State v. Robinson*, 1 Kan. 188; *Freeman v. Selectman of New Haven*, 34 Conn. 406; *Humboldt Co. v. Churchill Co.*, 6 Nev. 30; *Ex parte* Black, 1 Ohio St. 30; *Ottawa v. People*, 48 Ill. 240; *U. S. v. Seaman*, 17 How. (U. S.) 225; *St. Albans v. National Car. Co.*, 57 Vt. 68; *Devine v. Harvie*, 7 T. B. Mon.

The performance of a plain, positive duty may be compelled by mandamus, but where there is a discretion as to the result that may be arrived at, it cannot be controlled.¹ But the discretion of the court, however, to grant or refuse a writ of mandamus is not absolute, but is governed by legal rules, and its exercise is subject to review.² The scope and province of the writ is to prevent a failure of justice from delay or refusal to act when addressed to a court acting judicially.³

Mandamus will not lie to correct the errors of inferior tribunals

(Ky.) 439; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Page v. Hardin*, 8 B. Mon. (Ky.) 648, 651. *Stout v. Hopping*, 17 N. J. L. (2 Harr.) 471; *Ferris v. Munn*, 22 N. J. L. (2 Zab.) 161; *City of Louisville v. Kean*, 18 B. Mon. (Ky.) 161; *Allen v. Calhoun*, 6 Cow. (N. Y.) 32; *People v. Russel*, 1 Abb. (N. Y.) Pr. (N. S.) 230; *People v. Judges*, 2 How. (N. Y.) Pr. 59.

The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law. It lies, however, also to subordinate judicial tribunals, to compel them to act where it is their duty to act, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions. *People ex rel v. Dental Examiners*, 110 Ill. 180; *State v. Rightor*, 32 La. An. 1305; *State v. Second District Judge*, 32 La. An. 1306.

Removal of County Seat.—Mandamus lies to compel the county court to permit the filing of the petition for the removal of a county seat, and to make the necessary order thereon, it being a ministerial duty. *Doolittle v. Cabell County Court*, 28 W. Va. 158.

Granting Habeas Corpus.—The city judge of New York has power to allow a writ of *habeas corpus*; but if he refuses to do so, it being discretionary with him whether to allow it or not, the remedy is not by mandamus. *People v. Russel*, 46 Barb. (N. Y.) 27.

Obedience to habeas corpus. issued by lower court, will not be enforced by mandamus. *People v. Edwards*, 66 Ill. 59.

To Levy a Tax.—Mandamus lies to compel a county court to levy a tax for payment of county bonds. *Shelley v. St. Charles County*, 30 Fed. Rep. 603.

1. *Ex parte Morgan*, 114 U. S. 174; *State v. Williams*, 69 Ala. 311; *Ex parte Redd*, 73 Ala. 548; *People v. Knickerbocker*, 114 Ill. 539; s. c., 55

Am. Rep. 879; *State v. Marshall*, 82 Mo. 484; *Virginia v. Rives*, 100 U. S. 313; *People v. Detroit Superior Court Judge*, 41 Mich. 31; *Ex parte South etc. R. Co.*, 44 Ala. 654; *People v. Detroit Superior Court Judge*, 40 Mich. 169; *Ex parte Denver & Rio Grande R. Co.*, 101 U. S. 711; *Appling v. Bailey*, 44 Ala. 333; *Ex parte Newman*, 14 Wall. 152; *Gunn v. Pulaski County*, 3 Ark. 427; *Ex parte Hutt*, 14 Ark. 368; *Com. v. Judges etc.*, 3 Binn. (Pa.) 273; *Roberts v. Hallsworth*, 10 N. J. L. (5 Halst.) 57; *Lamar v. Marshall*, 21 Ala. 772; *Matter of Pickett*, 20 N. J. L. (1 Spen.) 134; *Pudney v. Burkhardt*, 62 Ind. 179; *Jackson v. Justices of Harrison*, 1 Va. Cas. 314; *Dawson v. Thurston*, 2 Hen. & M. Va. 132; *Manns v. Givens*, 7 Leigh (Va.) 689; *Delaney v. Goddin*, 12 Gratt. (Va.) 266; *People v. Judges of Jackson Circuit Court*, 1 Dougl. (Mich.) 302; *Sedden v. Templeton*, 7 La. An. 126; *Barnet v. Warren Circuit Court, Hard.* (Ky.) 172; *Ex parte Putnam*, 20 Ala. 592; *Platte County Court v. McFarland*, 12 Mo. 166; *Colston v. Dorchester County Court*, 4 Har. & M. (Md.) 283; *Hickman County Court v. Moore*, 2 Bush. (Ky.) 108; *Anonymous*, 7 N. J. L. (2 Halst.) 160; *Ellicott v. Levy Court*, 1 Har. & J. (Md.) 359; *Mallory v. Matlock*, 10 Ala. 595; *Giboney v. Rogers*, 32 Ark. 462; *State v. Seventh District Judge*, 38 La. An. 499.

It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. *Ex parte Flippin*, 94 U. S. 350; *Ex parte Railway Co.*, 101 U. S. 720; *Ex parte Burtis*, 103 U. S. 238.

2. *People v. Chapin*, 104 N. Y. 96. See *State v. Doyle*, 40 Wis. 220.

3. *State St. Louis Court*, 87 Mo. 374; *State v. Judge of Second District Court*, 13 La. An. 89.

by annulling what they have done erroneously.¹ Nor has the court jurisdiction by mandamus to review the decisions of a subordinate court in a matter of which such subordinate court had judicial cognizance.² So if a court has lost jurisdiction by granting an appeal, mandamus does not lie.³ But it lies to compel an inferior court to entertain and try indictments erroneously quashed for want of jurisdiction.⁴ And to hear a proceeding for contempt dismissed for the same cause.⁵

1. *Com. v. Boone Co. Court*, 82 Ky. 632; *State v. Megown*, 89 Mo. 156; *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244; *Judges v. People*, 18 Wend. (N. Y.) 79; *Ex parte Hoyt*, 13 Pet. (U. S.) 279; *Herrington v. Sawyer*, 36 Cal. 289; *King v. Hewes*, 3 Ad. & E. 725; *King v. Justices of Suffolk*, 5 Nev. & Man. 139; *People v. Judges of Dutchess C. P.*, 20 Wend. (N. Y.) 658; *Ex parte Nelson*, 1 Cow. (N. Y.) 417; *Jansen v. Davison*, 2 Johns. (N. Y.) Cas. 72; *People v. Superior Court*, 18 Wend. (N. Y.) 575; *State v. St. Louis*, 87 Mo. 374; *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183; *Potter v. Todd*, 73 Mo. 101; *Young v. Harrison*, 6 Ga. 130. See *People v. Judges of Calhoun Circuit Court*, 1 Dougl. (Mich.) 417.

The United States supreme court will not, by mandamus, compel an inferior court to reverse a decision made in the exercise of its jurisdiction. *Ex parte Perry*, 102 U. S. 183; *Squier v. Gale*, 1 Halst. (N. J.) 157. Compare *Rand v. Townshend*, 29 Vt. 670.

It will not issue commanding a subordinate tribunal to reverse their decision, when they have acted in a judicial capacity upon a question properly brought before them. *Chase v. Blackstone Canal*, 10 Pick. (Mass.) 244; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *Morse, Petitioner*, 18 Pick. (Mass.) 443.

Where a court of common pleas, in New York, authorized a defendant to enter a judgment *nunc pro tunc*, where the plaintiff had died after a report of referees made, in a case where the supreme court would have denied the application for such rule on account of the delay in making it, it was held that a mandamus would not be granted to compel the common pleas to vacate the rule. *Ex parte Koon*, 1 Den. (N. Y.) 644.

On an affidavit, on a motion for a new trial, where there is something upon which the circuit judge is called to exercise his judgment, the question

whether a new trial should be granted is one addressed to his discretion, and the supreme court has no authority to review his conclusion and compel him by mandamus to rescind his order. *People v. Circuit Judge of Branch County*, 17 Mich. 67.

2. *State v. Megown*, 89 Mo. 156; *Com. v. Boone*, 82 Ky. 632; *Manor v. McCall*, 5 Ga. 522; *State v. Williams*, 69 Ala. 311; *Kleiber v. McManus*, 66 Tex. 48; *Strong, Petitioner*, 20 Pick. (Mass.) 484; *Carr v. Bristol Commrs.*, 21 Pick. (Mass.) 258; *State v. Justices, Dudley (Ga.)*, 37; *Satterlee v. Strider*, 31 W. Va. 781; *Ramagnano v. Crook*, 85 Ala. 226; *Shine v. Kentucky C. R. Co.*, 85 Ky. 177; *Com. v. McLaughlin*, 120 Pa. St. 518; *State v. Board of Commrs. (Ind.)*, 21 N. E. Rep. 1097; *State, Johnson v. Rightor*, 40 La. An. 852; *State v. Cramer*, 96 Mo. 75; *Crittenden County Court v. Shanks (Ky.)*, 11 S. W. Rep. 468; *State, Mooney v. Edwards (N. J.)*, 17 Atl. Rep. 973; *Ex parte Trapnell*, 6 Ark. 9; *State v. Judges of the Court of Appeals (La.)*, 6 So. Rep. 804; *State v. King (La.)*, 6 So. Rep. 721; *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244; *County Court v. Round Prairie Township*, 10 Mo. 679.

A writ of mandamus cannot be used to bring up for review a judgment of the United States circuit court on a plea to the jurisdiction. *Held*, accordingly, where the circuit court quashed and vacated a writ of replevin on a plea to the jurisdiction, that as the question might be re-examined by the supreme court on writ of error a petition for mandamus to compel the circuit court to take jurisdiction should be dismissed. *Ex parte Baltimore etc. R. Co.*, 108 U. S. 566.

3. *State v. Lubke*, 15 Mo. App. 152. See *State v. Livsey (Neb.)*, 42 N. W. Rep. 762.

4. *People v. Swift*, 59 Mich. 529.

5. *Temple v. Superior Court*, 70 Cal. 211.

(a) EXERCISE OF JURISDICTION.—By mandamus, inferior courts or magistrates, when they fail or refuse to do so, will be compelled to *entertain and exercise jurisdiction*. They will not be controlled in the *manner of its exercise*, nor directed as to *what judgment* they will render.¹

(b) PLEADING.—The discretion of inferior courts over questions of pleading cannot be interfered with by mandamus.²

(c) JUDGMENTS.—Where a court refuses to make a final disposition of a cause, and insists upon dropping it from the docket, a peremptory writ of mandamus may be had from the supreme court.³ So where in the trial of a cause a verdict is agreed upon by the jury and reduced to writing in due form and brought into court by the jury, it is the duty of the court to receive the verdict and enter judgment, and for a refusal so to do the writ of mandamus is an appropriate remedy, and the only one that affords adequate relief.⁴ So if a judgment has been erroneously entered mandamus will lie upon a seasonable application to change the journal entry thereof accordingly, unless such change will preju-

1. *Ex parte Graves*, 61 Ala. 381; *Floral Springs Water Co. v. Rives*, 14 Nev. 431; *People v. Troy Common Council*, 78 N. Y. 33.

The question whether a court rightfully refused to entertain jurisdiction of a cause may be reviewed in proceedings for a mandamus. * *Beguhl v. Swan*, 39 Cal. 411.

2. *Ex parte Coster*, 7 Cow. (N. Y.) 523; *People v. Judges of Chautauque*, 1 Wend. (N. Y.) 73. See *Arno v. Wayne Circuit Judge*, 42 Mich. 362; *Nederlander v. Jennison*, Judge, 55 Mich. 411.

3. *State v. Cape Girardeau Court*, 72 Mo. 560; *State v. Horner*, 10 Mo. App. 307; *Blackerby v. People*, 10 Ill. (5 Gilm.) 266; *Ex parte Thornton*, 46 Ala. 384.

A mandamus will issue to direct the trial of a case in which the judge has refused to go into the merits of the action on an erroneous construction of same question of practice preliminary to the whole case. *State v. Ellis* (La.), 6 So. Rep. 55.

4. *Munkens v. Watson*, 9 Kan. 669; *Smith v. Moore*, 38 Conn. 105; *State v. Judge Fourth Dis. Ct.*, 28 La. An. 451; *Brooke v. Ewers*, Stra. 113; *Williams v. Saunders*, 5 Coldw. (Tenn.) 60; *State v. Knight*, 46 Mo. 83; *State v. Kinkaid* (Neb.), 37 N. W. Rep. 612; *Fairbanks v. Amoskeag Nat. Bank*, 32 Fed. Rep. 572; *Haight v. Turner*, 2 Johns. (N. Y.) 371; *State v. Williams*, 69 Ala. 311; *Ex parte Bostwick*, 1 Cow. (N. Y.) 143; *People v. Woodman*,

4 N. Y. Supp. 554; *Branford v. Erant*, 1 New Mex. 579; *Blake v. Boggs*, 1 Mo. 116; *Kerr v. Rector*, 1 Mo. 117.

Mandamus is the proper remedy to procure an entry of judgment on the verdict, where the court has granted a new trial without having the power to do so. *State v. Adams*, 12 Mo. App. 436.

But not where the proceedings in the case were irregular. *Meacham v. Austin*, 5 Day (Conn.) 233.

In *Territory v. Ortiz*, 1 N. Mex. 5, it was held that some damage or inconvenience must appear to have resulted from the failure, and that it was wilful and without excuse, or the writ will be denied.

A peremptory writ of mandamus will not issue to compel a trial judge to enter judgment upon a verdict which he is satisfied, from affidavits, was obtained by the perjury of a party in interest, though there have been two trials upon the same issues, and findings for the relator. *State v. Edwards*, 11 Mo. App. 152.

Mandamus will not lie to compel a judge to enter judgment on a verdict for \$4,000, rendered in favor of the sheriff, in an action of replevin for attached property, where the amount of the attachments was about \$3,517, and the court had, in the exercise of its discretion, required a *remittitur* of \$1,000, or that petitioner submit to a new trial. The petitioner has an adequate remedy at law. *State v. Kinkaid* (Neb.), 37 N. W. Rep. 612.

dice the rights of strangers.¹ But mandamus does not lie to direct *what particular judgment* shall be rendered in a pending cause, nor is it the proper function of such remedial writ to re-examine or correct errors in any judgment or decree so rendered. The rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been *erroneously* performed. If the duty is unperformed and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to *the manner* in which it shall be done; or if it be ministerial the mandamus will direct the specific act to be performed.²

Mandamus does not lie where the remedy sought is the revision of a final judgment on matters of record, and where everything necessary to a determination may be returned on writ of error.³ So a mandamus could not be used to revise a judgment of an inferior court dismissing an appeal for want of a sufficient appeal bond.⁴

(1) *Enforcing Judgment.*—Mandamus will issue in a proper case to enforce a judgment.⁵ So where a court refuses, after an ineffectual appeal from its judgment, to issue execution thereon, mandamus will lie to compel it to do so.⁶

It will not lie to compel the circuit court to enter judgment declaring personal property levied on and claimed as exempt subject to the process, on the failure of the defendant to file an inventory as provided by section 2837 of the Alabama code. *Ex parte* Redd, 73 Ala. 548.

Report of Referee.—A mandamus lies to compel the judge of a district court to enter judgment on the report of a referee. *Russell v. Elliott*, 2 Cal. 245. *Compare* *Ludlum v. Fourth Dis. Ct.*, 9 Cal. 7.

1. *Frederick v. Circuit Judge*, 52 Mich. 529.

2. *Ottawa v. People*, 48 Ill. 233; *State v. Demaree*, 80 Ind. 519; *State v. Robinson*, 1 Kan. 188; *Price v. Sacramento Co.*, 6 Cal. 255; *Macauley v. Brooks*, 16 Cal. 35; *People v. Lake Co.*, 33 Cal. 487; *Springer v. Green*, 46 Cal. 73; *People v. Sexton*, 24 Cal. 78; *Berryman v. Perkins*, 55 Cal. 483; *Com. v. Boone Co. Court*, 82 Ky. 632; *People v. Superior Court*, 19 Wend. (N. Y.) 701; *Miller v. Canal Commrs.*, 21 Pa. St. 23; *Com. v. Park*, 32 Leg. Int. (Pa.) 412; *People v. Sexton*, 37 Cal. 532; *Foster v. Redfield*, 50 Vt. 285. *Compare* *State v. Norton*, 20 Kan. 506.

3. *Olson v. Muskegon Circuit Judge*, 49 Mich. 85; *Warren Co. Court v.*

Daniel, 2 Bibb (Ky.) 573; *State v. Monroe*, 2 So. Rep. 215; *Ex parte* Koon, 1 Den. (N. Y.) 44; *School District v. Circuit Judge for Ingham Co.*, 49 Mich. 432; *Com. v. Huetz*, 6 Pa. St. 469; *Com. v. McLaughlin* (Pa.), 14 Atl. Rep. 377; *Hemphill v. Collin*, 117 Ill. 396; *Ex parte* Parker, 120 U. S. 737; *People v. Gale*, 16 How. (N. Y.) Pr. 199; *Ex parte* Morgan, 114 U. S. 174; *Ewing v. Cohen*, 63 Tex. 482; *In re Burdett*, 8 S. Ct. Rep. 1394; see *State v. Bowen*, 6 Ala. 511; *State v. Monroe* (La.), 1 So. Rep. 300; *Little v. Morris*, 10 Tex. 263.

4. *Ewing v. Cohen*, 63 Tex. 482, *Ex parte* Perry, 102 U. S. 183; *State v. Orleans Appeals Judges*, 37 La. An. 111.

A mandamus will not be granted to the superior court the reverse its ruling as to the admissibility of offered evidence, especially after the cause has been tried and judgment rendered. *Scott v. Superior Court* (Cal.), 16 Pac. Rep. 547.

5. *State v. Beloit*, 20 Wis. 79; see *U. S. v. Addison*; *Harriman v. Woldo County*, 53 Me. 83; see *Ex parte* French, 100 U. S. 1.

6. *State v. District Court* (N. J.), 13 Atl. Rep. 43; *Gartner v. Cohen*, 16 Atl. Rep. (N. J.) 684; see *Mansfield v.*

(d) CONTINUANCE.—The principle has long been settled that the action of the primary courts on an application for a continuance, whether granting or refusing it, is matter of discretion, and neither revisable on appeal nor to be controlled by mandamus.¹

(e) SUPERSEDEAS.—Stay of proceedings will not be compelled for a mere irregularity in procedure.² But a mandamus lies to correct an improper granting or refusal of a *supersedeas*.³ It will, however, not issue to the district court for refusing to grant a *supersedeas* to a judgment of the county court, and entering the refusal on record.⁴ Nor will it be granted to compel the issue of a *supersedeas* which would be futile.⁵ So mandamus will not issue to vacate a *supersedeas* granted where no writ of error was sued out, as it has no legal effect.⁶

It is the duty of the judge, in allowing an appeal, to take se-

Fassett, 63 N. H. 573; *Levy v. Yoto County Superior Court*, 66 Cal. 292.

Where a judgment is fairly open to two different constructions, and according to the construction of the court and clerk execution should not issue, a mandamus will not be granted to compel the issuance of an execution. *Hall v. Stewart*, 23 Kan. 396.

1. *Ex parte Jones*, 66 Ala. 202; 1 Brickell's Digest, 774. § 2; *People v. Superior Court*, 19 Wend. (N. Y.) 701; *Louisiana v. Judge of Parish Court*, 15 La. 521; *Territory v. Ortiz*, 1 N. Mex. 5; *Palmer v. Jones*, 49 Iowa 405; *State v. Farrar*, 20 La. An. 99. Compare *Dixon v. Field*, 10 Ark. 243.

The refusal of a court to grant a continuance on account of the absence of a witness is a matter of discretion, and will not be revised, although the court may have mistaken the rights of parties as to compelling the personal attendance of a witness. *Locker v. Child*, 11 Ala. 640.

Discretion of Court as to Time of Hearing Proof of Will.—The probate court is invested with a reasonable discretion as to advancing or postponing cases, and may properly, in the exercise of such discretion, during the pendency of an appeal from its order refusing the probate of a paper purporting to be a last will, stay and postpone the hearing of an application to probate another paper of a prior date claimed as the will of the same person; and the exercise of such discretion, when not abused, will not be interfered with by mandamus. In such case the good faith of the party appealing from the order refusing probate is not a matter of enquiry. *People*

v. Knickerbocker, 114 Ill. 539; s. c., 55 Am. Rep. 879.

2. *Culver v. Superior Court Judge*, 57 Mich. 25. See *People v. Judge of Calhoun Circuit*, 24 Mich. 408. Mandamus is the proper remedy where a court, in which a case is pending, wrongfully passes an order staying proceedings therein. *Rhodes v. Craig*, 21 Cal. 419.

The supreme court of Georgia will not grant a writ of mandamus or prohibition to one of the judges of the superior court, when acting as chancellor, to restrain him from hearing and adjudicating a motion made before him, on the ground that one of the parties has excepted to his decision on point made before him during the hearing and progress of such motion, and has sued out a writ of error thereon, and filed bond, etc., in accordance with the statute, before any decision has been had upon the main question involved in the original motion made before him. *Jones v. Dougherty*, 11 Ga. 305.

An application for a writ of mandamus to compel the county treasurer to pay certain moneys, where the treasurer, without consulting an attorney, agreed to a statement of facts. *Held*, that the proceedings should be stayed until a copy of the record could be served on the district attorney, and the chairman of the board of supervisors. *Uhler v. Boyd*, 41 Cal. 60.

3. *Ex parte Walker*, 54 Ala. 577.

4. *Mayo v. Clark*, 2 Call. (Va.) 276.

5. *Middleton v. McCollough* (Ark.), 9 S. W. Rep. 844.

6. *Ex parte Ralston*, 119 U. S. 613. See *U. S. v. Columbia Ins. Co.*, 2 Cranch, C. Ct. 266.

curity on the appeal in the sum decreed; if this is not done the appellant is not entitled to a *supersedeas* of any process necessary to carry the decree into effect, and the judge is bound on application of the plaintiff to issue such process. If he refuse to do this, the appellate court will issue a peremptory mandamus commanding him to carry the decree into effect.¹

The filing of a *supersedeas* bond cannot be denied by either the trial court or clerk upon the ground that no appeal lies, and the clerk may be compelled by mandamus to approve and file a bond which he admits to be good and sufficient. But before allowing mandamus to compel the clerk to approve such bond and issue a *supersedeas*, the superior court must determine whether or not an appeal lies from the particular judgment or order.²

(f) CHANGE OF VENUE.—The writ of mandamus will not lie to compel a court to enter an order granting a change of venue in a cause pending in such court.³ The duty of a court or judge to award a change of venue, if satisfied of the truth of the facts alleged, is judicial, not ministerial, in its character; and a man-

1. *Stafford v. Union Bank*, 17 How. (U. S.) 275; *Stafford v. New Orleans etc. Co.*, 17 How. (U. S.) 283.

2. *Daniels v. Miller*, 8 Colo. 542.

Where, after an appeal to the United States supreme court, the judge below refused to approve a bond for a *supersedeas* because the sureties were non-residents of the district, the supreme court declined to issue a mandamus to compel the judge to approve the bond and allow a *supersedeas*, because the issuing a mandamus would control a matter apparently of judicial option, but ordered a *supersedeas* to issue, on the filing of a bond approved by the clerk of the supreme court. *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 188.

Evidence in Application for *Supersedeas*.—On an application for a mandamus to a clerk to issue a writ of *supersedeas*, the judgment and appeal bond should both be received in evidence. *Crumley v. McKinney* (Tex.), 9 S. W. Rep. 157.

3. *People v. McRoberts*, 100 Ill. 458; *State v. Washburn*, 22 Wis. 99; *Ex parte Banks*, 28 Ala. 28; *Flagler v. Hubbard*, 22 Cal. 34; *People v. Sexton*, 24 Cal. 78; *Ex parte Chambers*, 10 Mo. App. 240.

"The granting of a change of venue is a judicial act. The refusal of a change of venue may be erroneous. In such case the party aggrieved has his remedy by appeal or writ of error; and mandamus never issues except where the petitioner has a specific right and

no other specific remedy. *State v. Lafayette Co. Court*, 41 Mo. 225; *State v. Garesché*, 65 Mo. 480, 489." *BLAKEWELL, J.*, in *Ex parte Chambers*, 10 Mo. App. 240; *Newlin v. Indiana County* (Pa.), 23 W. N. C. 153.

"At common law it seems that such a writ was not allowed, nor do we think that under our statute any change has been made in regard to an application of this character. If the writ was allowed in this case compelling the court to enter a mere interlocutory order, we see no reason why it might not be asked for and granted in every case while the suit was progressing, compelling the court to enter particular orders. In other words, it would be to bring up the case in fragments from the court below, and have every ruling of that court passed upon during the progress of the case, and in that way bring cases before the court where there was no final judgment or determination in the court below." *WALKER, J.*, in *People v. McRoberts*, 100 Ill. 458.

If the venue of a case be changed after verdict, a mandamus will lie from the supreme court to compel the court below to proceed to a final disposition of the case. *Ex parte Cox*, 10 Mo. 742.

The action of a justice's court in granting or refusing a change of venue cannot be reviewed in an application for a mandamus. By this writ the justice may in case of his refusal be compelled to act, but his erroneous action cannot be thus corrected. The

damus will not be granted to compel an order changing the venue of an action on the ground that the judge has decided wrong.¹

(g) **DISMISSAL OF CAUSES.**—Mandamus will not issue to compel the circuit judge to vacate an order.² When proceedings have been dismissed by an inferior court and upon application for their restoration to the docket such restoration is denied, a superior court will not (unless to prevent great injustice) interfere by mandamus to order such restoration.³

(h) **REMOVING CAUSE FROM DOCKET.**—Where an inferior court has set aside a judgment and has allowed defendant to plead to the merits, it will not be compelled by mandamus to remove the cause from its docket and to issue an execution upon the judgment since full and adequate relief may be afforded by an appeal in the ordinary course.⁴

Mandamus lies to compel an inferior court to change its docket entries to conform to the law and the facts.⁵ So where a trial

remedy is by appeal. *People v. Hubbard*, 22 Cal. 34.

But see *contra* *State v. McArthur*, 13 Wis. 407, where it was held that the statute regulating changes of venue gave a defendant an unqualified and absolute right to a trial in the county where he resided, and that no discretion was left to the court in granting the application for such change, and that mandamus would therefore lie to compel the court to make the order changing the place of trial to the county of defendant's residence. This doctrine, however, was overruled in *State v. Washburn*, 22 Wis. 99; the court holding that the proper remedy for the party aggrieved was by appeal.

1. *Newlin v. Indiana County* (Pa.), 23 W. N. C. 153; see *Cook v. Baxter*, 27 Ark. 480. Compare *State v. McArthur*, 13 Wis. 407. The writ does not lie to compel the performance of a particular judicial act. *Ex parte Chambers*, 10 Mo. App. 240; *People v. McRoberts*, 100 Ill. 458.

Mandamus will lie to set aside an order made for a change of venue, in a criminal case, in the absence of the accused from the court room. *Ex parte Bryan*, 44 Ala. 402.

Transfer of Cause.—If a judge of probate improperly refuses to transfer to the circuit court a cause in which he is personally interested, mandamus lies to compel its transfer. *State v. Castleberry*, 23 Ala. 85.

Mandamus is not the proper remedy where a district court refuses to transfer an indictment for murder pending therein to another district court for

trial—the legislature having passed a special act directing said court to transfer said indictment. *People v. Judge of Twelfth District*, 17 Cal. 548.

2. *State v. Taylor*, 19 Wis. 566; *People v. Detroit Superior Court Judge*, 41 Mich. 5; *Elkins v. Athearn*, 2 Den. (N. Y.) 191; *Ex parte Easton*, 25 Ala. 72; *State v. Judge*, 14 La. An. 60; *People v. Common Pleas*, 1 Wend. (N. Y.) 73. Compare *People v. New York Common Pleas*, 18 Wend. (N. Y.) 534.

But mandamus is the proper remedy to vacate an interlocutory order not touching the merits. *People v. Bay County Circuit Court Judge*, 41 Mich. 326.

Or when a prohibition has been improperly granted by a circuit judge, to restrain a probate judge from acting on an application for bail in a case which is within his jurisdiction, the supreme court will award a mandamus to set aside the order for the prohibition. *Ex parte Keeling*, 50 Ala. 474.

3. *Davis v. Co. Commrs.*, 396; *Ex parte Johnson*, 25 Ark. 614; *Goheen v. Myers*, 18 B. Mon. (Ky.) 423; *People v. Weston*, 28 Cal. 639; *People v. Judges*, 20 Wend. (N. Y.) 658; *Heilbron v. Superior Court*, 72 Cal. 96; *State v. Wright*, 4 Nev. 119; *York v. Ingham*, 57 Mich. 421; *Hemstead County v. Grave*, 44 Ark. 317; *Ex parte Brown*, 116 U. S. 401; *State v. Secrest*, 33 Minn. 381; *In re Burdett*, 127 U. S. 771; *Ex parte Rowland*, 26 Ala. 133.

4. *Ex parte Goolsby*, 2 Gratt. (Va.) 575.

5. *Frederick v. Mecosta County Cir-*

court refuses to act upon a motion and simply orders the case to be "dropped from the docket," the superior court will issue its writ of mandamus to compel it to proceed to final judgment.¹

Mandamus is the proper remedy to compel the reinstatement of a cause which has been improperly struck from the docket by the chancellor.² But after the court has fully discharged its duty by making a final disposition and determination of the cause it cannot be compelled by mandamus to reinstate an action which has been stricken from its docket. The reinstatement or refusal to reinstate is the exercise of judicial functions which cannot be controlled by mandamus.³

(i) REINSTATING ATTACHMENT.—Mandamus is the proper remedy to reinstate an attachment ancillary to an ordinary action, which attachment has been improperly dismissed. But an alternative mandamus only will be issued in such case, and without notice of the motion to the other party.⁴

(j) SETTING ASIDE SUMMONS.—Mandamus lies to set aside the service of a summons illegally made on one while attending court as a witness.⁵

(k) GRANTING OR DISSOLVING INJUNCTIONS is a matter of purely judicial discretion, and when this discretion has once been exercised, and the inferior court has refused to grant an injunction, or if already granted has refused to dissolve it, mandamus will not lie to control such decision,⁶ nor will it compel the

cuit Judge, 52 Mich. 529; *State v. Whittell*, 61 Wis. 351; *People v. Fillmore*, 11 Mich. 197.

1. *State v. Cape Girardeau Court*, 73 Mo. 560; *Sanders v. Nelson Circuit Court*, Hard. (Ky.) 19.

2. *Ex parte State*, 51 Ala. 69; *Sanders v. Nelson Circuit Court*, Hard. (Ky.) 17; *Matter of Nabor*, 7 Ala. 459; *Ex parte Lowe*, 20 Ala. 330.

3. *Hemstead Co. v. Grave*, 44 Ark. 317; *Brown v. Ragland*, 35 La. An. 837. When a court has once decided a cause, it cannot be compelled, by mandamus, to decide it differently. The remedy, if any, is by appeal or writ of error. *Hemphill v. Collins*, 117 Ill. 396; *Sankey v. Levy*, 69 Cal. 244; *Appling v. Bailey*, 44 Ala. 333.

4. *Boraim v. Da Costa*, 4 Ala. 393.

5. *Mitchell v. Huron Circuit Judge*, 53 Mich. 541.

6. *State v. Judge of Sixth Dist. Ct.*, 28 La. An. 905; *McMillen v. Smith*, 26 Ark. 613; *Ex parte Montgomery*, 24 Ala. 98; *Ex parte Hays*, 26 Ark. 510; *People v. Muskegon County Judge*, 40 Mich. 63; *Ex parte Schwab*, 98 U. S. 240; Ohio etc. R. Co. v. Wyandot, 7 Ohio St. 278; *Beebe v. Judge of Sixth District Court*, 28 La. An. 905. See

Pardron v. Parish Judge, 31 La. An. 794; *State v. Twelfth District Judge*, 38 La. An. 31; *People v. West Troy*, 25 Hun (N. Y.) 179; *State v. Judge of Sixth District Court*, 32 La. An. 557; *Detroit, Lansing etc. R. Co. v. Newton*, 61 Mich. 33. See *Ex parte Schwab*, 98 U. S. 240; *Ex parte Batesville & Bunkley R. Co.*, 39 Ark. 82; *State v. Engleman*, 86 Mo. 551; *State v. Twenty-First District Judge*, 36 La. An. 394; *State v. Orleans Civil Judge*, 37 La. An. 400; *State v. Kispert*, 21 Wis. 387.

Mandamus lies to vacate an injunction where the bill upon which it was granted was devoid of substance, and could not therefore support the application for the writ. *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204; *Merced Mining Co. v. Fremont*, 7 Cal. 131; *Ortman v. Dixon*, 9 Cal. 23. Compare *Fremont v. Merced Mining Co.*, 9 Cal. 18; *Ex parte Conway*, 4 Ark. 302; *State v. Rightor (La.)*, 5 So. Rep. 416; *Matter of Pile*, 9 Ark. 336.

Mandamus lies to vacate an injunction where the bill upon which it was granted was devoid of substance, and could not therefore support the application for the writ. *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204.

violation of an injunction.¹ See INJUNCTIONS, vol. 10, p. 986.

(l) GRANTING LICENCE.—An officer in granting or refusing a licence to sell liquor acts judicially; not ministerially, and his action cannot, therefore, be controlled or reviewed by mandamus.²

(m) OTHER REMEDIES—WRIT OF ERROR OR APPEAL.—The writ of mandamus cannot be made to perform the functions of a writ of error or an appeal.³ When addressed to subordinate

So where there is danger that the administration of justice may suffer by delay, a mandamus lies to compel a district judge to grant an injunction *in limine*, even though a party has other but slower means of relief (La. Code, arts. 830, 831), leaving the matter at the discretion of the court. *State v. Lazarus*, 36 La. An. 578.

1. *Ex parte Fleming*, 4 Hill (N. Y.) 581.

2. *Dunbar v. Frazier*, 78 Ala. 538; *Sights v. Yarnalls*, 12 Gratt. (Va.) 292; *Atty. Gen. v. Justices of Guilford*, 5 Ired. (N. Car.) 315; *Ex parte Whittington*, 34 Ark. 394. See *Ex parte Yeager*, 11 Gratt. (Va.) 655.

Where an application for a mandamus was made to compel the issue of a licence to sell liquor, under the Pennsylvania act of May 13th, 1887, the mandamus was refused, although it was alleged that the court had wholly neglected to exercise the discretion vested in it by the law, but had concluded to grant no licences, on the ground that there was an aggregate preponderance of remonstrances over the petitions in respect to the issue of such licences. *Re King's Application* (Pa.), 23 W. N. C. 152.

3. *State v. Laughlin*, 75 Mo. 358; *Hemphill v. Collins*, 117 Ill. 396; *Justices v. Munday*, 2 Leigh (Va.) 165; *State v. Dunn, Minor* (Ala.) 46; *State v. Holliday*, 3 Hals. (N. J.) 205; *Commissioners v. Lynah*, 2 M'Cord (S. Car.) 170; *Boyce v. Russell*, 2 Cow. (N. Y.) 444; *Ex parte Nelson*, 1 Cow. (N. Y.) 417; *People v. Brooklyn*, 1 Wend. (N. Y.) 318; *State v. Bruce*, 1 Treadw. Const. (N. Car.) 165, 175; *Morris v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *People v. Cayuga Common Pleas*, 10 Wend. (N. Y.) 632; *Livingston v. Superior Court*, 10 Wend. (N. Y.) 545; *People v. Superior Court*, 18 Wend. (N. Y.) 575; *People v. Rensselaer Co.*, 2 How. (N. Y.) Pr. 189; *People v. Columbia Common Pleas*, 3 How. (N. Y.) Pr. 30; *People v. Board of Police*, 43

How. (N. Y.) Pr. 385; *People v. Tracy*, 1 Den. (N. Y.) 617; *People v. Dutchess Common Pleas*, 20 Wend. (N. Y.) 658; *State v. Lubke*, 85 Mo. 338; *State v. Megown*, 39 Mo. 156; *Early v. Mounix*, 15 Cal. 149; *State v. Marshall*, 82 Mo. 484; *People v. Lott*, 42 Hun (N. Y.) 408; *Blatchford v. Newberry*, 100 Ill. 484; *Olson v. Muskegon Circuit Judge*, 49 Mich. 85; *Ex parte Baltimore & Ohio R. Co.*, 108 U. S. 566; *State v. Horner*, 16 Mo. App. 191; *State v. Marshall*, 82 Mo. 484; *People v. Lovelidge* (Mich.), 42 N. W. Rep. 997; *People v. Barnes* (N. Y.) 20 N. E. Rep. 609; *State v. Third District Court*, 16 La. An. 185; *State v. Twenty-first District Judge*, 36 La. An. 394; *Ex parte Brown*, 116 U. S. 401; *State v. Platte County Court*, 83 Mo. 539; *Ex parte Newman*, 14 Wall. 152; *Ex parte Schwab*, 98 U. S. (8 Otto) 246; *Cowan v. Doddridge*, 22 Gratt. (Va.) 458; *Ex parte Bottoms*, 46 Ala. 312; *State v. Buhler* (Mo.), 3 S. W. Rep. 68.

Mandamus will not lie to correct an alleged error of law. *State v. Orleans Civil Judge*, 37 La. An. 842; *Wilson v. Moore*, 26 N. J. L. (2 Dutch.) 458; *Ex parte Gordon*, 2 Hill (N. Y.) 363; *People v. Dutchess Co.*, 20 Wend. (N. Y.) 658.

A mandamus will not lie to a court from the decision of which an appeal is provided by statute. *State v. Mitchell*, 2 Treadw. Const. (S. Car.) 703.

A party against whom a decree is rendered is entitled to an appeal as a matter of right, and where the appeal is denied its allowance may be compelled by mandamus. *Ware v. McDonald*, 62 Ala. 81. But where the remedy is by appeal, and the party instead of availing himself of the proper remedy seeks mandamus, the writ will be denied. *State v. Laughlin*, 75 Mo. 358; *People v. Cayuga Common Pleas*, 10 Wend. (N. Y.) 632; *Livingstone v. Superior Court*, 10 Wend. (N. Y.) 545; *State v. Lubke*, 85 Mo. 338; *Ex parte Schmidt*, 62 Ala. 252; *People v. Tracy*,

judicial tribunals it simply requires them to proceed to exercise their judicial functions.¹ Of course a court would not compel an inferior court to proceed to try a case of which it had no jurisdiction, and where an inferior court refuses to proceed and finally dispose of a case on the ground of an alleged want of jurisdiction, on application made to a higher court to compel such inferior court to hear the same, it will be the duty of the higher court to determine whether such inferior court has jurisdiction of the cause, and such determination will be binding upon the inferior court.²

It is not the province of this writ, which courts always grant with great circumspection, to correct errors of subordinate tribunals when acting within their jurisdiction.³ Nor does the fact that the decision bears oppressively upon the relator justify a departure from the rule.⁴ It is never resorted to to enforce the payment of a debt when it can be collected by suit, unless the tribunal having jurisdiction refuses to act; in which case the order would be not to render a specific judgment but to proceed with the cause.⁵ And though mandamus is never granted where another adequate remedy exists at law, the want of any such remedy by appeal or writ of error does not necessarily entitle the party aggrieved to this relief.⁶

1 Den. (N. Y.) 617. Mandamus will not lie to correct errors in the final judgments or decrees of an inferior court; and where the injury sought to be redressed consists in the refusal of the lower court to enter proper judgment upon the verdict of a jury the remedy is by appeal and not by mandamus. *Ex parte Schmidt*, 62 Ala. 252. See also *People v. Dutchess Common Pleas*, 20 Wend. (N. Y.) 658; *People v. Board of Police*, 43 How. (N. Y.) Pr. 385; *People v. Columbia Common Pleas*, 3 How. (N. Y.) Pr. 30; *People v. Rensselaer Co.*, 2 How. (N. Y.) Pr. 189.

1. *State v. Lafayette Co. Ct.*, 41 Mo. 224; *State v. Garesche*, 65 Mo. 489; *State v. Macon Co. Ct.*, 68 Mo. 29; *State v. Laughlin*, 75 Mo. 358.

Mandamus lies to compel the county court to permit the filing of the petition for the removal of a county seat, and to make the necessary order thereon, it being a ministerial duty. *Doolittle v. Cabell Co. Court*, 28 W. Va. 158.

2. *State v. Laughlin*, 75 Mo. 358; *State v. Lubke*, 15 Mo. App. 152.

When the county court refuses to grant an appeal, or to act on the application for it, it may be compelled by mandamus; and if the time for appeal-

ing has elapsed it will be compelled to make the necessary order by a *nunc pro tunc* entry. *Pettigrew v. Washington Co.*, 43 Ark. 33; *McCreary v. Rogers*, 35 Ark. 298.

Where an inferior court having determined that it had no jurisdiction, and that another tribunal had exclusive jurisdiction, for that reason declined to proceed to a final disposition of a criminal case, and ordered it transferred to the other tribunal for that purpose, *held* that an appellate court would, upon an application for a mandamus to compel the inferior court to proceed, enquire into the question of jurisdiction, and if it found the jurisdiction to exist would issue the writ. *State v. Laughlin*, 75 Mo. 358.

3. *State v. St. Louis Court App.*, 87 Mo. 374; *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244; *People v. Oneida Common Pleas*, 21 Wend. (N. Y.) 20; *Ex parte Parker*, 120 U. S. 737; *People v. Gale*, 16 How. (N. Y.) Pr. 199.

4. *State v. Thayer*, 10 Mo. App. 540.

5. *Mansfield v. Fuller*, 50 Mo. 338; *Ward v. Co. Court*, 50 Mo. 401; *Strahan v. Audrain Co. Court*, 65 Mo. 644.

6. *People v. Judges*, 20 Wend. (N. Y.) 658; *Queen v. Blanchard*, 13 Ad. & E. 318; *Ex parte Whitney*, 13 Pet. (U.

(n) ORDERING SPECIAL TERM.—Under a statute requiring a speedy trial in all contested elections—if the suit cannot be tried at the next regular term, a mandamus will lie to compel the judge, even if he be only appointed under a recusation of the presiding judge of the court, to order a special term and to try the case without unnecessary delay.¹

(o) COURTS ACTING UNDER A SPECIAL COMMISSION.—A mandamus will not be granted to a court acting under a special commission which has expired by its own limitation previous to the motion for a suit.²

(p) REFUSAL TO AWARD COSTS.—A mandamus is not the proper remedy where an inferior court refuses to enter a judgment for costs. The party complaining has the right to appeal from such a defective judgment, or he may resort to his action for the costs.³

(q) STIPULATION TO SETTLE.—Mandamus does not lie to enforce a disputed stipulation to settle a case, even though money has been paid thereunder.⁴

3. Appeal.—The right of appeal should be granted upon a judgment or final order. And if it be denied the superior court will, by mandamus, compel the inferior court to allow it.⁵

S.) 404; *Ex parte* Ostrander, 1 Den. (N. Y.) 679; *State v. Judge*, 1 Mo. App. 543; *State v. Cooper Co. Court*, 64 Mo. 170; *Mansfield v. Fuller*, 50 Mo. 338; *State v. Thayer*, 10 Mo. App. 540.

1. *State v. Debaillon*, 36 La. An. 828.

2. *People v. Monroe Oyer and Term.*, 20 Wend. (N. Y.) 108.

3. *Peralta v. Adams*, 2 Cal. 594; *Jansen v. Davison*, 3 Johns. Cas. (N. Y.) 72.

Where a judgment of a circuit court of the United States, in the record of which the amount of costs recovered was left blank, was affirmed by the supreme court, who issued a mandate to the circuit court to carry the judgment into execution, in which mandate the amount of costs was left blank in like manner; and the circuit court overruled a motion to amend the record by inserting the amount of costs, it was held that a mandamus would not lie to command the judge of the circuit court to adjudicate and allow the costs. *Ex parte* Many, 14 How. (U. S.) 24.

Where the judgment of a circuit court is reversed and the proceedings up to a certain point are set aside at the cost of the defendant in error, and the cause is remanded for further proceedings, if the circuit court refuse to render a judgment for the costs according to the mandate the supreme

court will grant a rule to show cause why a mandamus should not issue. *Jared v. Hill*, 1 Blackf. (Ind.) 155.

4. *Leavitt v. Detroit Superior Judge*, 52 Mich. 595. Mandamus will lie where under an agreement of record a party is entitled to judgment in the case, and the court below allows the other party to amend and go on with the case. *Ex parte* Lawrence, 34 Ala. 446.

5. *McCreary v. Rogers*, 35 Ark. 298; *Ex parte* Parke, 7 Sup. Ct. Rep. 767; *Gresham v. Pyron*, 17 Ga. 263; *Ex parte* Martin, 5 Ark. 371; *Ware v. McDonald*, 62 Ala. 81; *Beebe v. Lockert*, 6 Ark. 422; *Greathouse v. Jameson*, 3 Colo. 397; *State v. Murphy* (La.), 6 So. Rep. 816; *State v. Currie*, 35 La. An. 887; *Ex parte* Parker, 120 U. S. 737; *State v. Lewis*, 71 Mo. 170; *State v. Eighth District Judge*, 35 La. An. 212; *State v. Rightor*, 35 La. An. 515; *State v. Judge of Sixth District Court*, 22 La. An. 119; 8 c. 22 La. An. 120; *Ware v. McDonald*, 62 Ala. 81; *State v. Judge of Fourth District Court*, 22 La. An. 90; *Ex parte* Jordan, 94 U. S. (4 Otto) 248; *State v. Judge of Second District Court*, 24 La. An. 596; *State v. Third District Judge*, 31 La. An. 800; *State v. Judge of Fifth District Court*, 23 La. An. 713; *Watson v. Mayrant*, 1 Rich. (S. Car.) Eq. 449; *State v. Parish Judge*, 26 La. An. 122; *Malain v. Judge of Third District*, 29 La. An. 793; *State*

To entitle a petitioner to a writ of mandamus in such cases he must show that he has a clear right to an appeal.¹ Mandamus does not lie to compel the granting of an appeal in a case which, on the face of the papers, is unappealable.²

Where the statute requires that entries for appeal must be in writing, a judge cannot be compelled by mandamus to grant an appeal on a mere verbal notice.³

(a) APPEAL BOND.—Mandamus will lie to compel the trial court to allow to be filed an appeal bond where the sureties are sufficient, irrespective of the amount of the penalty named therein.⁴

(b) CORRECTING APPEAL.—If a judge makes errors in making out the appeal papers, and he refuses to correct the error, he may be compelled to do it by a writ of mandamus.⁵

v. Judge of Third District Court, 31 La. An. 800; *State v. Houston*, 36 La. An. 210; *Danville v. Blackwell*, 80 Va. 38; *State v. Lazarus*, 34 La. An. 1117; *State v. Baton Rouge*, 34 La. An. 1197. Compare *Brown v. Parish Judge*, 29 La. An. 809; *State v. Judge of Superior District Ct.*, 27 La. An. 672; *State v. Allen*, 92 Mo. 20; *State v. Monroe* (La.), 6 So. Rep. 21.

A mandamus does not lie to compel the district court to hear an appeal from a justice of the peace which it has dismissed, although such dismissal was erroneous, and no appeal will when the amount involved is not sufficient. *State v. Wright*, 4 Nev. 119.

Mandamus will issue to compel an inferior court to grant an appeal, by a *nunc pro tunc* entry, if the time has elapsed within which the appeal should have been allowed. *Pettigrew v. Washington County*, 43 Ark. 33.

Return to an Appeal.—Mandamus may be issued to compel canal appraisers to make a return to an appeal taken from their decision to the canal board, notwithstanding the objections that the appeal was not taken in time, and that the appellant had settled and discharged his claim. Those questions are for the canal board. *People v. Canal Appraisers*, 20 N. Y. Sup. Ct. 64; s. c., 73 N. Y. 443.

1. *Ex parte Cutting*, 94 U. S. 14. See *Lake v. King*, 16 Nev. 215; *Com. v. Clarke*, 1 Bibb (Ky.) 531; *Sabine v. Rounds*, 50 Vt. 74.

A mandamus will not lie against a judge *a quo*, to compel him to allow an appeal on a judgment refusing a mandamus to compel a justice of the peace to issue a commission to take testimony.

The remedy is by appeal to the district court, and ultimately to this court, when the amount gives such appellate jurisdiction. *State v. Third District Court*, 16 La. An. 185.

An appeal will not lie on a refusal to grant a mandamus. *Shrever v. Livingston Co.*, 9 Mo. 196.

Suspensive Appeal.—A mandamus lies to compel the granting of a suspensive appeal from a dissolving order on bond, where the doing of the act—as here, erection of a steam engine amidst lumber near the relator's premises—might imperil health and life. *State v. Houston*, 36 La. An. 886.

But if the bond tendered for a suspensive appeal from a judgment dissolving, with costs, an injunction for preservation and cultivation of a sugar plantation under seizure does not cover the consequent expenses incurred by the sheriff, a mandamus will not lie to compel the district judge to grant the appeal. *State v. Twenty-sixth District Judge*, 36 La. An. 910.

2. *State v. Burthe* (La.), 1 So. Rep. 656.

3. *State v. Cooper*, 20 Fla. 547.

The statute regulating appeals from orders and decrees of the county court in probate proceedings contemplates that the appeal shall be entered in writing by the party appealing. A mere verbal request made to the county judge to enter an appeal in his minutes, furnishes no ground for a mandamus to compel the judge to enter the appeal, if he neglects to comply with such request. *State v. Cooper*, 20 Fla. 547.

4. *State v. Adams*, 9 Mo. App. 464.

5. *Taylor v. Gillette*, 52 Conn. 216.

(c) DISMISSING APPEAL.—Mandamus will not lie to revise the judgment of a lower court dismissing an appeal for want of a sufficient appeal bond.¹ So where an appeal is dismissed for insufficiency of the affidavit, a mandamus will not be granted to compel the common pleas to allow the appellee to take the appeal bond from the files.² Mandamus does not lie to the court of common pleas to dismiss an appeal alleged to be improperly entered and sustained; a *certiorari* is the proper remedy.³

(d) REINSTATING APPEAL.—Mandamus will not lie to compel subordinate courts to reinstate an appeal, the proper remedy is by writ of error.⁴

4. Bill of Exceptions.—It has been uniformly held that superior courts have the power, when a judge of an inferior court refuses to sign a bill of exceptions, to award a writ of mandamus to compel the judge to settle and sign a bill of exceptions or to show cause why he has not performed an act he was bound by law to do.⁵ But to authorize a mandamus to compel a judge to

1. Ewing v. Cohen, 63 Tex. 482.

Where the superior court erroneously dismisses an appeal to it on the ground that the undertaking is insufficient, the appellant's remedy is not by mandamus but by *certiorari*. Levy v. Yoto Co. Superior Court, 66 Cal. 292.

2. Gregory v. Obrian, 13 N. J. L. (1 Green) 11.

3. Jones v. Allen, 13 N. J. L. (1 Green) 97.

4. Wells v. Stackhouse, 2 Harr. (N. J.) 355; Com. v. Common Pleas of Phila., 3 Binn. (Pa.) 273; Sinnickson v. Corwine, 2 Dutch. (N. J.) 311; Lankey v. Levy, 69 Cal. 244; People v. Judge, 1 Mich. 359; Brown v. Ragland, 35 La. An. 837; State v. Evans, 45 N. J. L. 295; Lewis v. Weir, 14 N. J. L. (2 Green) 353. Compare Adams v. Mathis, 3 Harr. (N. J.) 310; Freas v. Jones, 1 Harr. (N. J.) 358; Ten Eyck v. Farlee, 1 Harr. (N. J.) 348; Detroit etc. R. Co. v. Judge, 27 Mich. 304; Ex parte Parker, 9 S. Ct. Rep. 708; State v. Kansas City Courts of Appeals (Mo.), 10 S. W. Rep. 855.

If a defendant, erroneously assuming that, by his mere offer of settlement, litigation is suspended, fails to appear and move in the common pleas an appeal which he has taken from a justice's court, and therefore the common pleas dismisses the appeal, a mandamus will not be awarded for its reinstatement. State v. Evans, 45 N. J. L. 295.

5. Re Chateaugay O. & I. Co's Petition, 128 U. S. 544; State v. Brockwell, 16 Lea (Tenn.) 683; Che Gong

v. Stearns, 17 Pac. Rep. 871; State v. Drew, 32 La. An. 1043; Sikes v. Ransom, 6 Johns. (N. Y.) Rep. 279. See also People v. Van Buren Circuit Judge, 41 Mich. 725; People v. Judge of Superior Court, 41 Mich. 726; State v. Hall, 3 Coldw. (Tenn.) 255; Newman v. Scott Co., 1 Heisk. (Tenn.) 787; State v. Elmore, 6 Coldw. (Tenn.) 528; People v. Judges of Washington, 1 Cal. (N. Y.) 511; Drexel v. Man. 6 W. & S. 386; State v. Haws, 43 Ohio St. 16; Crane, ex parte, 5 Pet. 190; State v. Macdonald, 30 Minn. 98; see Hawes v. People (Ill.), 17 N. E. Rep. 13; Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494; People v. Van Buren Circuit Judge, 41 Mich. 725; Hawes v. People, 129 Ill. 123; McDonald v. Sheldon, 2 Kan. 322; Ex parte Crane, 5 Pet. 190.

When a bill of exceptions is presented to the court to settle and sign, the court should carefully examine the bill, and if any of the statements are incorrect, correct them. If a fact is truly stated, it must not be struck out because impertinent or immaterial, and any material facts omitted the court must add. Having thus settled the bill, it is the duty of the court to sign it, and, upon refusal, mandamus will lie to compel it to do so. Poteet v. Cabell, 30 W. Va. 58; see Morgan v. Fleming, 24 W. Va. 186.

A judge refused to sign a bill of exceptions because he thought that the time within which he was allowed to sign it by the statute had elapsed; on a petition for a mandamus, the court

sign a bill of exceptions, a clear abuse of his discretion must appear.¹ A judge will not be compelled by mandamus to settle a bill of exceptions in a particular manner, where there is a dispute as to the incidents of the trial. His determination as to what occurred upon the trial is conclusive on such an application.²

(a) CORRECTION OF BILL.—The judge before whom the cause was tried has the power to determine the accuracy of the bill of exceptions, and whether it correctly recites the points made and opinions excepted to, and the exercise of this power is beyond control by mandamus.³

held that he might sign it after the time, if he thought that there was good excuse for not having applied to him earlier, and that the excuse offered was a good one, and thereupon ordered him to sign it, if found conformable to truth and proper to be signed. *People v. Lee*, 14 Cal. 510.

Where an alternative writ of mandamus was granted to compel a judge to sign a bill of exceptions, and the writ was delivered to the judge, but not returned by him, the supreme court granted a peremptory mandamus requiring him to sign it. *People v. Pearson*, 2 Scam. (Ill.) 189.

In *Springer v. Peterson*, 1 Blackf. (Ind.) 188, a mandamus was awarded to compel the associate judges to sign a bill of exceptions, which had been signed by the president judge, or show cause, *and no cause was shown*, the court awarded a peremptory writ compelling them to sign the particular bill.

Where an alternative writ of mandamus commands a judge of an inferior court to allow and sign a certain bill of exceptions, filed with the petition in the case, and averred to be true, and which was tendered to him in due time, or to show cause why he does not sign the same, and he fails to answer, or answers and fails to show a sufficient cause, the peremptory writ should command him to sign the particular bill named. *State v. Hawes*, 43 Ohio St. 16.

The superior court cannot issue a mandamus to the orphans' court to compel the signing of a bill of exceptions. *Crawford v. Short*, 1 Harr. (Del.) 355.

1. *Galloway v. Fleming*, 2 Leg. Rep. 62; *State v. Brockwell*, 16 Lea (Tenn.) 683; *Harbin v. Ketron*, 94 Ind. 146.

The superior court will, in aid of its appellate jurisdiction, compel a trial judge, by mandamus to sign a bill of exceptions, but the writ will only be

granted when it appears that there has been a clear abuse of discretion. *Alexander v. State*, 14 Lea (Tenn.) 88.

If the commissioners of a county in West Virginia, sitting as a board of canvassers after an election, refuse to sign bills of exceptions to their ruling, when requested to do so by a candidate voted for at the election, they will be required by mandamus to settle and sign such bills of exceptions. *Alderson v. Kanawha Co. Commrs.*, 31 W. Va. 633.

2. *Tweed v. Davis*, 4 Thomp. & C. (N. Y.) 1; 47 How. Pr. 162; 1 Hun (N. Y.) 252.

A writ of mandamus to compel a judge of a lower court to sign a bill of exceptions requires nothing more than that the judge should confess and seal the exceptions, or deny them. *Conrow v. Schloss*, 55 Pa. St. 28.

3. *People v. Pearson*, 2 Scam. (Ill.) 189; *People v. Lee*, 14 Cal. 512; *State v. Todd*, 4 Ohio 351; *Shepard v. Peyton*, 12 Kan. 616; *Benedict v. Howell*, 39 N. J. L. 221; *State v. Babcock*, 51 Vt. 570; *State v. Noggle*, 13 Wis. 380; *People v. Williams*, 91 Ill. 87; *People v. Jameson*, 40 Ill. 96. See *State v. Macdonald*, 30 Minn. 98; *State v. Cox*, 26 Minn. 214; *Delavan v. Boardman*, 5 Wend. (N. Y.) 132; *Douglass v. Loomis*, 5 W. Va. 542; *State v. Clough*, 69 Wis. 369. Compare *State v. Macdonald*, 30 Minn. 98.

Where the answer shows that the defendant is willing to sign a true bill, but denies that the bill presented is true, the writ must be refused, as the right to determine as to the truth of a bill of exceptions is vested in the judge to whom it is presented. *State v. Todd*, 4 Ohio 351; *Creager v. Meeker*, 22 Ohio St. 207.

Where exceptions were reserved to the refusal by the court of instructions to the jury, requested by the excepting party, and the judge of the

The knowledge and recollection of the judge who presides at the trial must determine finally what occurred there, so far as the settlement of bills of exceptions is concerned,¹ and the verdict of a jury cannot be resorted to to override such determination.²

But when he has already signed one bill of exceptions he cannot be compelled by mandamus to sign another and a different one, since it is his own exclusive province to determine the correctness of the bill which he shall sign.³

(b) DEMAND AND REFUSAL.—Mandate will not be awarded to compel a judge to sign a bill of exceptions who has not been requested to do so, though his predecessor has wrongfully refused.⁴

(c) LACHES.—It may be true that a judge who grants time in which to file a bill of exceptions cannot by his absence deprive the party of his bill, but a party cannot unreasonably delay the presentation of the bill after the return of the judge.⁵ The al-

circuit court struck from the bill of exceptions, as prepared and presented to him, the words "This being all the evidence in the case," an application for a mandamus to compel the judge to insert in the bill the words so stricken out, which fails to show that the bill of exceptions, without these words, does not show that the instructions were not abstract, or that the insertion of the words is necessary to show that the instructions were not abstract, fails to show a right to the insertion, and will be denied. *Ex parte* Huckabee, 71 Ala. 427.

A party to a cause sought, by an alternative mandamus, to compel the judge to sign a certain bill of exceptions which had been tendered. The judge gave insufficient reasons for not signing the bill, but admitted that he had not read it. *Held*, that the peremptory writ should issue to compel the signing of the bill tendered. [McILVAINE, C. J., and O'KEY, J., dissenting, on the ground that the judge should be ordered to sign a true bill, but not necessarily the bill tendered, without examination.] *State v. Hawes*, 43 Ohio St. 16.

1. *Ex parte* Bradstreet, 4 Pet. (U. S.) 102; *Root v. King*, 6 Cow. (N. Y.) 569; *Jamison v. Reid*, 2 Greene (Iowa) 394.

A circuit judge will not be compelled by a mandamus to insert in a bill of exceptions instructions which it is claimed he gave to the jury, when he returns that he has already settled the bill of exceptions truly and correctly

according to his knowledge and recollection of the facts and that he is confident he did not give such instructions to the jury. *Spaulding v. Gale*, 7 Wis. 693; *State v. Larrabee*, 3 Wis. 783; *Fellows v. Tait*, 14 Wis. 156.

The supreme court has jurisdiction to grant a writ of mandamus to compel a judge of an inferior court to sign a bill of exceptions. But the judge to whom the bill is offered must be the exclusive judge as to its correctness and will not be compelled to sign a bill which he believes does not contain the truth. *People v. Jameson*, 40 Ill. 93.

2. *State v. Noggle*, 13 Wis. 380.

3. *People v. Jamison*, 40 Ill. 96; *Harris v. State*, 2 Ga. 290; *Harbaugh v. Wayne Circuit Judge*, 32 Mich. 259.

A bill of exceptions, signed by the judge as a true bill, cannot be attacked for alleged imperfections on its face by a writ of *mandate* requiring the judge to sign a true bill of exceptions. *Harbin v. Ketron*, 94 Ind. 146.

4. *State v. Slick*, 86 Ind. 501; *Alexander v. State*, 14 Lea (Tenn.) 88. Where a judge whose term of office is about to expire refuses to sign a proper bill of exceptions presented in apt time, his successor may be promptly applied to by verified petition showing the facts, and it will be his duty to sign and file the bill, though the time limited for its presentation has expired by reason of the refusal of his predecessor—and then, if he refuse, he may be compelled by mandate to do so. *State v. Slick*, 86 Ind. 501.

5. *Alexander v. State*, 14 Lea (Tenn.)

lowance of time in which to file the bill is the grant of a privilege, and the party to whom it is granted will lose it unless he acts with reasonable diligence.¹ It is important that delay should not be allowed, for bills of exceptions containing the evidence should be prepared and signed while the matter is still in the memory of court and counsel.² A party cannot secure a writ of mandate unless he shows that he has acted with diligence and promptness.³

(d) WRIT GRANTED TO JUDGE WHO TRIED CAUSE.—A circuit judge will not be compelled by mandamus to settle and sign a bill of exceptions in a case which was tried before his predecessor in office.⁴ Whether a judge can be compelled, after his

88; *People v. Van Buren* Circuit Judge, 41 Mich. 725. Compare *People v. Detroit Superior Court Judge*, 41 Mich. 725.

A writ of mandate will not be awarded against a judge to compel him to sign a bill of exceptions after the time limited, where he was absent from the State when the time expired, if the applicant for the writ fails to show proper diligence in presenting the bill for signing after his return. An unexplained delay of fifty days shows want of diligence. *State v. Dyer*, 99 Ind. 426; *State v. Brockwell*, 16 Lea (Tenn.) 683.

1. *State v. Dyer*, 99 Ind. 426; *Cross v. Cross*, 90 N. Car. 15. The writ will not lie where the trial judge having a rule of court limiting the time for filing bills of exceptions, twice grants an extension for definite periods far beyond the limits of the rule, within which time of extension, so far as appears, the bill of exceptions might, by diligence, have been completed, and no further extension of time was asked for. *Alexander v. State*, 14 Lea (Tenn.) 88.

2. *Engel v. Speer*, 36 Ga. 258; *State v. Dyer*, 99 Ind. 426; *State v. St. Louis Court of Criminal Correction*, 41 Mo. 598; and see *Midberry v. Collins*, 9 Johns. (N. Y.) 346; *State v. Brockwell*, 16 Lea (Tenn.) 683; *Alexander v. State*, 14 Lea (Tenn.) 88.

Where by agreement of counsel a further time than usual is granted to file a bill of exceptions, but the agreement is not entered upon the record, and the exceptions are not saved in writing at the trial, the judge will not be required by mandamus to sign a bill of exceptions presented so long after the trial that he cannot reasonably be expected to remember the proceedings well enough to be able to say whether

the exceptions are true or not. *State v. St. Louis Court*, 41 Mo. 598.

Under the laws of Iowa, bills of exceptions were required to be taken and tendered to the judge for his signature, during the progress of the trial, although he might sign them afterwards *nunc pro tunc*. But where a bill of exceptions appeared to have been signed two years after the trial, it was held that they were rightfully stricken from the record by the appellate court, and a mandamus to the judge to sign the bill *nunc pro tunc* was properly refused, especially as it did not appear that the exceptions were taken during the trial. *Sheppard v. Wilson*, 6 How. (U. S.) 260.

3. *State v. St. Louis Court of Criminal Correction*, 41 Mo. 598; *State v. Dyer*, 99 Ind. 426; *Cross v. Cross*, 90 N. Car. 15; *Brown v. Williams*, 84 N. Car. 116. See *State v. Brockwell*, 16 Lea (Tenn.) 683. Where on the return to an alternative mandamus commanding the judges of a court of common pleas to sign and seal a bill of exceptions, or show cause, etc., it appeared that the bill of exceptions was not tendered to the judges of the trial, but was presented to them individually at different times after the court had adjourned for the term the supreme court of New York refused to grant a peremptory mandamus; *Midberry v. Collins*, 9 Johns. (N. Y.) 345.

4. *Davis v. Menasha*, 20 Wis. 194; *Oliver v. Town*, 28 Wis. 328; *Tellows v. Sherry*, 14 Wis. 156. See *State v. Roger*, 7 La. An. 382.

In *Davis v. Menasha*, 20 Wis. 205, COLE, J., writing the opinion of the court, in stating that it is essential for the judge who tried the cause to settle the bill, uses the following language: "He knows what took place on the

term of office expires, to settle and sign a bill of exceptions in a cause tried before him during his term is not well settled.¹

(c) ANSWER.—If a judge refuses to sign a bill of exceptions he should make known the cause.² While the mandatory part of the writ may be very general, the return or answer must be very minute in showing why the party did not do what he was commanded to do.³

It is the duty of the respondent to set forth in his return or answer the nature of his defence, either by denying the allega-

trial, what questions of law were raised and decided, and seems to be the most suitable person to settle the exceptions for the review of the appellate court. In this State it has been the common practice for the judge who tried the cause to settle the bill of exceptions, even after his term of office, and we can see no objection to his doing so."

And in *Hale v. Haselton*, 21 Wis., 322, the same learned judge says: "It seems that the bill of exceptions was settled and signed by Judge Noggle after his term of office had expired. And it is said that a circuit judge, after his term of office expires, has no right or authority to settle a bill of exceptions in a case tried before him. In *Fellows v. Tait*, 14 Wis. 156, it was stated that the practice in this State has been for the person before whom the cause was tried to settle the bill of exceptions, although he was no longer judge. We cannot perceive any valid objection to this practice, and indeed, unless the judge who tried the cause is sometimes permitted to settle a bill of exceptions after his term of office expires, it would deprive a party of the benefit of an appeal to this court." See also *Galbraith v. Green*, 13 S. & R. (Pa.) 85.

In *State v. Slick*, 86 Ind. 501; *ELLIOTT, J.*, said, "It is the duty of a judge to sign a proper bill of exceptions, duly presented within the time allowed, although the proceedings which it recites took place during his predecessor's term of office. *Hedrick v. Hedrick*, 28 Ind. 291; *Smith v. Baugh*, 32 Ind. 163.

One who tenders a proper and just bill within the time allowed presents it in season to allow a fair examination, and upon the refusal of the judge to sign it, proceeds with reasonable diligence, will not lose his rights because of the expiration of the term of office of the judge to whom the bill was presented. In such a case the party may, within a reasonable time,

present to the successor of the judge to whom the bill was first presented a verified petition showing all the facts, and praying him to sign and seal the bill, and if, after notice and upon a hearing, the party is found entitled to the relief he seeks, it will be the duty of the judge to sign the bill and make it part of the record in such a manner as to make it available on appeal. If the judge to whom such a petition is presented should wrongfully refuse to sign the bill, then, upon a proper showing, mandate would issue commanding him to do it."

Leave to File Exceptions to Special Findings.—Mandamus to compel a court to allow the filing of exceptions to special findings was denied where no motion for leave to do so had been made until nearly two years after the findings had been filed and judgment rendered thereon, and the judge who had heard the case and entered judgment had gone out of office. *Eggleston v. Kent Circuit Judge*, 50 Mich. 147.

1. *State v. Supervisors of Beloit*, 21 Wis. 280; *Fellows v. Tait*, 14 Wis. 156.

In *State v. Barnes*, 16 Neb. 37, it was held that "the judge who heard or tried a case" in the district court has authority to settle and allow a bill of exceptions in a case tried before him after the expiration of his term of office.

2. *State v. Judges*, 1 West L. J. 358; *State v. Hawes*, 43 Ohio St. 27; *State v. Brockwell*, 16 Lea (Tenn.) 683; *Sikes v. Ransom*, 6 Johns. (N. Y.) 279; *State v. Drew*, 32 La. An. 1043; see *People v. Judges of Washington*, 1 Cal. (N. Y.) 511; *State v. Elmore*, 6 Coldw. (Tenn.) 528; *State v. Hall*, 3 Coldw. (Tenn.) 255.

3. *Regina v. Commissioners etc.*, 1 Best & Smith 4. A return to an alternative writ is insufficient which merely alleges that the relator had no authority to compel the respondent to sign the bill, since he himself must be the judge of the correctness of the exceptions,

tions of the writ or stating facts sufficient to defeat the relator's right. It should contain positive allegations of fact, and not mere inferences from facts.¹

(f) CHARGE TO THE JURY.—Where an exception is taken to a refusal to charge that there is no evidence tending to prove a certain point, the plaintiff in error, desiring to bring up for review this exception, is entitled to have incorporated into the bill of exceptions all the evidence bearing upon the point in question; and if the circuit judge refuses to so incorporate it mandamus is the proper remedy.²

(g) CHANCERY COURTS.—Mandamus will not issue to compel the signing of a bill in a chancery cause determined in an inferior court. Nor will it be granted to compel a court of chancery to inscribe in an order book upon the application of one of the parties which it has made in a cause.³

(h) JUSTICE COURTS.—Mandamus will not compel the justice of the peace to sign a bill of exceptions in a cause tried by him.⁴

(i) WHEN GRANTED TO REFEREE.—A referee may be compelled by mandamus to settle a case and exceptions and to settle it correctly. But before the writ will be issued to compel the settlement in a particular way it must be made to appear that when so settled it will be according to the facts.⁵

IV. JUDICIAL OFFICERS—1. Generally.—Mandamus will be issued to compel judicial officers to perform duties imposed by law.⁶ And an application to compel the performance by an officer of the court of a duty devolving upon him by virtue of such office should ordinarily be made in the first instance to that court.⁷

2. Judges.—Mandamus will lie to compel a judge to perform a duty.⁸ Thus if a judge unreasonably delay judgment in a parti-

trial, cannot be taken in such a form as to bring the whole charge of the judge before this court, a charge in which he not only states the results of the law from the facts, but sums up all the evidence. *Ex parte* Crane, 5 Pet. (U. S.) 190.

1. *Com. v. Commrs.*, 37 Pa. St. 277; *State v. Hawes*, 43 Ohio St. 17.

The answer of a judge to a writ, commanding him to seal a bill of exceptions, that the bill "is not a true bill of exceptions, and does not state the exceptions in manner and form as they were taken upon the case," without stating in what respect it is untrue, is bad for uncertainty. *Reichenbach v. Ruddach*, 121 Pa. St. 18.

2. *Crane v. Judge of Wayne Co.*, 24 Mich. 513. Exceptions taken on the trial of a cause before a jury for the purpose of submitting to the revision of the court questions of law decided by the circuit court during the

trial, cannot be taken in such a form as to bring the whole charge of the judge before this court, a charge in which he not only states the results of the law from the facts, but sums up all the evidence. *Ex parte* Crane, 5 Pet. (U. S.) 190.

3. *High on Ex. L. Rem.*, § 211; *State v. Powers*, 14 Ga. 388.

4. *Ohio v. Wood*, 22 Ohio St. 537.

5. *People v. Baker*, 35 Barb. (N. Y.) 105.

6. *Buchoz v. Pray*, 37 Mich. 512; *People v. Randall*, 37 Mich. 473; *Ex parte* Dowe, 54 Ala. 258; *Brown v. Atkin*, 1 Utah 277. See *Mitchell v. Hay*, 37 Ga. 581.

7. *State v. Breese*, 15 Kan. 123.

8. *Com. v. M'Laughlin*, 120 Pa. St. 518. See *Boone v. DeHaven*, 72 Cal. 280; *Life etc. Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291; *Shehan v. Wayne Circuit Judge*, 42 Mich. 69; *Careago v. Fernold*, 66 Cal. 351; *Cochran v. Miller*, 74 Ala.

cular case, he may be compelled to act by mandamus.¹ But it will not compel him to give judgment in a particular way; it will only compel him to act.²

The writ may issue to compel a judge to settle a statement on motion for a new trial,³ to compel a judge to accept a bond, and settle and sign the case for appeal,⁴ or to approve official bonds.⁵ To issue an execution;⁶ to certify a case on which he has heard and decided a motion for a new trial;⁷ to sign a bill

50; *State v. Judge of the Third District*, 17 La. An. 328; *People v. Dodge*, 5 How. (N. Y.) Pr. 47.

1. *Com. v. M'Laughlin*, 120 Pa. St. 518; *State v. Lazarus*, 37 La. An. 610.

2. *Ex parte Bostwick*, 1 Cow. (N. Y.) 143; *Johnston v. Glascock*, 2 Ala. 519; *State v. Kinkaid* (Neb.), 37 N. W. Rep. 612; *People v. Judge of Wayne Co. Court*, 1 Mich. 359; *State v. Williams*, 69 Ala. 311; *Ex parte Redd*, 73 Ala. 548; *Brown v. Kalamazoo Circuit Court Judge*, 75 Mich. 274. See *State v. Judges of Ninth etc. Jud. Dist.*, 29 La. An. 785; *Griffen v. Steele*, 1 Edm. (N. Y.) Sel. Cas. 505; *Life Ins. Co. v. Adams*, 9 Pet. 573.

Mandamus lies to compel a circuit judge to set aside a verdict and grant a new trial for communicating and drinking with others after being sent out to consider their verdict. *Churchill v. Emerick Circuit Judge*, 56 Mich. 536.

A mandamus lies to compel the trial of a case, where the judge has illegally refused to go into the merits of the action upon an erroneous construction of some question of practice preliminary to the whole case. *State v. Twenty-sixth District Judge*, 34 La. An. 1177.

A plea to the jurisdiction in a criminal case was sustained, and the order sustaining it directed, without any authority therefor, that the indictment be transmitted to another court. *Held*, that the indictment had not been disposed of, and that a writ of mandamus to compel the court to proceed with the trial would be granted, provided such court actually had jurisdiction of the offence charged. *State v. Laughlin*, 75 Mo. 358.

Upon the certificate of a judge of his disqualification to try a cause, a special judge, who has been appointed and qualified to try the cause, has power to do so, and where he refuses on the ground that the regular judge was not disqualified, and that, therefore, his own appointment was void, mandamus will lie to compel him to proceed. *Schultze v. McLeary*, 73 Tex. 92.

3. *State v. Murphy*, 19 Nev. 89. See *Ex parte Virginia Commrs.*, 112 U. S. 177; *People v. Circuit Judge of Branch County*, 17 Mich. 67; *Frost v. Frost*, 45 Tex. 324; *People v. Rosborough*, 29 Cal. 415.

Mandamus will not issue to compel the superior court to settle a statement on motion for a new trial, where the notice of the motion was made too late. The writ would be of no avail if granted. *Clark v. Crane*, 57 Cal. 629.

Mandamus will not be granted to compel the circuit judge to grant a new trial, where he has exercised his discretion and refused it, after considering affidavits *pro* and *con*, and where the negligence of the defendant in not producing its principal witnesses at the trial stands confessed. *SHERWOOD, C. J.*, and *CAMPBELL, J.*, dissenting. *Detroit Tug & Wrecking Co. v. Gartner* (Mich.), 42 N. W. Rep. 968.

Mandamus to settle a case for review will not issue to a judge who has resigned since filing his answer to the order to show cause. Relief should be asked from his successor. *DeHaas v. Newago Circuit Judge*, 46 Mich. 12. See *Eggleston v. Kent Circuit Judge*, 50 Mich. 147.

4. *Gartner v. Cohen*, 16 Atl. Rep. (N. J.) 684. See *Levy v. Yoto County Superior Court*, 66 Cal. 292; *Mansfield v. Fassett*, 63 N. H. 573; *Ex parte Powers*, 4 La. An. 105; *Ex parte Henderson*, 6 Fla. 279; *Anderson v. Brown*, 6 Fla. 299. Compare *Gruner v. Moore*, 6 Colo. 526.

5. *Ex parte Candee*, 48 Ala. 386; *Cate v. Ross*, 2 Duv. (Ky.) 243; *People v. Stout*, 11 Abb. (N. Y.) Pr. 17; *People v. Judges of Washington*, 1 Cal. (N. Y.) 511; *People v. Pearson*, 3 Ill. (2 Scam.) 189; *State v. Hall*, 3 Coldw. (Tenn.) 255; *Porter v. Harris*, 4 Call (Va.) 485.

6. *State v. Hoboken District Court*, 49 N. J. L. 539; *State v. Berning*, 8 Mo. App. 600.

7. *State v. Cox*, 26 Minn. 214; *State v. Phillips* (Mo.), 10 S. W. Rep. 182.

of exceptions but not to direct what statements or exceptions the bill shall contain;¹ to sign a judgment rendered by his predecessor in office;² to consider a coroner's account for holding an inquest on the dead body of a stranger, the statute requiring this service of the judge;³ to issue a warrant on the county treasury in payment of claims allowed by the commissioners' court;⁴ to compel the judge of an inferior tribunal to grant an order essential to a speedy execution of its decree or judgment; for instance, an order that an appellant execute a *supersedeas* bond.⁵

But a judge's discretion will not be reviewed by mandamus, such as granting or refusing a rehearing⁶ or issuing a search warrant upon the complaint of a private citizen,⁷ or to compel the judge to commit for contempt,⁸ or to permit an answer to be filed;⁹ or to reverse his findings;¹⁰ or to receive certain evidence in a cause pending in the inferior court, the admissibility of the evidence being a question addressed wholly to the judgment of the court itself;¹¹ or to approve the salary now due of one of

1. *People v. Anthony*, 25 Ill. App. 532; *State v. Eighth District Judge*, 35 La. An. 248.

2. *Life etc. Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291.

A mandamus lies to compel a district judge to sign *de novo* a final judgment when improperly signed by him. *State v. Orleans District Judge*, 35 La. An. 218. But after the judge has *proprio motu* reinstated the case to be tried anew, a mandamus does not lie to compel him to sign a judgment therein. *State v. Fifth District Judge*, 35 La. An. 873.

3. *Locke v. Speed*, 62 Mich. 408.

4. *Jack v. Moore*, 66 Ala. 184. An alternative writ of mandamus was granted to compel a county judge to issue a warrant for costs of a witness. The judge pleaded that his term of office had expired. *Held*, that the proceedings might be continued against his successor, and a peremptory writ ordered. *State v. Puckett*, 7 Lea (Tenn.) 709.

5. *Ex parte Sibert*, 67 Ala. 349. Where property claimed as exempt is in the hands of the judgment debtor, and the execution is *functus officio*, mandamus will not be granted to compel the issuance of a *supersedeas*. *Middleton v. McCullough* (Ark.), 9 S. W. Rep. 844.

6. *Ex parte Gresham*, 82 Ala. 359; *State v. Monroe*, 39 La. An. 99; *Territory v. Nowlin*, 3 Dak. 349. See *Jennings v. Kalamazoo Circuit Judge*, 44 Mich. 99; *State v. Rising*, 15 Nev. 164;

Ex parte Jones, 66 Ala. 202; *State v. Douglas County Judges*, 19 Neb. 149; *Castor v. Allegan Judge*, 54 Mich. 318; *State v. Rightor*, 36 La. An. 112; *State v. Monroe* (La.), 1 So. Rep. 300; *Kimball v. Morris*, 2 Met. (Mass.) 573; *Ex parte Denver & Rio Grande R. Co.*, 101 U. S. 711; *State v. District Judge* (La.), 5 So. Rep. 648; *State v. Ellis* (La.), 5 So. Rep. 530; *Bassler v. Niesly*, 1 Serg. & R. (Pa.) 431; *Spencer v. Jawler* (Cal.), 21 Pac. Rep. 742; *State v. Judge of Superior District Court*, 26 La. An. 116.

Mandamus will not issue in a case not specially provided for by law, but based only on the general discretion of judges to enjoin any "injurious act." *State v. Rightor*, 38 La. An. 916.

Mandamus will not issue to compel a probate judge in Kansas to grant a permit to a druggist to sell liquor, the granting or refusing of such permit being within the discretion of the judge. *Stanley v. Monnet*, 34 Kan. 708.

7. *Mitchell v. Boardman*, 79 Me. 469.

8. *Atchison, Topeka etc. R. Co. v. Jennison*, 60 Mich. 232.

9. *State v. Thayer*, 10 Mo. App. 540.

10. *Delhi School District v. Ingham County Judge*, 49 Mich. 432; *State v. Orleans Appeals*, 37 La. An. 111; *Scott v. Superior Court*, 75 Cal. 114; *Byington v. Hamilton* 39 Kan. 758; *Ex parte Bell*, 48 Ala. 285.

11. *Ex parte Smith*, 69 Ala. 528; *King v. Justices of Cambridgeshire*, 1 Dow. & Ry. 325.

Admission of Evidence Generally.—In

their officers for a particular amount, when their refusal to thus approve is predicated on an act of the legislature reducing such salary twenty per cent.¹ So mandamus to compel a judge to do an act should be refused when there is an adequate remedy at law,² and when the judge has no jurisdiction.³

(a) POWER OF JUDGES AT CHAMBERS.—Where the right is clear, a judge at chambers, within his district, may grant a peremptory writ of mandamus.⁴ But the judge at chambers cannot legally hear and determine a prosecution in the nature of contempt for an alleged violation of the writ of mandamus.⁵

(b) AWARDING MANDAMUS IN VACATION.—A judge of the court cannot award a mandamus in vacation.⁶

3. **Attorneys.**—The admission of an attorney by a court is a judicial, not a ministerial act, and mandamus cannot issue to compel such admission.⁷ It rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor and for which cause he ought to be removed.⁸ The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice or personal hostility; but it is the duty of the court to exercise and regulate it by a sound judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court.⁹ So where the discretion of an inferior court is exercised with manifest injustice in striking an attorney's name from its rolls mandamus may be used to control that discretion.¹⁰

Mandamus lies to compel a judge of an inferior court to recog-

a proceeding for a mandamus to compel a district survey or to survey disputed lands, a discrepancy in the calls of a survey having been established, *held*, that it was error to exclude the testimony of the surveyor who made the survey to show how a mistake was made in calling for the old line. *Booth v. Upshur*, 26 Tex. 64.

1. *State v. Orleans District Judges*, 34 La. An. 1114.

2. *State v. Meiley*, 22 Ohio St. 534.

3. *Rogers v. Jenkins* (N. Car.), 3 S. E. Rep. 821; *State v. Stevens* (Kan.), 19 Pac. Rep. 365; *In re Price* (Kan.), 19 Pac. Rep. 751.

4. *Clark v. State*, 24 Neb. 263; *State v. Cheraw etc.* R. Co., 16 Shand. (S. Car.) 524; s. c., 9 Am. & Eng. R. Cas. 631; *Territory v. Shearer*, 2 Dak. 332. Compare *Belmont v. Reilly*, 71 N. Car. 260; *Palmer v. McChesney*, 26 Ark. 452.

A judge of the superior court may deny the application for a rule nisi at chambers. *Gay v. Gilmore*, 76 Ga. 725.

5. *In re Price*, 40 Kan. 156; *State v. Stevens*, 40 Kan. 113.

6. *Ex parte Grant*, 6 Ala. 91; *Territory v. Ortiz*, 1 New Mex. 5. Compare *Hammond v. Poole*, 58 Ga. 169.

Rev. Stat. Mo., § 3254, providing that a judge may issue a writ of mandamus in vacation, does not infringe upon Const. Mo., art. 6, § 3, giving the supreme court power to issue such writs, and the writ will not be quashed merely because issued in vacation. *State v. Weeks*, 93 Mo. 499.

7. *Re Splane* (Pa.), 19 Pitt. Leg. J., N. S. 237.

8. *Com. v. Common Pleas of Cumberland*, 1 S. & R. (Pa.) 187.

9. *Ex parte Secombe*, 19 How. (U. S.) 9.

10. *State v. Kirke*, 12 Fla. 278; s. c., 95 Am. Dec. 314.

City Attorney.—A writ of mandate will lie to reinstate a city attorney appointed by the common council and afterwards wrongfully removed by it from the office. *Madison v. Korbly*, 32 Ind. 74.

nize a duly elected (or appointed) and qualified district attorney.¹

Mandamus is an appropriate remedy to restore an attorney to practice in inferior courts, especially where no appeal or writ of error from the order of the inferior court or other remedy is authorized by law.² So where an attorney is disbarred by an inferior court for cause over which it has no jurisdiction.³

Where an attorney is proceeded against for the purpose of expelling him from the bar he is entitled to have notice of the charges against him and an opportunity to make his defence. And when his name is thus taken from the roll mandamus should issue to command the court to vacate the order and restore the party.⁴

A clear case of debarring must be made out, however, in order to warrant the interference by mandamus in this class of cases.⁵ And in order to restore an attorney who has been admitted to practice in all the courts of the State it must be alleged that he is a practitioner of law in all the courts of the State, both of State and federal jurisdiction, and that he is duly and regularly licenced, that he has taken the oath, and that the court has improperly removed him.⁶

1. *People v. Hallett*, 1 Colo. T. 352.

Under the Florida practice mandamus is a proper remedy, where one entitled to be examined for admission to practice law has been refused an examination. *State v. Baker* (Fla.), 6 So. Rep. 445.

2. *State v. Kirke*, 12 Fla. 278; Com. v. District Court, 5 W. & S. (Pa.) 272. See *Randall*, 11 Allen (Mass.) 473.

3. *Ex parte Bradley*, 7 Wall. (U. S.) 364; *State v. Kirke*, 12 Fla. 278; *Withers v. State*, 36 Ala. 252; *People v. Justices*, 1 Johns. (N. Y.) Cas. 181; *Ex parte Robinson*, 19 Wall. (U. S.) 505; *Ex parte Garland*, 4 Wall. (U. S.) 333; *Ex parte Heyfron*, 7 How. (Miss.) 127; *People v. Turner*, 1 Cal. 148; *Start v. Start*, 7 Iowa 499; *Fletcher v. Dangerfield*, 20 Cal. 430; *Leigh's Case*, 3 Mod. 335; *Beene v. State*, 22 Ark. 149, 157; *Bradley v. Fisher*, 13 Wall. (U. S.) 335. See *Ex parte Secombe*, 19 How. (U. S.) 3; *Ex parte Burr*, 9 Wheat. (U. S.) 530; *White's Case*, 6 Mod. 18; *McLaughlin v. Court*, 5 W. & S. (Pa.) 272; *Witliens v. State*, 36 Ala. 252.

4. *People v. Turner*, 1 Cal. 145. In *Ex parte Heyfron*, 7 How. (Miss.) 127, no notice of the charges upon which the order was made was given; no opportunity for explanation, apology or defence was afforded; the judgment of the court was *ex parte*, and condemned the defendants without a hearing. It

was *held* that a judgment thus rendered, partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, could not be sustained.

Where the statute directs that the proceedings to remove an attorney must be taken by the court on its own motion for matter within its knowledge, and that notice shall be given to the relator, yet where the court are of the opinion that no notice was necessary and proceed without it, its decisions, being made in the exercise of judicial authority where the subject was within their jurisdiction, cannot be reversed and annulled by mandamus. *Ex parte Secombe*, 19 How. (U. S.) 9.

5. *People v. Dowling*, 55 Barb. (N. Y.) 200.

Where the only act of the court of which the relator complained related to a single case, which was ended before a mandamus was applied for, *held* that his general rights not being affected by the order made in that case there was nothing pending in which he had any interest that could give him standing in court to ask for the writ. *People v. Dowling*, 55 Barb. (N. Y.) 197.

6. *Withers v. State*, 36 Ala. 252.

A rule to show cause why a mandamus should not issue to a court of common pleas to restore an attorney was refused because the affidavit did not

A subordinate court may be compelled by mandamus to appoint an attorney to defend a person who is *non compos* and against whom suit is brought.¹

4. Clerks of Courts.—A judge may issue a writ of mandamus to a clerk of a court in his judicial district, requiring the clerk to appear before him and show cause why he does not discharge what the judge considers the clerk's official duties.²

But the jurisdiction by mandamus over clerks of court to compel the performance of ministerial duties will be withheld if the party aggrieved has a sufficient remedy by writ of error,³ or if a plain, speedy and adequate remedy is provided by statute.⁴

Mandamus lies to compel a clerk of court to issue process to enforce a judgment,⁵ or to furnish copies of the record of the court,⁶ or to record an instrument,⁷ or perform any duty imposed by statute.⁸

state that the court had improperly removed. *In re Gephard*, 1 Johns. Cas. (N. Y.) 134.

1. *Ex parte* Worthington, 37 Ala. 496.

2. *Jones v. McMahon*, 30 Fed. Rep. 719; *State v. Shaw* (Ohio), 1 West. Rep. 219; *State v. Jacobs*, 11 Oreg. 314; *Ex parte* Cornochan, T. U. P. Charlt. (Ga.) 215; *Cox v. Kash*, 1 Bush (Ky.) 201.

The supreme court of Arkansas cannot, by mandamus, compel a clerk of the circuit court to perform a legal duty which the judge of that court, by reason of interest, is disqualified from compelling. Except in the cases specially provided for, the jurisdiction of the supreme court is appellate only. *Ex parte* Snoddy, 44 Ark. 221.

Clerk of Municipal Court.—A writ of mandamus is the proper process to compel the clerk of a municipal court to furnish certified copies of its records. *State v. Meagher*, 57 Vt. 398.

3. *State v. Engleman*, 45 Mo. 27.

Where the court of common pleas granted an appeal to the district court, with the proviso that no transcript should be made out until the filing of the bond, held that such proviso was unwarranted; but the clerk acting under the direction of the court properly refused to issue the transcript in default of a bond, and mandamus would not lie against him to compel its issue. The proper remedy of appellant in such case was by writ of error. *State v. Engleman*, 45 Mo. 27.

4. *Pickell v. Owen*, 66 Iowa 485.

Mandamus will not lie to compel the clerk of the courts to issue an execu-

tion on a judgment, because, in case of his refusal to do so in a proper case, the statute (Code, § 2923) provides a plain, speedy and adequate remedy, in the presence of which mandamus is forbidden by code, § 3376. *Pickell v. Owen*, 66 Iowa 485.

Remedy at Law.—A mandamus will not lie against a clerk of the court to compel him to issue execution on a money judgment where the plaintiff has, in an ordinary course of law, a plain and adequate remedy by an action on the bond of the officer. *Goodwin v. Glazer*, 10 Cal. 333; *Fulton v. Hanna*, 40 Cal. 278. If the remedy by action against the clerk upon his official bond for damages be inadequate to procure for the party aggrieved the specific relief to which he is entitled, mandamus will lie. *People v. Loucks*, 28 Cal. 68; *Atty. Gen. v. Lum*, 2 Wis. 507.

5. *Moore v. Muse*, 47 Tex. 210; *People v. Clerk of Marine Court*, 3 Abb. (N. Y.) Dec. 491; *People v. Lucks*, 28 Cal. 68. A judge of one circuit who orders an injunction to issue in another circuit, cannot, by mandamus, compel the clerk of the latter circuit to issue the writ. *Welch v. Byrns*, 38 Ill. 20.

6. *State v. Meagher*, 57 Vt. 398; *Davis v. Carter*, 18 Tex. 400.

7. *Wulftange v. McCollom*, 83 Ky. 361; *State v. Gimshaw* (Mo.), 5 West. Rep. 427; *People v. Miller*, 43 Hun (N. Y.) 463; *Ex parte* Goodell, 14 Johns. (N. Y.) 335. See *State v. Ware*, 13 Oreg. 380; *Road Co. v. Douglas Co.*, 5 Oreg. 373.

8. *Ex parte* Lawson, 12 Ark. 323.

It does not lie to compel a clerk to furnish a transcript of the record when the writ of error has not issued,¹ or to require the clerk of the court below by mandamus to send up a record when the case could not, under the law, be heard after its arrival, and the process would thus be useless.²

(a) APPROVAL OF BOND.—If the clerk refuses to consider the sufficiency of a bond tendered for his approval, either for no reason or for an assigned insufficient reason, mandamus will lie, not to compel him to approve the bond; that is a matter for his own enlightened judgment; it will lie to compel him to consider and pronounce on the sufficiency of the bond. This involves an enquiry into its form, whether it is in proper penalty and condition, and whether the sureties tendered are sufficient. This is a duty cast on him, which he alone can perform, and suitors who may be required to give such bonds have the clear legal right to demand its exercise.³ A mandamus will not be awarded to compel the approval of a bond which was refused on the ground of the insufficiency of the sureties.⁴ And where the statute makes it the duty of the clerk of the court to approve the bonds of all county officers, the act of approval is so far judicial in its nature that mandamus will not lie to control the judgment of the clerk as to the approval of a bond presented.⁵

(b) ISSUING CERTIFICATE OF ELECTION.—Mandamus will issue to compel the county clerk to issue to the relator a certificate of election where the proof shows that he is duly elected.⁶

(c) CLERK OUSTED FROM OFFICE.—Mandamus is the proper remedy to restore a clerk ousted from his office by the illegal appointment of another person.⁷

5. Justices of the Peace.—Mandamus lies to compel justices of

1. *Ex parte* Ralston, 119 U. S. 613.

2. *Roberts v. Smith*, 63 Ga. 213. See *People v. Loucks*, 28 Cal. 68.

3. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321; *Gulick v. New*, 14 Ind. 93; *Moses on Mand*, 61; *State v. Stockwell*, 7 Kan. 103; *McDuffie v. Cook*, 65 Ala. 430; *Swan v. Gray*, 44 Miss. 393. And see *Ross v. People*, 78 Ill. 375; *People v. Fletcher*, 2 Scam. (Ill.) 482; *State v. Lafayette Co. Court*, 41 Mo. 222; *State v. County Court of Texas Co.*, 44 Mo. 230; *Beck v. Jackson*, 43 Mo. 117; *Daniels v. Miller*, 8 Colo. 542.

In approving an attachment bond, the clerk to whom it is tendered acts in a *quasi* judicial capacity; and when he refuses to approve it, either because he considers the sureties insufficient, or for no assigned reason, his refusal will not be controlled or reviewed by mandamus; but, when he refuses to act on the bond tendered, or bases his refusal to

accept it on a specified reason which is insufficient in law, mandamus will lie, not to compel his approval, but to require him to pass upon the sufficiency of the bond without regard to the supposed defect. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321.

4. *Ex parte* Thompson, 52 Ala. 98; *McDuffie v. Cook*, 65 Ala. 430.

5. *Swan v. Gray*, 44 Miss. 393; *McDuffie v. Cook*, 65 Ala. 430.

6. *People v. Matteson*, 17 Ill. 167. Upon a petition for a mandamus to compel a county clerk to issue a certificate of election to the relator, who was duly elected a justice of the peace, it is no defence that the clerk has already issued a certificate to the relator's competitor, and that he has been regularly commissioned by the governor. *People v. Rives*, 27 Ill. 242.

7. *Dew v. Judges*, 3 Hen. & M. (Va.)

1. See *State v. Schofield*, 41 Mo. 38.

the peace to perform the duties required of them by law,¹ to hear and determine matters properly within their jurisdiction and properly brought before them.² Their discretion will not be controlled by mandamus, but if they disregard their plainly defined duties mandamus will lie,³ It will lie to compel a justice of the peace to enter judgment;⁴ to grant an appeal in a proper case;⁵ to issue his warrant in summary proceedings to recover possession

1. *King v. Montague*, 1 Barn. K. B. 72; *Com. v. Smith*, 3 W. N. C. (Pa.) 95; *State v. Shropshire*, 4 Neb. 411; *Kirk v. Cole*, 3 McArthur (D. C.) 71; *Harrison v. Emmerson*, 2 Leigh 764; *Smith v. Moore*, 38 Conn. 105; *Forman v. Murphy*, Pen. 1024; *Anderson v. Pennie*, 32 Cal. 265; *Garrett v. Stacy*, 17 Mo. 601; *Moore v. The State*, 72 Ind. 358; *Laird v. Abrahams*, 3 Green 22; *Terhune v. Barcelow*, 6 Halst. 38; *Ex parte Morris*, 11 Gratt. (Va.) 292; *Cox v. Rich*, 24 Kan. 20; *Town of Orange v. Bill*, 29 Vt. 442; *Kirk v. Cole*, 3 McArthur 71; *Ballou v. Smith*, N. H. 530; *Caly v. Hardy*, Holt 407; *R. v. Barnstaple*, 1 Barn. 137; *R. v. Drake*, 6 M. & S. 116; *R. v. Kent*, 14 East 395; *R. v. Long*, 1 Q. B. 740; *R. v. Cumberland*, 1 M. & S. 190; *R. v. Rawlinson*, 6 B. & C. 23; *R. v. Nottingham*, 2 Barn. 56; *R. v. Eaton*, L. R., 8 Q. B. D. 158; *R. v. Paget*, L. R., 8 Q. B. D. 151; *R. v. New Windsor*, L. R., 1 Q. B. D. 152; *R. v. Eyre*, L. R., 4 Q. B. 487.

To Levy Tax.—Neither the supreme nor circuit court of Tennessee has power to award a mandamus to the justices of the county court to compel the assessment of taxes for the payment of county debts. *Justices of Cannon Co. v. Hoodenpyle*, 7 Humph. (Tenn.) 145.

2. *People v. Barnes*, 66 Cal. 594; *Rex v. Tod*, Stra. 530; *King v. Montague*, 1 Barn. K. B. 72; *R. v. Cumberland*, 4 A. & E. 695; *R. v. Beard*, 12 East 673; *R. v. Handsley*, L. R., 8 Q. B. D. 383; *R. v. Brown*, 7 E. & B. 757; *R. v. Cambridgeshire*, 7 A. & E. 480; *R. v. Walker*, 3 D. & L. 131; *R. v. Martyr*, 13 East 55; *Ex parte Willingford*, 9 Dowl. 987; *Clark v. Minnis*, 50 Cal. 509.

In *Atty. Gen. v. Police Justice*, 40 Mich. 631, mandamus was issued to compel the police justice of Detroit to entertain a complaint. See also *King v. Mawbey*, 6 Term Rep. 628; *Reg. v. Adamson*, 1 Q. B. Div. 201.

A writ of mandamus lies to compel a justice of the peace to proceed with the

preliminary examination of a person regularly charged with having committed a public offence, arrested and brought before him. The duty of the preliminary examination is especially enjoined on the justice by sections 858-860 of the penal code, and his refusal to proceed with the examination is not justified by the mere statement of the counsel for the defendant that an examination for the same offence had been had before another magistrate, on which the defendant had been held to answer. *People v. Barnes*, 66 Cal. 594.

Mandamus cannot issue to a justice of the peace who is willing to proceed, but who thinks himself prevented from so doing by superior authority. *State v. Judge*, 39 La. An. 994.

Mandamus will not issue to compel a justice of the marine court to entertain an application for summary proceedings to eject a tenant, the refusal of the justice arising from the fact that all his time is occupied with other business of the court. *People v. McAdam*, 28 Hun (N. Y.) 284; s. c., 64 How. (N. Y.) Pr. 238.

Proceedings Commenced Before T o Justices.—Where a prisoner was arrested on a warrant issued by Justice A on complaint of prisoner's wife, and was afterwards arrested on a coroner's warrant and taken before Justice B. and the county attorney preferred to continue the proceedings before B rather than before A, held that A was not entitled to mandamus to bring the prisoner before him. *Evans v. Thomas*, 32 Kan. 469.

3. *People v. Norton*, 7 Barb. (N. Y.) 477. *State v. Judge*, 1 So. Rep. 281; *Anonymous*, 3 N. J. L. (2 Pen.) 576; *Petition of Farwell*, 2 N. H. 123; *Wannell v. Kern*, 51 Mo. 365; *Miller v. Powell*, 53 Me. 252; *Frisbie v. Justices*, 2 Va. Cas. 92.

4. *Smith v. Moore*, 38 Conn. 105; *Anderson v. Pennie*, 32 Cal. 265; *Forman v. Murphy*, 3 N. J. L. 1024.

5. *Ex parte Martin*, 5 Ark. 371; *Levy v. Inglish*, 4 Ark. 65; *Ex parte*

of lands;¹ to make correct docket entries in accordance with the facts;² and to perform all duties that are purely ministerial.³ It will not lie to compel a justice after rendering a judgment to set it aside and render a different one.⁴

(a) ISSUING EXECUTION.—The issuing of an execution by a justice of the peace upon a judgment rendered by him is the exercise of a ministerial function. It is a duty enjoined by law as resulting from his office and one which he may be compelled to perform by mandamus.⁵

(b) FILING TRANSCRIPT.—Mandamus may be maintained against a justice of the peace on appeal properly taken from him in a criminal case if he fail to send up the transcript in the limited time.⁶

(c) DISMISSING WRIT OF REPLEVIN.—Where a writ of replevin is dismissed by a justice and defendant waives return he has a right to introduce evidence to prove the value of the property and mandamus will lie to compel the justice to receive it in case he refuses to allow it.⁷

Morris, 11 Gratt. (Va.) 292; Town of Orange v. Bill, 29 Vt. 442.

1. People v. Willis, 5 Abb. (N. Y.) Pr. 205.

2. Green v. Van Ells, 69 Wis. 19. See State v. Edwards (N. J.), 17 Atl. Rep. 973.

3. Harrison v. Emmerson, 2 Leigh (Va.) 764; State v. Shropshire, 4 Neb. 411; Com. v. Smith, 3 W. N. C. (Pa.) 95; Bennett v. McCaffery, 28 Mo. App. 220; People v. Barnes, 66 Cal. 594; In the matter of Trustees of Williamsburgh, 1 Barb. (N. Y.) 34; Harrison v. Emmerson, 2 Leigh (Va.) 764; State v. Kings, 23 Neb. 540; Ostertag v. Galbraith, 23 Neb. 730; Logansport etc. R. Co. v. Groniger, 51 Ind. 383.

4. Brien v. Tallman, 36 Mich. 13.

5. Hamilton v. Lutt, 65 Cal. 57; Laird v. Abrahams, 3 Green (N. J.) 22; Terhune v. Barcalow, 6 Halst. (N. J.) 38; State v. Berning, 8 Mo. App. 600.

If a justice of the peace enters a judgment against a defendant, and afterwards makes a conditional order that the judgment shall be opened upon payment of costs by the defendant on a certain day, and, notwithstanding the defendant neglects to pay the costs on the day prescribed, the justice refuses to issue execution on the judgment, after being requested by the plaintiff so to do, a mandamus will be granted to compel the justice to issue the execution. Terhune v. Barcalow, 6 Halst. (N. J.) 38.

A justice cannot be compelled by

mandamus to issue execution on a judgment rendered in an action before it stood regularly for trial, after such judgment has been vacated and a new trial granted. Barons v. Anderson, 37 Kan. 399.

Where a constable charges illegal and unreasonable fees for executing a writ of replevin issued by a justice of the peace, the latter will not be compelled by mandamus to issue an execution for their collection. Chase v. De Wolf, 69 Ill. 47.

6. State v. Crisinger, 88 Ind. 499. The supreme court of Illinois, in the case of Little v. Smith, 4 Scam. (Ill.) 400, held, as summed up in the syllabus, as follows: "The provisions" of the act "are only directory to the justice, prescribing a ministerial duty to be performed by him within a limited time; the performance of which, if neglected, may be enforced by the circuit court. When the party appealing from the judgment of a justice of the peace has entered into the appeal bond, and the same is accepted and approved by the justice, the appeal is taken; and the neglect of the justice to return the papers to the office of the clerk within the time limited by the statute, does not defeat the appeal. The justice is the officer of the law, and not the agent of the party." See Cox v. Rich, 24 Kan. 20.

7. People v. Osborn, 38 Mich. 313; People v. Judge, 23 Mich. 497; People v. Tripp, 15 Mich. 518.

(*d*) CORRECTION OF ERRORS.—Where a justice erroneously dismisses a cause mandamus will not lie to correct the error when the case was judiciously determined by him.¹ So mandamus will not issue to require a justice to amend his record when the amount is insignificant and it would not benefit the petitioner.²

6. *Sheriff*.—When a party has a clear legal right to demand from a *sheriff* the performance of a specific duty, and there is not a defined adequate legal remedy, mandamus from the proper tribunal is the appropriate remedy to compel performance.³

Mandamus is the proper remedy to compel a sheriff to keep his office at the county seat,⁴ or to execute a writ of restitution issued by a justice of the peace upon his refusal to do so.⁵ But it will not issue to compel a sheriff to levy⁶ or to set off attached

1. *State v. Miller*, 1 Lea (Tenn.) 596. See *Queen v. Justices of Middlesex*, 2 Q. B. D. 516.

When a criminal case before a justice is disposed of so as to be out of court, there is no way by which the justice can reinstate the case, or bring the party before him for trial, without commencing anew. The writ ought not to issue requiring him to do what the law gives him no authority to do. *State v. Secrest*, 33 Minn. 381.

A constable made application for a mandamus to compel a justice of the peace to reinstate a judgment on the docket of his predecessor, where, on a trial to a jury of the right of property levied on by him, a verdict had been rendered in favor of the judgment creditors, which, on motion, was set aside by the justice on the ground of partiality and undue means. *Held*, that the error, if any, in setting aside the verdict and judgment, cannot be reviewed on an application for a mandamus. *State v. Powell*, 10 Neb. 48.

2. *Hall v. Crossman*, 27 Vt. 297.

3. *Ex parte Shandies*, 66 Ala. 134. See *Hopkins v. Thomas*, 80 Ga. 644; *State v. Brown*, 38 Ohio St. 344; *Waite v. Washington*, 44 Mich. 388; *Com. v. McLaughlin*, 120 Pa. St. 518; *Williams v. Smith*, 6 Cal. 91; *People v. McClay*, 2 Neb. 7.

When the sheriff fails to produce the body of the person, in whose behalf the writ of *habeas corpus* was sued out, and alleges, as an excuse for his failure, that the prisoner was in his custody under a sentence to hard labor for the county, and, being subject to the control of the court of county commissioners, had been delivered up, on their order, and to their agent, after the service of the

writ; on such return, the judge may properly refuse to make an order requiring the sheriff to produce the body before him. *Ex parte Shandies*, 66 Ala. 134.

Nor will a writ of mandamus lie to compel a sheriff to cause an appraisal of personal property levied on, to enable the debtor in execution to select such as he desires to claim as exempt, after the property has been sold and delivered by the sheriff. *State v. Bowden*, 18 Fla. 17.

Right to Private Interview.—The provision of New York constitution that "in any trial in any court whatever, the party accused shall be entitled to appear and defend in person and with counsel," gives the right to a private interview with counsel before trial. Such right may be enforced by mandamus against the sheriff. *People v. Risley*, 66 How. (N. Y.) Pr. 67.

Changing Official Advertisements.—Where a sheriff changed his official advertisements from one newspaper to another in the same county, *held* that mandamus did not lie to compel him to keep his advertising in the first paper, although he had not given notice of his intention to change, as required by Georgia Code, § 3650. *Tillman v. Thrasher*, 61 Ga. 15.

4. *State v. Walker*, 5 S. Car. 263; *State v. Saxton*, 11 Wis. 27.

5. *North Pac. R. Co. v. Gardner* (Cal.), 21 Pac. Rep. 735; *Fogarty v. Sparks*, 22 Cal. 142.

6. *Habersham v. Sears*, 11 Oreg. 431; s. c., 50 Am. Rep. 481. A writ of mandamus will not lie, at the instance of a judgment creditor, to compel a sheriff to levy execution upon property, the legal title to which is in the debtor's

property as exempt after he has sold it,¹ or to accept county warrants or scrip in payment of an execution from the supreme court in favor of the county.²

V. COURTS—1. Federal Courts.—*The Supreme Court* of the United States has power under the constitution to grant a writ of mandamus only in cases where its exercise is necessary in aid of the appellate powers of the court. It cannot grant the writ as the exercise of an original jurisdiction.³ It cannot review, by mandamus, the action of the circuit court relating to a matter which, but for the fact that the amount in controversy was not sufficient to give jurisdiction by appeal or writ of error, would be thus reviewable.⁴

A writ of peremptory mandamus will issue from the Supreme Court of the United States to the judges of the court of claims commanding them to hear and decide certain motions for a new trial.⁵ But the supreme court will not compel, by mandamus, the circuit court to rehear a motion to remand a cause which the petitioner avers would not have been remanded had the complaint been before that court. The remedy is by application to the circuit court for a rehearing.⁶ Where the State statute only permits mandamus to issue after the return of an unsatisfied execution against a city, the federal court should conform its practice to the statute.⁷

2. Circuit courts will not entertain proceedings in mandamus or grant the writ in any case where it is not a necessary adjunct to the exercise of a jurisdiction which they already possess.⁸

wife, but which is alleged to belong in equity to the debtor. *State v. Craft*, 17 Fla. 722.

1. *State v. Bowden*, 18 Fla. 17.

2. *Hinkle v. Ball*, 34 Ark. 177.

3. *Marbury v. Madison*, 1 Cranch (U. S.) 137. See Const., art. 3, § 1; *Columbian Ins. Co. v. Wheelwright*, 7 Wheat. 534.

The supreme court has neither an original nor an appellate jurisdiction to issue a mandamus to persons holding office under the authority of the United States. *McCluney v. Silliman*, 2 Wheat. (U. S.) 369; s. c., 6 Wheat. (U. S.) 598.

4. *Re Burdett*, 127 U. S. 771.

5. *Ex parte United States*, 16 Wall. (U. S.) 699.

6. *Re Sherman*, 124 U. S. 364; *Ex parte Hoard*, 105 U. S. 578.

7. *Laird v. De Soto*, 25 Fed. Rep. 76. Where the State statute makes a judgment dormant if execution is not taken out within five years, the federal court will not, after five years, issue its writ of mandamus to enforce the collection of a judgment against a municipality, mandamus, in such cases, being the

equivalent of execution. *United States v. Oswego*, 28 Fed. Rep. 55.

8. *Smith v. Jackson*, 1 Paine (U. S.) 453; *McIntire v. Wood*, 7 Cranch (U. S.) 504; *Graham v. Norton*, 15 Wall. (U. S.) 427; *Bath Co. v. Amy*, 13 Wall. (U. S.) 245. See *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *Knox Co. Commrs. v. Aspinwall*, 24 How. (U. S.) 376; *Welch v. St. Genevieve*, 1 Dill. (U. S.) 130; *Rusch v. Supervisors*, Woolw. (U. S.) 313; *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *U. S. v. Lee Co.*, 2 Biss. (U. S.) 77.

The power to grant the writ is limited under the Judiciary act of 1789, to cases where it is necessary to the exercise of their general jurisdiction as conferred by law. See *McIntire v. Wood*, 7 Cranch (U. S.) 504; *American Union Telegraph Co. v. Bell Telephone Co.*, 1 McCrary (U. S.) 175.

A federal court issues a writ of mandamus to compel the levy of a tax; it can control the execution of the process so that property which should not

3. State Courts.—Mandamus will not lie to compel the removal of a cause from a State court to a federal court.¹ So a State court cannot rescind or disregard by mandamus the order of an inferior court directing a cause to be transferred to the federal court. The attempt would be a flagrant violation and abuse of the well established functions of the writ.²

Authority conferred upon a court by a State constitution to issue writs of mandamus and to hear and determine the same carries with it the power to pass upon the facts without the intervention of a jury.³

4. Appellate Courts.—Where the supreme court of the State is vested only with appellate powers it cannot interfere by mandamus with the proceedings of a subordinate court,⁴ except when

pay a tax shall be protected. *Apperson v. Memphis*, 2 Flip. C. Ct. 363.

On mandamus to compel the county court to levy a tax for the payment of county bonds, the federal court will not determine existing equities, nor order a second levy on lands sold for payment of bonds due before such sales were made. *Shelley v. St. Charles County*, 30 Fed. Rep. 603.

1. *People v. Judge*, 2 Den. (N. Y.) 198; *Spraggins v. County Court*, *Cooke* (Tenn.) 160. And see *People v. Judge of Circuit Court*, 21 Mich. 577; *Hough v. Western Transp. Co.*, 1 Biss. (U. S.) 425; *Ladd v. Ludor*, 3 W. & M. 326; *In re Cromie*, 2 Biss. (U. S.) 160; *State v. Curler*, 4 Nev. 445; *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283; *Shelby v. Hoffman*, 7 Ohio St. 450; *People v. Judges*, 2 Den. (N. Y.) 197. *Compare State v. Judge of Thirteenth District*, 23 La. An. 29; *Hopple v. Kalkman*, 17 Cal. 517; *Brown v. Crippin*, 4 H. & M. (Va.) 173.

In *People v. Judge of Circuit Court*, 21 Mich. 577, the court said: "We are also unable to discover any propriety in resorting to the writ of mandamus of this court to correct the action of a circuit court in a case under the act of congress. If any coercive action should be deemed necessary to transfer proceedings into the courts of the United States, it should naturally come from the United States authority; and if the result cannot be reached without the intervention of some writ, we find it difficult to believe that the remedy can be dependent on the discretion of a State court. In all cases where writs are expressly mentioned for purposes of removing cases into the United States courts they issue returnable there. There is no writ of *certiorari* or

mandamus known to the common law issuing from one jurisdiction to courts within it for the removal of causes into another jurisdiction. *Certiorari* is the proper writ for removing records from one court into another for trial and is the writ expressly authorized to be issued by United States courts under the act of 1833, 4 U. S. Stat. 633. But whether *certiorari* or mandamus would be appropriate for this purpose, it is certainly more seemly that they should not depend on the discretion of any tribunal not holding its commission from the authority creating the right of removal. The United States supreme court has never, that we can find, decided expressly upon a case arising under the statute in question that the circuit courts of the United States may issue the proper writ if any is required, but the principle has been asserted distinctly that a summary remedy exists, and if so, there can be no special difficulty in ascertaining it. *Gordon v. Longest*, 16 Pet. (U. S.) 97." See *People v. Judges of N. Y. Common Pleas*, 2 Den. (N. Y.) 197.

2. *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283; *People v. Weston*, 28 Cal. 639.

Mandamus to set aside an order of removal to a federal court was denied without looking into the merits where the record did not show that any application had been made to the respondent to vacate the order. *Le Roux v. Judge of the Circuit*, 45 Mich. 416.

3. *State v. Johnston*, 26 Ark. 281.

4. *State v. Hall*, 6 Baxt. (Tenn.) 3; *State v. Biddle*, 36 Ind. 138; *King v. Hampton*, 3 Hayw. (Tenn.) 60; *Westbrook v. Wicks*, 36 Iowa 382; *U. S. v. Com., Morr. (Iowa)* 31; *Morgan v. The Register, Hard. (Ky.)* 618; *Daniel v.*

necessary to aid their appellate powers.¹ A mandate from the court of appeals to an inferior court is imperative on the court below; it has not the option to obey or disobey it. It must be carried into effect by the inferior court according to its time, intent and meaning.² But a circuit court may, by injunction, prevent the enforcement of a mandate of the court of appeals which has been obtained by fraud or surprise or in violation of an agreement.³

In general, the court of last resort will not take original jurisdiction of the writ of mandamus to compel the performance of local official duty in respect to a matter which, though *publici juris*, is of a local interest merely and does not involve directly the sovereign prerogative or the interest of the State at large.⁴

5. County Courts.—County courts may be compelled by mandamus to make a levy to pay for work done under a contract.⁵ So a mandamus is the proper remedy to compel the county court to admit a deputy sheriff to qualify.⁶

VI. PUBLIC OFFICERS—1. Generally.—The office of the writ of mandamus when addressed to a public officer is to compel him to exercise such functions as the law confers upon him. When the law enjoins upon such officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by this writ. But the writ neither creates nor confers power upon the officer to whom it is directed. It can do no more than to command the exercise of powers already existing.⁷ And in order to compel a public officer by man-

Warren Co. Court, 1 Bibb (Ky.) 497; Hawes v. People, 124 Ill. 560.

1. State v. Hall, 3 Coldw. (Tenn.) 255; U. S. v. Commrs. of Dubuque, Morr. (Iowa) 42. See Ing. v. Daven, 2 Lea (Tenn.) 276; Hosier v. Higgins Township Board, 45 Mich. 340; State v. Judge Superior District Court, 26 La. An. 121. See Com. v. Commrs. of Lancaster, 6 Binn. (Pa.) 5; Pennsylvania R. Co. v. Canal Commrs., 21 Pa. St. 9; Com. v. Councils of Pittsburgh, 34 Pa. St. 496; Com. Hartranft, 77 Pa. St. 154.

2. McLean v. Nixon, 18 B. Mon. (Ky.) 769.

3. Bank of Kentucky v. Hancock's Admr., 6 Dana (Ky.) 285.

4. State v. Supervisors, 38 Wis. 554. See State v. Breese, 15 Kan. 123; State v. Cooper Co. Court, 64 Mo. 170.

5. Anderson Co. Court v. Stone, 18 B. Mon. (Ky.) 852.

6. Day v. Justices of Fleming, 3 B. Mon. (Ky.) 198; Applegate v. Applegate, 4 Metc. (Ky.) 237.

7. Meadows v. Nesbit, 12 Lea (Tenn.) 486; Butterworth v. U. S., 112

U. S. 50; U. S. v. Butterworth, 3 Mackey (D. C.) 229; U. S. v. Labette Co., 2 McCrary (U. S.) 27; Williams v. Smith, 6 Cal. 91; Houston etc. R. Co. v. Randolph, 24 Tex. 317; Johnson v. Lucas, 11 Humph. (Tenn.) 306; U. S. v. Clark Co., 95 U. S. 769; People v. Forquer, Breese (Ill.) 104; Bateman v. Magowan, 1 Metc. (Ky.) 533; Clark v. McKenzie, 7 Bush (Ky.) 523; Patton v. State 117 Ind. 585; U. S. v. Black, 128 U. S. 40; Carroll v. Board of Police, 28 Mass. (6 Cush.) 38; People v. Lake, 33 Cal. 487; Baldwin v. Kouns, 81 Ala. 272; Beaman v. Lake County, 42 Miss. 237; Commrs. of Land Office v. Smith, 5 Tex. 471; D'Oyley's Case, 1 Brev. (S. Car.) 238; State v. Beloit, 21 Wis. 280; State v. County Judge, 7 Iowa 425; Alger v. Seaver, 138 Mass. 331.

When executive officers of the government refuse to act in a case at all, or when by special statute or otherwise a mere ministerial duty is imposed upon them that is a service which they are bound to perform without further question, then, if they refuse, a manda-

damus to do an act at the instance of a relator he must show that he has an interest in the act sought to be coerced.¹

The writ of mandamus lies to compel a public officer to perform a duty concerning which he is vested with no discretionary power and which is either imposed upon him by some express enactment or necessarily results from the office which he holds.² But it will not lie to restrain the incumbent of an office from discharging his duties,³ or to decide mere abstract questions from the determination of which no practical result can follow.⁴

Political and executive functions cannot be subject to judicial review when not ministerial, and when that review would require the court to act outside of judicial authority.⁵

In all matters resting in the sound discretion of an officer to whom a duty is confided by law, mandamus will not lie to control the discretion or determine the decision which is to be made.⁶

mus must be issued to compel them. *U. S. v. Black*, 128 U. S. 40.

A mandamus is the more efficient and appropriate remedy to compel the collectors of public revenue to proceed and perform their duties. *State v. Whetworth*, 8 Lea (Tenn.) 594.

Under the act of March 31st, 1876, providing for a supply of water for the city of Napa, and for that purpose authorizing the trustees of the city to issue bonds, to be signed by the president and secretary of the board, the defendant, who was also city clerk, was elected and qualified as secretary, and was ordered by the trustees to prepare and present to the board a proper form of bond to be adopted and issued, but refused to obey. *Held*, upon an application for a writ of mandamus, that the board had no power to elect or appoint a secretary, or to prescribe his duties or the duties of the city clerk, and as the act required of the clerk was not an official act enjoined upon him by the charter of the city, the application should be denied. *Napa v. Rainey*, 59 Cal. 275.

1. *State v. Commrs. etc.*, 4 Kan. 261; *State v. Grubb*, 85 Ind. 213; *State v. Taylor*, 59 Md. 338; *People v. Masonic Benevolent Assoc.*, 98 Ill. 635; *Sansom v. Mercer*, 68 Tex. 488; see *Territory v. Cole*, 3 Dak. 301; *Cincinnati etc. R. Co. v. Clinton*, 1 Ohio St. 77.

Mandamus will not issue at the instance of one showing no beneficial interest beyond that of a citizen, to compel the secretary of a State insane asylum to permit the examination of a written charge against the medical superintendent. *Colnon v. Orr*, 71 Cal. 43.

A mandamus will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that his ability to do so depends on the co-operative action of a third person who is not before the court. *State v. Cavanac*, 30 La. An., pt. 1, 237.

2. *Pond v. Parrott*, 42 Conn. 14, 16; *Dickson v. Hill*, 75 Ga. 369; *Napa v. Rainey*, 59 Cal. 275; *Johnson v. Kelly, Wright (Ohio)* 353; see *Samis v. King*, 40 Conn. 304; *State v. Bacon*, 6 Neb. 286; *Hempstead v. Underhill*, 20 Ark. 337; *State v. Robinson*, 1 Kan. 188; *Goheen v. Myers*, 18 B. Mon. (Ky.) 423; *Ex parte Black*, 1 Ohio St. 30; *Free Turnpike Road v. Sandusky*, Ohio St. 149; *Glasscock v. Commr. etc.*, 3 Tex. 51; *Bracken v. Wells*, Tex. 88; *Meyer v. Carolan*, 9 Tex. 250; *State v. Washington Co.*, 2 Chand. (Wis.) 247.

3. *Terry v. Stauffer*, 17 La. An. 306.

4. *People v. Com. Council of Troy*, 82 N. Y. 575.

5. *Ambler v. Auditor Gen.*, 38 Mich. 746; *Auditor Gen. v. Pullman Palace Car Co.*, 34 Mich. 59; *Supervisors of Midland v. Auditor Gen.*, 27 Mich. 165; *Respublica v. Clarkson*, 1 Yeates (Pa.) 46; *Dwelling House Ins. Co. v. Wilder (Kan.)*, 20 Pac. Rep. 265; *People v. Auditor General*, 36 Mich. 271; *U. S. v. Seaman*, 17 How. 225.

6. *Berryman v. Perkins*, 55 Cal. 483; *People v. Auditor General*, 36 Mich. 271; *People v. Judge of Monroe Circuit*, 36 Mich. 274; *Moses on Mandamus* 82; *Harpending v. Haight*, 39 Cal. 208; *People v. Leonard*, 74 N. Y. 443; *U. S. v. Commr.*, 5 Wall. (U. S.) 563; *State v. Board of Liquidators*, 23 La. An. 790; *Secretary v. McGarrahan*,

The writ may perhaps be awarded to set public officers in motion as to acts and duties necessarily calling for the exercise of judgment and discretion on their part and to compel action upon the particular matters over which they may have jurisdiction; yet the courts will in no manner interfere with the exercise of that discretion nor control or dictate the judgment or decision which shall be reached.¹

A public officer is not in default so as to be subject to mandamus until after demand and refusal.² While it is true as a general rule and especially where the proceeding has relation to private rights or interests that a writ of mandamus must show a re-

q Wall. (U. S.) 298; *State v. Shaw*, 23 La. An. 388; *Freeman v. Selectman of New Haven*, 34 Conn. 406; *King v. Licensing Justices*, 4 Dow & Ry. 735; *People v. Atty. Gen.*, 22 Barb. (N. Y.) 114; *People v. Collins*, 19 Wend. (N. Y.) 56; *State v. Warmouth*, 23 La. An. 76; *State v. Robinson*, 1 Kan. 188; *State v. Bonner*, Busb. (N. Car.) L. 257; *Com. v. Cochran*, 5 Binn (Pa.) 87; s. c., 6 Binn. (Pa.) 456; *People v. Leonard*, 74 N. Y. 443; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Adam*, 3 Mich. 427; *Swan v. Gray*, 44 Miss. 393; *Hull v. Commrs. of Patents*, 2 McArthur (U. S.) 90; *Holliday v. Henderson*, 67 Ind. 103; *Bledsoe v. International R. Co.*, 40 Tex. 537; *Rutter v. State*, 38 Ohio St. 496; *Bailey v. Ewart*, 52 Iowa 111; *People v. Fairchild*, 67 N. Y. 334; *Queen v. Hall*, 7 Q. B. D. 575; *Seymour v. Ely*, 37 Conn. 103; *State v. Police Jury*, 29 La. An. 146; *State v. Board of Liquidators*, 29 La. An. 264; *State v. Atty. Gen.*, 30 La. An. 954; *State v. Moore*, 42 Ohio St. 103; *Shober v. Cochrane*, 53 Md 544; *State v. Nash*, 23 Ohio St. 568; *U. S. v. Thacher*, 2 McArthur (U. S.) 24; *State v. Dubuclet*, 28 La. An. 85; *State v. Brown*, 28 La. An. 103; *Lunt v. Davison*, 104 Mass. 498; *State v. Barnes* (Fla.), 5 So. Rep. 722.

1. *People v. Equitable Life Assurance Society*, 103 N. Y. 635; *Dechert v. Com.*, 113 Pa. St. 229; *People v. Contracting Board*, 33 N. Y. 382; *People v. Contracting Board*, 27 N. Y. 378; *U. S. v. New Orleans*, 31 Fed. Rep. 537; *Wintz v. Charleston Education Board*, 28 W. Va. 227; *State v. McGrath*, 91 Mo. 386; *People v. Highway Commrs.*, 118 Ill. 239; *Cicotte v. Wayne Co.*, 59 Mich. 509; *Davison v. Solans Co. Supervisors*, 70 Cal. 612; *People v. Fairman*, 12 Abb. (N. Y.) N. Cas. 252.

Pilot Commissioners.—Mandamus lies to review the action of pilot commissioners in suspending a pilot [*McIVER, J.*, not concurring]; *State v. Beaufort Pilotage Commrs.*, 23 S. Car. 175; *State v. Courtenay*, S. Car. 180.

Arbitrators.—If arbitrators refuse to act, mandamus will not issue to compel them. *People v. Nash*, 47 Hun (N. Y.) 542.

Mandamus will issue to compel an arbitrator to restore to the files of the court an award which he has withdrawn before judgment has been entered on it. *Chapman v. Ewing*, 78 Ala. 403.

Keeper of the Rolls.—Mandamus will lie at the petition of any citizen of the commonwealth to compel the keeper of the rolls to strike from the rolls, and the superintendent of public printing to omit from the acts of the assembly, any act which in the judgment of the supreme court of appeals is not a law. *Wise v. Bigger*, 79 Va. 269.

Tax Collector.—A mandamus may be granted to compel a tax collector to collect a tax assessed, notwithstanding the remedy against his sureties and by execution against himself. *State v. Fyler*, 48 Conn. 145; see *State v. Whitworth*, 8 Lea (Tenn.) 594.

Register of Deeds.—A register of deeds who refuses to enter a satisfaction of a mortgage may be compelled by mandamus. *People v. Miner*, 37 Barb. (N. Y.) 466; 23 How. Pr. 223.

Mandamus will not lie to compel a register of deeds to enter a discharge of a mortgage in the record where the certificate offered to him as evidence upon which the right to a discharge is founded is insufficient. *People v. Miner*, 32 Barb. (N. Y.) 612.

2. *Talcott v. Harbor Commrs.*, 53 Cal. 199; *State v. Lehre*, 7 Rich. (S. Car.) 234; *State v. Davis*, 17 Minn. 429; *State v. Governor*, 1 Dutch. (N. J.)

quest and a refusal to perform the act commanded by the writ to be done, yet there are cases affecting public officers or duties where the idea of a literal demand and refusal does not exist, there being no one particularly empowered to demand it as it does not affect individual interests.¹

2. Federal Officers.—Where the duty in question is required by a federal officer and is one which is purely ministerial, and with regard to which nothing like judgment and discretion in the performance of the duty is left to the officer, mandamus will lie.²

331; *Condit v. Newton Co.*, 25 Ind. 422; *Chance v. Temple*, 1 Iowa 189.

1. *State v. County Judge*, 7 Iowa 188; *State v. Bailey*, 7 Iowa 390; *Com. v. Commrs. of Allegheny*, 37 Pa. St. 237; *Orrville etc. R. Co. v. Plumas Co.*, 37 Cal. 354.

2. *Litchfield v. Register*, 9 Wall. (U. S.) 577; *Kendall v. United States*, 12 Pet. (U. S.) 534; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Brashear v. Mason*, 6 How. (U. S.) 92; *U. S. v. Seaman*, 17 How. (U. S.) 225; *Commrs. of Patents v. Whitely*, 4 Wall. (U. S.) 522; *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *U. S. v. Boutwell*, 3 McArthur (D. C.) 172; *U. S. v. Key*, 3 McArthur (D. C.) 328; *Decatur v. Paulding*, 14 Pet. (U. S.) 497. In *U. S. v. Guthrie*, 17 How. (U. S.) 284, application for mandamus was made to compel the secretary of the treasury to pay the salary of a judge of a territory after his removal. *Held*, that mandamus would not lie. *McLEAN, J.*, dissenting on the grounds that the president had no power to remove such a judge, and that the payment of the salary was a ministerial duty.

Where, on application for an increased pension, the commissioner rates the applicant, mandamus will not lie to the commissioner to assign him to a different class; the decision rerating the applicant is an exercise of official discretion. *United States v. Black*, 9 S. Ct. Rep. 12.

Secretary of the Interior.—When a patent to a citizen for a part of the public lands has been regularly signed by the president, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right of its possession by the grantee is perfect and a writ of mandamus will lie to the secretary of the interior to compel its delivery. *U. S. v. Schurz*, 102 U. S. 407.

The petitioner applied for a writ of mandamus against the secretary of the interior to order the survey of Arsenal Island, which is situated in the Mississippi river, opposite the city of St. Louis. He represented that the island contained 230 acres, was ten feet above high water mark, and not subject to overflow; that the island was fast anchored and not subject to be changed by the action of the river; that the land was subject to pre-emption under the laws of the United States, and that he had inhabited and improved the land for the purpose of obtaining a title thereto. The application was rejected by the commissioner of the land office, and his action was sustained by the secretary of the interior on account of the drifting character of the island. Upon appeal to the supreme court of the United States from the supreme court of the district, on application for mandamus, it was *held* that there was no error in refusing a rule for mandamus. The court say: "It is settled by many decisions of this court that in matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue. It is only for ministerial acts, in the performance of which no exercise of judgment or discretion is required, that the rule will be granted. *Decatur v. Paulding*, 14 Pet. (U. S.) 499; *U. S. v. Guthrie*, 17 How. (U. S.) 284; *U. S. v. Commr.*, 5 Wall. (U. S.) 563; *Litchfield v. Register*, 9 Wall. (U. S.) 577." *United States v. Lamar*, 116 U. S. 423.

Secretary of State.—Mandamus will not compel the secretary of state to pay over money withheld by him to cover the possible expenses of a claims commission, in case a foreign government shall not pay them. *United States v. Bayard*, 4 Mackey (D. C.) 310.

Secretary of the Treasury.—Where,

3. State Officers—(a) THE GOVERNOR of a State in the exercise of those powers and duties confided to his discretion by the constitution is entirely independent of the supervision of the judiciary and cannot be coerced or nowise controlled by the writ of mandamus.¹ As to ministerial duties enjoined on him by statute, which might have been devolved on another officer of the State and affecting any specific private right, he may be made

in a suit brought by the United States, against a receiver of public money, a verdict and judgment is rendered for the defendant on a set-off, a mandamus does not lie to compel the secretary of the treasury to credit the defendant upon the books of the department with the amount of the verdict, and to pay the same. *Reese v. Walker*, 11 How (U. S.) 272.

The D. C. supreme court will not issue a writ of mandamus to compel the secretary of the treasury to draw his warrant for the payment of money, when the act involves the exercise of judgment or discretion, nor unless there has been a specific appropriation for the particular claim, and a direction by congress for its payment. *U. S. v. Boutwell*, 3 McArthur (D. C.) 172; see *Mississippi v. Durham*, 4 Mackey (D. C.) 235.

Commissioners of Patents.—Mandamus will issue to compel the commissioner of patents to give a certified copy of an abandoned application for a patent, remaining on file in the patent office, especially where it is made part of the specifications of an existing patent by reference thereto, where he has refused to give such copy upon a reasonable suggestion of necessity for its use as a document for evidence. *U. S. v. Hall* (D. C.), 16 Wash. L. Rep. 782.

Mandamus may issue to compel the commissioner of patents to prepare a patent, to countersign it, and to lay it before the secretary of the interior for his signature, the commissioner having decided that the relator was entitled to it. *Butterworth v. U. S.*, 122 U. S. 50; *U. S. v. Butterworth*, 3 Mackey (D. C.) 229.

Postmaster General.—When the salary of a postmaster has been adjusted and fixed at the proper time, upon a sworn statement of the revenues of the office furnished by such postmaster, a mandamus will not issue to compel a subsequent postmaster general to readjust the salary so fixed by his prede-

cessor. *U. S. v. Key*, 3 McArthur (D. C.) 328.

Collector of a Port.—The U. S. circuit court has power to compel, by mandamus, a collector of a port to grant a clearance which, without sufficient reason, he refuses to grant. *Gilchrist v. Collector*, 5 Hughes C. Ct. 1.

1. Board of Directors of Insane Asylum v. Wolfley, 22 Pac. Rep. (Ariz.) 383; *Middleton v. Low*, 30 Cal. 596; *Harpending v. Haight*, 39 Cal. 189; s. c., 2 Am. Rep. 432; *Tennessee etc. R. Co. v. Moore*, 36 Ala. 371; *Low v. Towns Governor*, 8 Ga. 360; *People v. Hatch*, 33 Ill. 9; *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *Chumasero v. Potts*, 2 Mont. 242; *Sutherland v. Governor*, 29 Mich. 320; *State v. Johnson*, 28 La. An. 932; *Com. v. Dennison*, 24 How. (U. S.) 66; *Houston etc. R. Co. v. Randolph*, 24 Tex. 317; *Jonesboro etc. Turnpike Co. v. Brown*, 8 Bax. (Tenn.) 490; *Mauran v. Smith*, 8 R. I. 192; *State v. Champ- lin*, 2 Bail. (S. Car.) 220; *State v. Fletcher*, 39 Mo. 388; *State v. Governor*, 1 Dutch. (N. J.) 331; *Chamberlin v. Sibley*, 4 Minn. 309; *State v. McGrath* (Mo.), 3 S. W. Rep. 846; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Miles v. Bradford*, 22 Md. 170. *In re Dennett*, 32 Me. 508; *State v. Governor*, 5 Ohio St. 528; *State v. Moffitt*, 5 Ohio 358; *Cotten v. Ellis*, 7 Jones (N. Car.) L. 545; *Com. v. Wick- ersham*, 90 Pa. St. 311; *State v. Fletch- er*, 39 Mo. 388; *Vicksburg & Meridian R. Co. v. Lowry*, 61 Miss. 102; s. c., 48 Am. Rep. 76; *Berryman v. Perkins*, 55 Cal. 483; see *Hosner v. DeYoung*, 1 Tex. 764; see *Re Cunningham*, 14 Kan. 416; *State v. Gruber*, 2 Bail. (S. Car.) 220; *State v. Kirkwood*, 14 Iowa 162; *Rice v. Austin*, 19 Minn. 103; *Board of Directors v. Wolfley* (Ariz.), 22 Pac. Rep. 383.

Very considerable diversity of opinion exists upon the question of author- ity of a State court to issue a mandamus against the governor of the State. On the one hand the authority is denied,

amenable to the compulsory process of the court by mandamus.¹ But where the act to be done requires the exercise of judgment and discretion in the governor, against whom mandamus is prayed it will be refused.² It must appear, however, that the matter was brought to the attention of the governor, or that his delay was not for the purpose of an investigation.³

(1) *To Issue Commission*.—Where the governor is required by law to issue a commission in accordance with the determination

because the structure of the constitutional government of the State requires its three departments to be separate and independent of each other and it is argued that if the judicial can control either the legislative or the executive branches of the government, the balance of power intended to be preserved would be destroyed. On the other hand it is said that while the executive head of the government is independent of everything, except his liability to the people by impeachment, for all acts pertaining to his executive office, nevertheless he is subject to law, like every other individual in the State, with respect to all duties of a purely ministerial character as distinguished from those belonging to his executive office. While in a third class of the cases, it is said that all duties imposed upon the governor in his official capacity are necessarily executive, and not ministerial. *State v. Governor*, 5 Ohio St. 534.

In *Hawkins v. Governor*, 1 Ark. 570, the court declined to issue a mandamus to compel the governor to issue a commission to a commissioner of public buildings.

Under the fourth section of the act of April 1st, 1876, "to provide for a supply of water for the University and for the asylum for the deaf, dumb, and blind," the power to approve or disapprove of the appraisal, made under the act, is vested in the governor, and his discretion in the matter cannot be controlled by mandamus. *Berryman v. Perkins*, 55 Cal. 483.

In *State v. Towns Governor*, 8 Ga. 360, the writ was denied on general principles, as well as on the facts of the case.

In *re Dennett, etc.*, 32 Me. 508, the court refused a mandamus commanding the governor and council to declare the petitioner elected to the office of county commissioner, denying generally the authority of the court in the premises.

The governor cannot be compelled by mandamus to perform any act. *Vicksburg R. Co. v. Lowry*, 61 Miss. 102; 5. c., 48 Am. Rep. 76.

In *Mauran v. Smith*, 8 R. I. 192, the court declined to compel the governor, by mandamus, to convene a court-martial for the trial of the petitioner.

In *Illinois*, the supreme court has no control over the governor of the State to compel him to perform any public duty. *People v. Bissell*, 19 Ill. 229; *People v. Hatch*, 33 Ill. 11.

In *People v. Yates*, 40 Ill. 126, the writ was refused "for the purpose indicated," when asked for to compel the governor to deposit in the office of the secretary of state a bill passed by both houses of the legislature.

Mandamus will not issue from the supreme court to compel the governor of the State to call an election. *People v. Cullom*, 100 Ill. 472.

In *Louisiana* it has been held that the writ of mandamus will not lie to compel the chief executive officer of the State to perform any act coming within the range of his duties as governor. *State v. Warmouth*, 22 La. An. 1; 5. c., 2 Am. Rep. 712; *State v. Warmouth*, 24 La. An. 351.

In *Pennsylvania*, the courts have no power to issue writs of mandamus to State officers. *Com. v. Wickersham*, 90 Pa. St. 311.

1. *Miles v. Bradford*, 22 Md. 170; *Cotten v. Ellis*, 7 Jones (N. Ca.) 545; *Tennessee etc. R. Co. v. Moore*, 36 Ala. 371; *State v. Chase*, 5 Ohio St. 528; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Midd. ton v. Lowe*, 30 Cal. 596; *Chumas v. Potts*, 2 Mont. 242; *Harpending v. Haight*, 39 Cal. 189; *Gray v. State*, 72 Ind. 567; *Low v. Towns Governor*, Ga. 360; *State v. Blasdel*, 4 Nev. 241; *State v. Adams*, 19 Nev. 370; *State v. Chase*, 5 Ohio St. 528.

2. *Miles v. Bradford*, 22 Md. 170.

3. *Martin v. Ingham*, 38 Kan. 641; *State v. Adams*, 19 Nev. 370.

of the board of county canvassers, the court will not award a mandamus directing a commission to be issued in conflict with such determination.¹

(2) *To Declare Person Elected.*—The court has no authority by mandamus to compel the governor and council to declare the relator elected to an office under a statute requiring such officers to open and compare the votes returned upon the election.²

(3) *To Deposit Bill with Secretary of State.*—Mandamus will not lie to compel a governor to deposit in the office of the secretary of State a bill which was passed by the general assembly and placed in the hands of the governor for his consideration, and which, it is alleged, has not been returned to the proper house within the time limited by the constitution with his objections.³

4. *State Officers Generally.*—State officers inferior to the governor have many duties which courts can compel them to perform.⁴ Mandamus will lie to compel the secretary to audit a claim or perform a duty imposed by law.⁵ The writ commanding the performance of such duty will issue against the present incumbent of that office, although the proceedings were commenced against his predecessor.⁶

1. *State v. Governor*, 25 N. J. L. 331; *State v. Governor*, 39 Mo. 388; *Hawkins v. Governor*, 1 Ark. 570; *State v. Fletcher*, 1 Dutch. (N. J.) 331; *State v. Drew*, 17 Fla. 67.

Mandamus will not issue although it appear affirmatively that the decision of the board of county canvassers was based upon illegal evidence and is contrary to the truth of the case. *State v. Governor*, 25 N. J. L. 331.

2. *In re Dennett*, 32 Me. 508.

3. *People v. Yates*, 40 Ill. 127.

4. *Ayers v. State Auditors*, 42 Mich. 422; *State v. Ryan*, 2 Mo. App. 303.

Register of Deeds.—Mandamus does not lie to compel a register of deeds to record a deed delivered to him in escrow, and withheld by the grantor's order. *People v. Curtis*, 41 Mich. 723.

5. *State v. Gates*, 22 Wis. 210; *State v. Barker*, 4 Can. 379; *U. S. v. Bayard*, 17 Am. & Eng. Corp. Cas. (D. C.) 485; *State v. Secretary of State*, 33 Mo. 293. See *Burkhart v. Reed* (Idaho), 22 Pac. Rep. 1; *Isle Royale Land Corporation v. Secretary of State*, 76 Mich. 162. Compare *State v. Doyle*, 38 Wis. 92.

In mandamus proceedings against a secretary of state, to compel him to audit and allow a claim, the peremptory writ will issue against his successor, the duty being a continuing one. *State v. Warner*, 55 Wis. 271.

14 C. of L.—10

Mandamus will not lie to the secretary of state to compel him to issue patents to State lands; that is the duty of the governor. *Crane v. Secretary of State*, 51 Mich. 195.

The secretary of state has no authority to issue patents for school lands, and therefore mandamus does not lie to compel him to do it. *State v. Harvey*, 11 Wis. 33.

Mandamus will not issue to compel the secretary of state to count up votes where the office in question is already filled by a person holding by color of right by virtue of a commission issued to him under the election. *State v. Rodman*, 43 Mo. 256.

Neither will mandamus lie on the application of the president of the council of a session of the legislature to compel the secretary of the territory to record a report of such president as part of the proceedings of the session, or to expunge from the records of such proceedings part of a former report made by the clerk. *BERRY, J.*, dissenting. *Clough v. Curtis* (Idaho), 22 Pac. Rep. 8.

6. *State v. Gates*, 22 Wis. 210; *State v. Warner*, 55 Wis. 271.

Generally, proceedings by mandamus against a fiscal officer—in this case a county treasurer—to require him to pay a demand are not defeated by

Mandamus will lie to compel a secretary of state to deliver a commission to which a party is entitled;¹ to give a certificate of election;² to affix his official signature to the commission of a sheriff by the governor;³ and to furnish a copy of the laws to the person holding the contract to print the same, notwithstanding the existence of a later law providing for the printing thereof by another party.⁴

(a) STATE REPRESENTATIVES.—The house of representatives in a State legislature have no such jurisdiction over the counting of the votes for members as will oust the jurisdiction of the common law courts in proceedings by mandamus against the canvassers. The member elected has a right to receive the certificate of election, and if it is refused him and given to another he may call upon the courts for redress by mandamus.⁵

(b) COMMISSIONERS.—Mandamus lies to compel a land commissioner to perform the duty of making and certifying a transcript of proceedings before him required for the purposes of an appeal.⁶ But a mandamus to compel the commissioner of the general land office to give title to public land will not be granted where it appears that there are other claimants who are not parties to the proceeding, notwithstanding that their claims are alleged in the petition to be void.⁷

Mandamus is not allowable to compel the commissioner of the general land office to issue railroad certificates.⁸

(c) TITLE TO OFFICE.—While the writ of mandamus will not be awarded to try a disputed right or title to an office,⁹ it is an appropriate remedy to compel the restoration of a rightful incumbent when wrongfully deprived of the enjoyment of official privileges by removal or suspension.¹⁰

the person against whom they were commenced going out of office. *People v. Treasurer of Rexford*, 37 Mich. 351.

1. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

2. *State v. Havne*, 8 S. Car. 367; *State v. Lawrence*, 3 Kan. 95.

3. *State v. Wrotnowski*, 17 La. An. 156.

4. *State v. Barker*, 4 Kan. 379.

5. *People v. Hilliard*, 29 Ill. 413.

When neither the speaker of the house of delegates, nor the joint assembly of both houses of the legislature, convened under section 3 of article 7 of the constitution of West Virginia for the purpose of opening and publishing the returns of the election for the office of governor, does in fact open and publish the returns in respect to said office, or declare any person elected to that office, this court cannot by mandamus adjudge the person who appears from the returns certified to the speaker of the house to have received the highest

number of votes for that office to be the governor, and compel the person who was the governor during the preceding term to deliver the office and its insignia to him. *Goff v. Wilson* (W. Va.), 9 S. E. Rep. 26.

6. *State v. Ryan*, 2 Mo. App. 303.

7. *Tabor v. Commrs.*, 29 Tex. 508.

8. *Galveston etc. R. Co. v. Gross*, 47 Tex. 428. See *Sullivan v. Shanklin*, 63 Cal. 247; *Smith v. Power*, 2 Tex. 57.

9. *Ex parte Lusk*, 82 Ala. 519; *State v. Johnson*, 29 La. An. 399; *Matter of Gardner*, 68 N. Y. 467. See *Anderson v. Colson*, 1 Neb. 172; *State v. Falconer*, 44 Ala. 696; *State v. Jaynes*, 19 Neb. 161.

Quo warranto, not mandamus, is the method of trying the title of an officer to his office. *People v. Stevens*, 5 Hill (N. Y.) 616; *Bonner v. State*, 7 Ga. 473; *People v. Detroit*, 18 Mich. 338; *People v. Corporation*, 3 Johns. (N. Y.) Cas. 79.

10. *Ex parte Lusk*, 82 Ala. 519;

(*d*) BOOKS, PAPERS, MUNIMENTS, ETC.—Mandamus lies by an officer to compel the delivery by his predecessor of the records, books and papers of the office, and to compel the payment of money which the officer is required by law to apply to public purposes, the needs of which may require the prompt application of the money.¹ So it lies to compel the State comptroller to allow the district attorney to inspect and make copies or abstracts or computations therefrom of all books, papers, statements and accounts on file or of record, in his office, relating to the proceeds of mines.²

5. State Boards.—Where the duties imposed upon State boards are deliberative and discretionary, mandamus will not lie.³ State boards can be directed to act, but not how to act, in a matter as to which they have the right to exercise their judgment; and where they are vested with power to determine a question of fact the duty is judicial, and however erroneous their decision may be, they cannot be compelled by mandamus to alter their determination.⁴

6. Auditing Officers.—Mandamus may be resorted to to compel auditing officers to do an act which is sought to be enforced in all cases where the officers have no discretion and where he is under an obligation to do the specific act and there is no adequate remedy in the ordinary course of law.⁵

See *O'Donnel v. Dusman*, 39 N. J. L. 677; *State v. Board of Health* (N. J.), 8 Atl. Rep. 509; *Chew v. Justices*, 2 Va. Cas. 208; *Amory v. Justices*, 2 Va. Cas. 523; *Metsker v. Neally* (Kan.), 21 Pac. Rep. 206; *State v. Common Council*, 9 Wis. 254; *Den. v. Judges*, 3 Hen. & M. (Va.) 1.

1. *Frisbie v. Trustees*, 78 Ind. 269; *People v. Kilduff*, 15 Ill. 492; *People v. Head*, 25 Ill. 287; *Territory v. Shearer*, 2 Dak. 332; *State v. Johnson*, 29 La. An. 399; *Runion v. Latimer*, 6 Rich., N. S. 126; *Burr v. Norton*, 25 Con. 103; *State v. Layton*, 4 Dutch. (N. J.) 244; *Atherton v. Sherwood*, 15 Minn. 221; *Crowell v. Lambert*, 10 Minn. 369; *Felts v. Mayor*, 2 Head (Tenn.) 650; *King v. Owen*, 5 Mod. Rep. 314; *Rex v. Clapham*, 1 Wils. 305; *King v. Ingram*, 1 Black W. 50. See *Bonner v. State*, 7 Ga. 473; *Nelson v. Edwards*, 55 Tex. 389; *Metsker v. Neally* (Kan.), 21 Pac. Rep. 206; *Hooten v. McKinney*, 5 Nev. 194; *State v. Jumel*, 32 La. An. 60; *State v. Secretary of State*, 32 La. An. 579.

If the auditor of public accounts declines to deliver to the commissioner copies of the land and property books for his district, the court will compel him

by mandamus. *Peters v. Auditor*, 33 Gratt. (Va.) 368.

2. *State v. Hobart*, 12 Nev. 408.

3. *People v. Illinois Dental Examiners*, 110 Ill. 180; *State v. Gregory*, 83 Mo. 123; *Shober v. Cochrane*, 53 Md. 544; *People v. State Prison*, 4 Mich. 187; *People v. Canal Board*, 13 Barb. (N. Y.) 432; *State v. Verner*, 30 S. Car. 713.

4. *Hoole v. Kinkead*, 16 Nev. 217; *State v. Scott*, 17 Neb. 686; *Shober v. Cochrane*, 53 Md. 544; *State v. Gregory*, 83 Mo. 123.

Mandamus lies to compel the board of State auditors to perform mandatory duties imposed on them by the legislature outside of the exclusive powers vested in them by the constitution. *Ayers v. State Auditors*, 42 Mich. 422.

Board of Public Lands.—Where a mandamus is sought to compel the board of public lands and buildings to accept the highest bid for the leasing of certain school lands, the writ will be denied unless it is clear that there is an abuse of discretion, and that the sum bid is the full rental value of the lands. *State v. Scott*, 17 Neb. 686.

5. *Lachance v. Auditor General* (Mich.), 43 N. W. Rep. 1005; *McDou-*

So where the duty of passing upon and determining the validity of claims against a State is entrusted by law to the discretion of the officer, mandamus will not lie to compel the auditor to allow a claim.¹ But if the auditor refuses to act upon a claim properly presented to him the court will compel him to do so.²

gall v. Bell, 4 Cal. 177; Oliver v. Board of Education (La.), 4 So. Rep. 166; State v. Anderson (N. J.), 18 Atl. Rep. 584; Lindsey v. Auditor, 3 Bush (Ky.) 231. See People v. Auditor General, 17 Mich. 161; McCulloch v. Stone, 64 Miss. 378; Peters v. Massey, 33 Gratt. (Va.) 368; People v. State Auditors' Board, 42 Mich. 422; Oliver v. Board of Liquidation, 40 La. An. 321; Brown v. U. S., 6 Ct. of Cl. 171; Weston v. Dane, 51 Me. 461; State v. Hobart, 12 Nev. 408; People v. Auditor General, 36 Mich. 271; Eichelberger v. Sifford, 27 Md. 320; State v. Anderson (N. J.), 18 Atl. Rep. 584; *Ex parte* Peckett, 24 Ala. 91; Justices of Inferior Court v. Felder, 23 Ga. 212; McDougal v. Roman, 2 Cal. 80.

A mandamus may issue to compel the controller of state to account to a member of the legislature for the daily compensation fixed by law. Fowler v. Pierce, 2 Cal. 165.

In Hull v. Supervisors of Oneida, 19 Johns. (N. Y.) 259, a mandamus was applied for to compel the supervisors of Oneida to audit and allow a bill for a surgical operation on a transient pauper; and it was shown in answer to the rule that the supervisors had acted on the subject and audited the bill, but at a very small amount; and the court denied the application on the ground that the board of supervisors were endowed with a discretion by statute which the court could not control. Fish v. Weatherwax, 2 Johns. (N. Y.) 217.

Under the provisions of Mansf. Dig. Ark., § 5775, the money paid to the county treasurer for redemption of lands sold for taxes, must be in coin or treasury notes of the United States, made a legal tender by the acts of congress; and, where a county treasurer refuses to pay over to the purchaser the full amount in such money, but tenders instead the amount, partly in money and partly in county script or warrants, he may, by mandamus, be compelled to make full payment in money. Murphy v. Smith, 49 Ark. 37.

Mandamus lies to the postmaster requiring him to give a credit on his books to certain contractors; which

credit had been certified by the solicitor of the treasury to be due to the contractors pursuant to an act of congress; and the postmaster general had been ordered by the same act to give the credit, but refused compliance. Kendall v. U. S., 12 Pet. (U. S.) 524.

Payment of Bonds.—Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds without a special act of legislature authorizing and commanding him to pay. State v. Bishop, 45 Mo. 504.

To Levy Tax.—Mandamus will not lie to direct a levy of a tax for the purpose of redeeming bills of credit issued in contravention of the constitution. State v. Comptroller General, 4 S. Car. 185. See State v. County Judge, 12 Iowa 237; State v. Harris, 17 Ohio St. 608.

1. Morton v. Comptroller General, 4 S. Car. 430; People v. Auditor etc., 2 Col. 97; Auditorial Board v. Arles, 15 Tex. 72; Towle v. State, 3 Fla. 202; Auditorial Board v. Hendrick, 20 Tex. 60; State v. Doyle, 38 Wis. 92; People v. Equitable Ins. Co., 103 N. Y. 635; State v. Verner (S. Car.), 9 S. E. Rep. 113; State v. Bruce, 1 Treadw. Const. (S. Car.) 165; Grier v. Shackelford, 2 Treadw. Const. (S. Car.) 642; State v. Applegate (N. J.), 16 Atl. Rep. 59; Green v. Purnell, 12 Md. 329. *Ex parte* Lynch, 16 S. Car. 32; Sanilac County v. Alpin (Mich.), 36 N. W. Rep. 794; People v. Adam, 3 Mich. 427; State v. Braden (Minn.), 41 N. W. Rep. 817.

A comptroller cannot be required to draw his warrant to pay a void judgment of costs against the State. Morgan v. Pickard, 86 Tenn. 208; see State v. Nolan, 8 Lea (Tenn.) 663.

In Michigan, the supreme court has no jurisdiction, by mandamus, to coerce or direct the action of the board of State auditors, as they are made an independent tribunal by the constitution of the State. People v. Board of State Auditors, 32 Mich. 191.

2. People v. Auditor etc., 2 Colo. 97; People v. Chapin, 105 N. Y. 309; Johnson v. Reynolds, 44 Ala. 586; McKinney v. Reynolds, 44 Ala. 660.

Auditing officers will be required by mandamus to make their audit according to law. If the compensation is fixed by statute or by agreement they will be required to audit the compensation so fixed. If they have already audited an account at a less sum than that fixed by statute or agreement, they will be required to set aside the audit already made, and to re-audit according to law.¹

(a) ISSUING WARRANT FOR SALARY, ETC.—The court may, by writ of mandamus, compel the auditor of State to issue his warrant on the treasurer of State for a sum due a public officer on his salary, it being an official duty involving no exercise of discretion by an executive officer of the State.² And it is no objection that such salary has already been paid to a third person, now out of office, who claimed the same as superintendent

In this case the court said: "We think the comptroller had legal authority to receive an act upon the proofs offered, and that they did constitute legal evidence. He was clearly authorized to decide the question of the validity or invalidity of the tax sales, at least as between the State and the purchaser, and for the purpose of determining whether the purchaser was entitled to have the purchase money paid by him refunded out of the State treasury. This was in the nature of a judicial function conferred upon him by law. It is a general principle that where a power is given by statute, everything necessary to make it effectual, or requisite to attain its end is implied. 1 Kent's Com., 464; Stief v. Hart, 1 N. Y. 20, 30.

To Pay Sheriff's Fees.—The comptroller of the State of Florida refused to pay a sheriff certain fees, to which he was entitled, and the sheriff petitioned for a mandamus. It appeared that it was the duty of the comptroller to audit, adjust and settle the accounts of all officers, and also to decide upon the justice and legality of claims against or by the State. *Held*, that as his office was not purely ministerial, but discretionary, the comptroller could not be controlled by the court in the exercise of his judgment and discretion, and that the relief of the sheriff was by memorial to the general assembly of the State. *Towle v. State*, 3 Fla. 202.

Evidence.—Where a person in the employ of the State presented his claim for services to the board of examiners, which was allowed by them, but he failed to have such claim audited by the

controller, and the latter, for that reason, refused to issue his warrant on the treasury for the amount, *held*, in an application for a mandamus to compel the controller to issue his warrant on the treasury for the amount, that it was necessary for the relator to show a presentation of the claim for allowance to the controller. *State v. Doron*, 5 Nev. 399.

1. *People v. Elmira Auditors*, 82 N. Y. 80; *People v. Police Board*, 75 N. Y. 38; *People v. Green*, 63 Barb. (N. Y.) 390; *People v. Supervisors*, 40 How. (N. Y.) Pr. 54; *People v. Supervisors*, 56 Barb. (N. Y.) 452; *State v. Hastings*, 15 Wis. 83; *Fowler v. Peirce*, 2 Cal. 165; *McCauley v. Brooks*, 16 Cal. 11; *Swann v. Buck*, 40 Miss. 268; 5 Wait's Pr. 561-6.

In *Osborn v. Clark*, 1 Ariz. 397, it was *held* that if a State auditor has erred in an audit, his error cannot be remedied by mandamus.

2. *Bryan v. Cattell*, 15 Iowa 538; *Turner v. Meloney*, 13 Cal. 621; *State v. Bordelon*, 6 La. An. 68; *Danley v. Whitely*, 14 Ark. 687; *State v. Gamble*, 13 Fla. 9; *State v. Secretary of State*, 33 Mo. 293; *People v. Smith*, 43 Ill. 219; *People v. Secretary of State*, 58 Ill. 90; *Auditor v. Haycraft*, 14 Bush. (Ky.) 284; *People v. Schuyler*, 79 N. Y. 189; *Smith v. Strobach*, 50 Ala. 462; *Babcock v. Goodrich*, 47 Cal. 488; *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154; *State Bank v. Hastings*, 15 Wis. 75; *Ryan v. Hoffman*, 26 Ohio St. 109; *Smith v. Commrs.*, 9 Ohio 26; *State v. Burgoyne*, 7 Ohio St. 153; *Comms. v. Hunt*, 33 Ohio St. 169; *State v. Board of Education*, 35 Ohio St. 368; *State v. Wilson*, 17 Wis. 687, 694; *State v.*

de facto and that hence the right to the office is involved.¹ So it will lie to compel payment of a claim on a special fund where the failure to pay is without excuse, and the proceeding without appeal.² But where a claim against the State is payable only out of a specific appropriation, which has been exhausted, the court cannot, by mandate, order the auditor to issue a warrant for the payment of the claim, or the treasurer to pay it.³ If there is no appropriation to pay it and the claim is one recognized by law he should audit and settle it and issue to the claimant a certificate of the amount under his official seal if demanded.⁴

In cases where the State does not recognize a liability mandamus will not issue to compel the State treasurer to pay.⁵ So it will not issue to compel the State auditor to audit a claim where an adequate remedy is afforded by appeal.⁶

(b) MATERIALS FURNISHED THE STATE UNDER CONTRACT.—Where it is the duty of a State treasurer to countersign and pay a warrant for amount due for materials received by the State under a contract he may be compelled to perform the duty by mandamus.⁷

(c) AWARDED PUBLIC CONTRACTS.—The duties of officers entrusted with the letting of contracts for public work to the lowest responsible bidder are not of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus.⁸

Auditor Delaware Co., 39 Ind. 272; Fowler v. Pierce, 2 Cal. 165; State v. Starling, 13 S. Car. 262; People v. Board of Police, 75 N. Y. 38; State v. Clinton, 28 La. An. 47; State v. Jumel, 30 La. An. 339, 861.

1. Williams v. Clayton (Utah), 21 Pac. Rep. 398.

2. State v. Bollinger County, 48 Mo. 475.

3. State v. Porter, 89 Ind. 260; see Pritchard v. Woodruff, 36 Ark. 196.

Under Gantt's Ark. Dig., § 2779, providing that "in all cases where the law recognizes a claim for money against the State, and no appropriation shall be made by law to pay the same, the auditor shall audit and settle such claim." *Held*, that the auditor could be compelled by mandamus to audit and settle a claim for legal services rendered in enforcing the payment of overdue taxes for which claim no appropriation had been made. Files v. State, 42 Ark. 233.

4. Files v. State, 42 Ark. 233; State v. Clinton, 28 La. An. 47; State v. Clinton, 28 La. An. 72; State v. Dubuclet, 28 La. An. 85; Buffington v. Clinton, 28 La. An. 132; see Livingston v.

McCarthy (Kan.), 20 Pac. Rep. 478. A mandamus will not lie to compel the comptroller of New York to pay a claim for which no appropriation has been made by law. People v. Haws, 23 How. (N. Y.) Pr. 107; s. c., 37 Barb. (N. Y.) 440; People v. Connolly, 2 Abb. Pr., N. S. 315; People v. Glowacki, 2 s. c., (N. Y.) 436; People v. Green, 1 Hun (N. Y.) 1; s. c., 1 S. C. (N. Y.) 90.

5. Buster v. Butler, 60 Mich. 40.

6. State v. Babcock, 22 Neb. 38.

7. People v. Secretary of State, 58 Ill. 90. A petition for a writ of mandamus against the auditor to compel him to issue his warrant upon the treasurer in favor of the plaintiff for a sum of money due the plaintiff from the State, for work done and materials furnished in repairing public property, under a contract with the superintendent of public property, is not demurrable because it does not show that the repairs were made by the plaintiff under a written contract, approved by the governor. Haly v. Auditor, 4 Bush (Ky.) 490.

8. State v. McGrath, 91 Mo. 386; State v. Dixon Co. (Neb.), 37 N. W.

Nor can a bidder for work, on mandamus, secure the award to himself simply by showing defects in the successful competitor's bid.¹

(d) CONVEYING TITLE.—An action of mandamus will lie to compel the auditor to convey to any one offering to comply with the requirements of the law such title as the State may have to lands acquired under a tax sale, whether such sale, in the opinion of the auditor, be valid or not. The auditor has no authority to determine as a matter of law the validity of a tax sale, except that he may, with the advice of the attorney general, strike from his lists such lands as, in the opinion of the attorney general, are held by the State by invalid titles. And such action is maintainable by the party seeking the conveyance of the auditor.²

(e) AFFIXING SEAL TO WARRANT.—Where the clerk of a board of auditors neglects to place the seal to a warrant he may be compelled by mandamus to affix the seal and a remedy at law cannot be successfully urged against the right to maintain such a proceeding.³

(f) DISTRIBUTION OF FUNDS.—The writ of mandamus cannot be invoked by a creditor of the State to compel the State treasurer to make a certain distribution of funds, not yet in his hands, as they may be received by him.⁴

(g) PAYMENT OF STATE TAXES.—The State taxes upon the capital stock of corporations are payable directly to the State treasurer by the proper officer of the corporation, and their payment may be enforced by a writ of mandamus at the instance of the State.⁵ It can properly issue against the State treasurer only when he has money and illegally withholds it from one entitled to be paid.⁶

Rep. 936; *Hoole v. Kinkead*, 16 Nev. 217; *State v. Kendall*, 15 Neb. 262; see *Detroit Free Press Co. v. Auditors*, 47 Mich. 135; *State v. York County Supervisors*, 17 Neb. 643; *People v. Board of Education*, 5 N. Y. Supp. 392.

The only restriction upon a contracting board was that when they contracted it should be with the lowest bidder. *Held*, that mandamus did not lie for the lowest bidder to compel the board to contract with him, but that they might reject his bids as being deceptive and fraudulent and disadvantageous to the State. *People v. Contracting Board*, 33 N. Y. 382.

Mass. Pub. St., ch. 22, § 22, does not require county commissioners to accept the lowest proposal for the construction of public works. Mandamus, therefore, will not issue to compel them to. *Mayo v. Hampden County Commrs.*, 141 Mass. 74.

Mandamus to compel commissioners of public buildings to accept the highest bid for leasing school lands, will be refused unless it appears that the bid was the full rental value. *State v. Scott*, 17 Neb. 686.

1. *State v. Board of Education*, 42 Ohio St. 374.

2. *McCulloch v. Stone*, 64 Miss. 378.

And if to such action of mandamus the auditor set up the defence that he has already conveyed the title of the State to the lands in question to another, the supreme court of Mississippi will determine whether such conveyance be a valid one, but will not pass upon the validity of the title under which the State held. *McCullough v. Stone*, 64 Miss. 378.

3. *Prescott v. Gonser*, 34 Iowa 175.

4. *State v. Dubuclet*, 24 La. An. 16.

5. *Barney v. State*, 42 Md. 480.

6. *State v. Dubuclet*, 26 La. An. 127.

VII. PRIVATE CORPORATIONS.—When a statute imposes a specific duty upon a private corporation, either in express terms or by a fair and reasonable implication, and there is no other specific and adequate remedy, the writ of mandamus may be awarded to compel the performance of the duty.¹

The court will not interfere with the internal regulation of private corporations in the enforcement of their rules unless under very peculiar circumstances of substantial wrong; if members have any grievance arising therefrom, for which they are entitled to redress, they can proceed by action.² So mandamus will not usually lie to settle the controversies of private corporations where the facts are not important on public grounds, or would not justify the interference of the court if corporate authority did not exist.³

1. *People v. State Ins. Co.*, 19 Mich. 392; *State v. Board of Trustees*, 4 Nev. 400; *State v. Wright*, 10 Nev. 167; *Fireman's Ins. Co. v. Mayor of Baltimore*, 23 Md. 297; *Mount Moriah Cemetery Assoc. v. Com.*, 81 Pa. St. 235; *People v. Cummings*, 72 N. Y. 433; *Norris v. Irish Land Co.*, 8 Ellis & B. 512; *Price v. Riverside etc. Co.*, 56 Cal. 431; *Insurance Co. v. Baltimore*, 23 Md. 296; *People v. Saratoga etc. R. Co.*, 7 West. L. J. 155; s. c., 2 Am. L. J. 158; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; s. c., 30 How. (N. Y.) Pr. 87; *Freon v. Carriage Co.*, 42 Ohio St. 30; s. c., 10 Am. & Eng. Corp. Cas. 101; *Canal etc. Commrs. v. Willamette Transp. etc. Co.*, 6 Oreg. 219; *Queen v. Hull & Selby R. Co.*, 6 Ad. & E., N. S. 70.

The Fireman's Insurance Company, a joint stock corporation of the city of Baltimore, is bound by the express terms of the statute to furnish to the appeal tax court the list of stockholders, with their places of residence, and amount of stock held by each, and having failed or refused so to do, the appropriate remedy to enforce a compliance with the obligation so imposed, was by the writ of mandamus. *Fireman's Ins. Co. v. Baltimore*, 23 Md. 296.

The authorities of a hospital will be compelled by mandamus, to correct a certificate of death filed with the board of health; such correction being necessary to enable the widow of the deceased to obtain a legacy payable in a foreign country. *People v. German Hospital*, 8 Abb. (N. Y.) N. Cas. 332.

A failure on the part of the first board of trustees of a mining company for a period of nearly two months after the expiration of the first six months of

its organization, to call and provide for a meeting of the stockholders for the purpose of electing their successors, shows a neglect and failure on the part of the trustees to do their duty, and mandamus will issue against them. *State v. Board of Trustees*, 4 Nev. 400. 2. *Hargnell v. Lafayette Benevolent Society*, 47 Mich. 648; *Morton v. Timken*, 48 N. J. L. 87.

Redress for injuries received from private corporations organized for joint or partnership undertakings, should be sought at common law, not through mandamus proceedings. *Lamphere v. Grand Lodge of United Workmen*, 47 Mich. 429.

Mandamus does not lie to compel a mutual benefit insurance company to levy an assessment to pay the amount falling due upon the death of a member; the proper course is to bring suit upon the undertaking of the company. *Bates v. Detroit Mutual etc. Assoc.*, 47 Mich. 646.

Mandamus does not lie to compel a private corporation to pay dividends which it has declared. *Van Norman v. Central Car Co.*, 41 Mich. 166.

Breach of Contract of Insurance.—If a mutual benefit association fails to pay the amount due upon the death of a member whom it has agreed to insure to the extent of a certain sum for each certificate in force, the remedy is by an action for breach of contract, especially if the liability is disputed; and not by mandamus to compel the company to assess its members in order to make up the amount due. *Burland v. Northwestern Mutual Benefit Assoc.*, 47 Mich. 424.

3. *Lamphere v. Grand Lodge of United Workmen*, 47 Mich. 429.

1. **Affixing Seal.**—A corporation or its officers may be compelled by mandamus to affix the corporate seal to its official action.¹

2. **Religious Corporations.**—Where property is conveyed to a church society to be used in a certain manner, and subject to a certain trust, courts of equity will, on the application of any party interested, compel the execution of that trust and restrain any diversion from such use.²

A writ of mandamus is the proper remedy to put a minister of any religious sect in possession of the pulpit to which he is entitled, notwithstanding such pulpit is occupied by another person.³ But the courts will not interfere to compel an individual to attend worship at any place, to remain connected with any church organization, nor to receive anyone as his pastor.⁴ So the secular courts have no power by mandamus to reinstate a member expelled from membership by the church after conviction in accordance with its rules and discipline.⁵

3. **Reinstatement of Member.**—A writ of mandamus will not lie to compel a corporation to reinstate a member who has been regularly tried and expelled therefrom.⁶ But where the proceedings were not in accordance with the by-laws of the society a writ of

1. *Rex v. Windham*, Cowp. 377; *King v. University of Cambridge*, 1 Black W. 547; *Rex v. Vice Chancellor of Cambridge*, Burr. 1647; *King v. Bland*, 7 Mod. Rep. 355; *Queen v. Kendall*, 1 Ad. & E., N. S. 366.

The keeper of the common seal of a university may be compelled to affix the seal to the diploma or instrument appointing one to an office in the university to which he has been duly elected. *Rex v. Vice Chancellor of Cambridge*, Burr. 1647.

2. *Feizel v. First German Soc. M. E. Church*, 9 Kan. 592.

Subscriptions to a denominational church building fund were induced by a stipulation in the subscription papers that the building should be used by other denominations. *Held*, that mandate would not issue to enforce the stipulation. *State v. Salem Church Trustees*, 114 Ind. 389.

3. *People v. Steele*, 2 Barb. (N.Y.) 398.

Every endowed minister, of any sect or denomination of Christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of mandamus to be restored to his function, and temporal rights with which it is endowed. *Runkel v. Winemiller*, 4 Har. & M. (Md.) 429. *Aliter*, if the office is not allowed; *Runkel v. Winemiller*, 4 Har. & M. (Md.) 429. But see *People v. Dikeman*, 7 How. (N. Y.) Pr. 124.

4. *Feizel v. First German Soc. M. E. Church*, 9 Kan. 592.

5. *People v. German etc. Church*, 63 N. Y. 103.

6. *Sale v. First Reg. Baptist Church* 62 Iowa 26; s. c., 1 Am. & Eng. Corp. Cas. 169; *Society for the Visitation of the Sick v. Com.*, 52 Pa. St. 125; *People v. Board of Trade*, 80 Ill. 134; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *Burt v. Grand Lodge of Masons*, 44 Mich. 208; *Com. v. Pike Beneficial Soc.*, 8 W. & S. (Pa.) 247; *Black etc. Soc. v. Vandyke*, 2 Whart. (Pa.) 309; *Tribe v. Murbach*, 13 Md. 91; *Leech v. Harris*, 2 Brews. (Pa.) 571; *State v. Adams*, 44 Mo. 570; *Riddell v. Harmony Fire Co.*, 8 Phila. (Pa.) 310; *Harmstead v. Washington Fire Co.*, 8 Phila. (Pa.) 331; *People v. Board of Trade*, 80 Ill. 134; *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490; *State v. Odd Fellows Grand Lodge*, 8 Mo. App. 148; *Barrows v. Mass. Medical Society*, 12 Cush. (Mass.) 402.

The Massachusetts Medical Society having expelled a member for alleged gross immorality, the court declined to issue a mandamus to compel his restoration, there being no sufficient proof of haste, or prejudice against such member, or that the society came to a wrong decision, or acted in violation of his rights. *Barrows v. Mass. Medical Soc.*, 12 Cush. (Mass.) 402.

mandamus will lie against the officers and society to compel reinstatement of expelled member.¹

4. Admission to Society.—A mandamus will lie to compel the admission of a duly qualified applicant to a society; the right of

1. Sperry's Appeal, 116 Pa. St. 391; Doyle v. New York etc. Society, 6 Thomp. & C. (N. Y.) 85; 3 Hun 360; Roehlen v. Mechanics' Aid Soc., 22 Mich. 86; Green v. African M. E. Soc., 1 S. & R. (Pa.) 254; Evans v. Philadelphia Club, 50 Pa. St. 107; Hibernia Fire Engine Co. v. Com., 93 Pa. St. 264; State v. Georgia Medical Society, 33 Ga. 608; Hussey v. Gallagher, 61 Ga. 86; Sibley v. Carteret Club of Elizabeth, 40 N. J. L. 295; State v. Lusitanian Portuguese Soc., 15 La. An. 73; Union Church of Africans v. Saunders, 1 Houst. (Del.) 100; People v. Albany Medical College, 10 Abb. (N. Y.) N. Cas. 122; Medical etc. Society v. Weatherly, 75 Ala. 248; s. c., Am. & Eng. Corp. Cas. 26; Fuller v. Plainfield Academic School, 6 Conn. 532; People v. Medical Society, 24 Barb. (N. Y.) 570; People v. Board of Trade, 45 Ill. 112; People v. Mechanics' Aid Society, 22 Mich. 86; Delacey v. Nuese River Nav. Co., 1 Hawks (N. Car.) 274. But see Cook v. College of Physicians, 9 Bush (Ky.) 542.

So, where the by-laws required notice to members to be tried, and this was omitted, it was *held* that members could compel reinstatement by mandamus. Com. v. German Society, 15 Pa. St. 251; Delacey v. Nuese River Nav. Co., 1 Hawks (N. Car.) 274; Com. v. Pennsylvania Beneficial Institution, 2 S. & R. (Pa.) 141; Washington Ben. Society v. Bacher, 20 Pa. St. 425.

Mandamus will issue to restore to membership in an incorporated society one suspended for a failure to pay a penalty not authorized by the constitution or by-laws. Erd v. Bavarian Nat. A. & L. Assoc. (Mich.), 11 West. 171, 34 N. W. 555.

But where relator, without his knowledge, was expelled from membership in a society, and after such expulsion brought a civil action to recover damages for the loss of his rights and privileges as a member, occasioned by such expulsion, in which he recovered verdict and judgment, it was *held* that the bringing of such action is a waiver of his right to a mandamus to restore him to his rights and privileges of membership. State v. Slavonska, 28 Ohio St. 665.

A member of a benevolent associa-

tion, whose constitution and by-laws contain no definition of offences against the society, or provisions for imposing penalties, cannot be suspended for non-payment of a fine imposed by the society, and a writ of mandamus will lie to restore him to membership. Erd v. Bavarian Nat. Aid & Relief Assoc., 67 Mich. 233.

In an application for a rule to show cause why a writ of mandamus should not issue to a literary corporation, commanding it to restore an expelled member to the privileges of membership, where it appeared that the proceedings of the corporation, which first partially, and then wholly, disfranchised the applicant, were irregular, and where certain papers written by the applicant, which were the grounds of his disfranchisement, were not before the court, the rule prayed for was made absolute; but, in order to enable the corporation to set out, in its return to the writ, specifically, the grounds of its action, the rule was, that the writ should issue in the alternative, either to restore the applicant to his rights of membership, or to show good cause to the contrary. Sleeper v. Franklin Lyceum, 7 R. I. 523.

In Roehlen v. Mechanics' Aid Society, 22 Mich. 86, it was *held* that, where a by-law made uttering slanderous words against the society an expellable offence, by slanderous words must be meant something similar to the legal signification of slander, and hence that a return to a writ of mandamus to compel the reinstatement of a member expelled under the by-law, which did not set out the words alleged to be slanderous, was bad. Roehlen v. Mechanics' Aid Society, 22 Mich. 86. See also Green v. African M. E. Soc., 1 S. & R. (Pa.) 254.

An incorporated lodge of Odd Fellows has the right, through its proper officers, and in accordance with its established rules, to determine who are not members thereof, and the courts will leave that question to be determined by the lodge itself, through the judicial action of its proper officers, regardless of whether the charter of the lodge in which membership is claimed gives, in express terms, such power to

immediate expulsion should be clear and unquestioned to justify the rejection of the claim.¹

5. Election of Officers.—Mandamus is the proper remedy to issue at the instance of a stockholder of a private (as well as a public) corporation to compel the officers to hold an election for new officers.²

6. Corporation Books and Records.—Mandamus will lie upon the petition of a private corporation to compel the surrender to its lawful officers of books and papers pertaining to their offices and held by persons actually but unlawfully exercising the functions of those offices under a claim of right.³

these officers. *State v. Odd Fellows Grand Lodge*, 8 Mo. App. 148.

A fellow of King's College, Cambridge, had been expelled the college and deprived of his fellowship, by the provost and fellows, upon a charge of fraud and perjury, the proceedings being conducted partly in the absence of the accused, and the charge being alone supported by a comparison of his letters with an answer which he had filed in a suit in chancery. Upon appeal to the visitor, the decision of the provost and fellows was affirmed. *Held*, that the court had no power to grant a mandamus to restore to the fellowship. *Buller, ex parte*, 30 Eng. Law and Eq. 356. See *Dr. Widdrington's Case*, 1 Lev. Part 123; s. c., *sub nom.* *Dr. Witherington's Case*, 1 Keb. 2; *Parkinson's Case*, Carth 92; s. c., 3 Mod. Rep. 265; *Appleford's Case*, 1 Mod. Rep. 82. But see *King v. Patrick*, 2 Keb. 65; *King & Queen v. St. John's College*, 4 Mod. Rep. 241.

Rights of Pastor.—Mandamus will not lie to compel a local church to receive as its pastor one appointed by the ecclesiastical organization of which the local church is a member, where the church property is vested in and subject to the disposition of the local church, and no salary has been agreed on, nor rents of the church property directed to be applied to the payment of the pastor's salary, so as to vest in him a temporal right of which the civil courts can take jurisdiction. *State v. Bibb St. Church (Ala.)*, 4 So. Rep. 40.

1. *People v. Medical Society of Erie*, 32 N. Y. 187; s. c., 25 How. (N. Y.) Pr. 333; *Bartlett v. Medical Society*, 32 N. Y. 187.

Mandamus will not issue to compel a medical society to admit a member who would be immediately liable to expulsion for gross ignorance or misconduct. *Ex parte Paine*, 1 Hill (N. Y.) 665.

2. *Orr v. Bracken Co.*, 4 Am. & Eng. Corp. Cas. (Ky.) 231; *People v. Albany Hospital*, 61 Barb. (N. Y.) 397; *State v. Wright*, 10 Nev. 67; *People v. Cummings*, 72 N. Y. 433.

An application for mandamus, by a stockholder of a corporation, requiring the board of managers to hold an election at the time specified by the by-laws thereof, need not be supported by a previous demand and refusal. *Motter v. Primrose*, 23 Md. 482.

3. *American R. Frog Co. v. Haven*, 101 Mass. 398; *St. Luke's Church v. Slack*, 7 Cush. (Mass.) 226; *State v. Gall*, 3 Vroom (N. J.) 285; *Anon.*, 1 Barn. K. B. 402; *Rex v. Wildman*, Stra. 879; *Warner v. Myers*, 4 Oreg. 72.

On the refusal of the treasurer or clerk of a religious society whose term of office has expired to deliver the records and papers of the society to his successor in office, a writ of mandamus will be issued on the petition of the society to compel him to do so. *St. Luke's Church v. Slack*, 7 Cush. (Mass.) 226.

Officers of a corporation who, upon the expiration of their terms, refuse to deliver to their successors books, papers, accounts, or the like, which came to their hands as such, may be compelled to do so by mandate. *Fasnacht v. German etc. Assoc.*, 99 Ind. 133.

A writ of mandamus will not lie to compel the restoration of parish registers by a person who obtained possession of them by wrong. The Hospital of St. Cross, which was partly a charitable institution and partly an ecclesiastical benefice, was united in 1507 with the parish of St. Faith, and the church of the latter was pulled down. Subsequently to that union many persons were instituted and inducted to the mastership of the hospital with the rectory of St. F.; but since 1808 the

(a) BOOKS OF TRADING CORPORATION.—The books and papers of a trading corporation, though of necessity left in some one hand, are the common property of the stockholders; and unless the charter provides otherwise, a stockholder has the right, at proper times, to inspect them personally, and with the aid of a disinterested expert, to make extracts from them for a definite and proper purpose.¹

(b) INSPECTION OF BOOKS.—The officers of a corporation have no right to exclude one of its members from an inspection of its books, although they believe him to be hostile to the interests of the institution, and mandamus is the proper remedy to compel permission to inspect them.²

(c) DEMAND AND REFUSAL.—To entitle a corporator in the absence of statutory provisions to a mandamus to compel the

rectory had been vacant, and there was no regular officiating minister. In 1853, C was appointed under a decree of the court of chancery receiver of the hospital charities; and he had taken possession of the joint registers of St. F. and St. C., which were formerly kept in the church of St. Cross, but now at the office of C out of the parish. Upon the application of a church warden of St. F. for a mandamus to compel C to deliver up the register books to the church wardens, it was *held* that the writ of mandamus could not go against C, as his possession of the books was wrongful from the first. Holloway, *ex parte*, 30 Eng. Law and Eq. 240.

1. Phoenix Iron Co. v. Com., 113 Pa. St. 563.

2. People v. Throop, 12 Wend. (N. Y.) 183; Com. v. Phoenix Iron Co., 105 Pa. St. 111; s. c., 51 Am. Rep. 184; People v. Pacific Mail S. S. Co., 5 Barb. (N. Y.) 280; Foster v. White, 6 So. Rep. (Ala.) 88; State v. Bergenthal, 39 N. W. Rep. (Wis.) 566; see Lyon v. American Screw Co., 17 Atl. Rep. (R. I.) 61; Kelsey v. Fermentation Co., 3 N. Y. Sup. 723; Foster v. White (Ala.), 6 So. Rep. 88; People v. St. Louis & San Francisco R. Co., 44 Hun (N. Y.) 552.

A stockholder in a private corporation, who is denied access to corporate records and information as to corporate affairs, may, in certain cases, have a mandamus to compel the production of such books and papers as are essential to him for some proper and definite purpose, such as an accurate ascertainment and legal assertion of his rights as a stockholder. Com. v. Phoenix Iron Co., 105 Pa. St. 111; s. c., 51 Am. Rep. 184.

If a corporation does not keep the books which the statutes prescribe it is their duty to permit an inspection of such as they do keep for the purpose of recording the transactions which the statutes give the stockholders the right to know. And such right of inspection may be enforced by mandamus. People v. Pac. Mail S. S. Co., 5 Barb. (N. Y.) 280.

Such right may be exercised by the attorney in fact of the stockholder. Foster v. White, 86 Ala. 467.

In Lyon v. American Screw Co., 17 (R. I.) Atl. Rep. 61, mandamus was not allowed to compel the inspection of the stock ledger.

A benevolent association is entitled to a peremptory writ of mandamus for an inspection of its books in the hands of one claiming a lien upon them for arrears of salary, the books to be returned to the claimant after the inspection. People v. Scheel, 8 Abb. (N. Y.) N. Cas. 342.

Mandamus lies to compel a cashier of a bank to permit inspection of books by director. People v. Throop, 12 Wend. (N. Y.) 183.

An appeal from a final judgment rendering peremptory the mandamus permitting relator to examine the books, papers and affairs of the bank, but giving no permission for the appointment of experts to aid him, the court below made an *ex parte* order appointing two experts to aid relator. *Held*, that the court *à quâ* erred in granting this supplemental order. It was not at the time in the power of the court to reopen the case and make this order. The judgment had been signed ten days previously, disposing finally of the mandamus case, and there was

custodian of the corporate records and documents to allow him an inspection of them he must show that he has made a proper demand for such inspection at a proper time and place and for a proper reason. The writ will not be granted to enable a corporator to gratify idle curiosity.¹

The members of a corporation have no right on speculative grounds to call for an examination of the books in order to see if by possibility the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged, and then the question will arise whether the court will grant a mandamus.²

(d) TO WHOM THE WRIT SHOULD BE DIRECTED.—The rule is that the writ shall be directed to the person having the custody of the books in question.³

7. **Transfer of Stock.**—Mandamus does not lie to compel the transfer of stock on the books of the corporation⁴ for the reason

no suit pending in which the order in question could be granted. *State v. Accommodation Bank*, 28 La. An. 874.

1. *People v. Walker*, 9 Mich. 328. If there is fair reason to believe that a party asking for an inspection of corporate books intends to make an improper use of them, and on that ground his request is denied, the court will not aid him by mandamus. *Rosenfeld v. Einstein*, 46 N. J. L. 479.

2. *King v. Master and Warden of the Merchant Tailors Co.*, 2 Barn. & Adol. 115; *Pratt v. Meriden Cutlery Co.*, 35 Conn. 36; *People v. Northern Pac. R. Co.*, 50 N. Y. Super. Ct. 456.

3. *People v. Throop*, 12 Wend. (N. Y.) 183.

4. *Tobey v. Hakes*, 54 Conn. 274; *Georgia Bank v. Harrison*, 66 Ga. 696; *Lowell on Transfer of Stocks*, § 233, citing *Rex v. Bank of England*, Doug. 524; *Rex v. London Assurance Co.*, 5 B. & A. 899; *Kimball v. Union Water Co.*, 44 Cal. 173; *American Asylum v. Phoenix Bank*, 4 Conn. 172; *Townes v. Nichols*, 73 Me. 515; *Murray v. Stevens*, 110 Mass. 95; *Baker v. Marshall*, 15 Minn. 177; *State v. Rombauer*, 46 Mo. 155; *State v. Guerrero*, 12 Nev. 105; *State v. Warren Foundry Co.*, 3 Vroom (N. J.) 439; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Birmingham etc. Ins. Co. v. Comm.*, 92 Pa. St. 72; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (N. Car.) 195; *People v. Crockett*, 9 Cal. 112, holding *contra* has been overruled, and *Green Mt. Turnpike Co. v. Bulla*, 45

Ind. 1, is modified by later decisions. See also *Rex v. Worcester Canal Co.*, 1 Man. & R. 529; *Reg. v. Liverpool & M. R. R. Co.*, 21 L. J., Q. B. 284; *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263; *People v. Parker Vein Coal Co.*, 10 How. (N. Y.) Pr. 186; *Durham v. Monumental Silver Mining Co.*, 9 Oreg. 41.

Mandamus will not lie to compel the secretary of a private corporation to allow a stockholder to transfer his stock on the books of the corporation. *Tobey v. Hakes*, 54 Conn. 274; s. c., 16 Am. & Eng. Corp. Cas. 400; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484. *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.) 243.

Exceptions.—In some jurisdictions the remedy by mandamus is allowed by statute. *People v. Goss etc. Mfg. Co.*, 99 Ill. 355; *State v. First Nat. Bank*, 89 Ind. 302; and in *Norris v. Irish Land Co.*, 8 E. & B. 512, the court hesitates between the statute and the fact that the corporation was established by royal charter, as a ground for issuing the writ.

Mandamus has been allowed where a sheriff was seeking to transfer stock sold on execution, on the ground that the sheriff was performing a public duty. *Bailey v. Strohecker*, 38 Ga. 259; *State v. Jeffersonville Bank*, 89 Ind. 302. See, however, *Durham v. Monumental M. Co.*, 9 Oreg. 41, and also where the corporation was a railway company, on the ground that it was a public corporation, which, however, it is not. *State v. McIver*, 2 S. Car. 25;

that the relator has a plain, speedy and adequate remedy at law by an action against the corporation for the value of the stock claimed.¹

8. To Issue Certificate of Stock.—The officers of a business corporation cannot be compelled by mandamus to cancel a certificate of stock and issue others in lieu thereof without proof that they are under a legal duty to do so and that their refusal so to do will result in a pecuniary injury to the applicant which cannot be recovered in an action at law.²

9. Railway Companies.—(a) **GENERALLY.**—Railway companies are given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road. Hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. Ordinarily, the true interests of railway companies and the strict liabilities imposed upon them as common carriers are all that is necessary to protect the public against such abuses as are complained of in most cases.³

The writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is from its very nature physically impossible; or where from extrinsic causes it has become so; or where performance,

State v. Cheraw etc. R. Co., 16 S. Car. 524. See also *State v. Orleans R. Co.*, 38 La. An. 312; *Memphis Appeal Publishing Co. v. Pike*, 9 Heisk. (Tenn.) 697. So the writ may be granted to require a corporation to enter upon its books the probate of the will of a deceased shareholder, disposing of his shares in the company, leaving all doubts as to the question of the right to the shares so disposed of to be shown by the corporation in its return to the writ. *Rex v. Worcester etc. Canal*, 1 Man. & R. 529.

1. *Kimball v. Union Water Co.*, 44 Cal. 173; *Rex v. Bank of England*, cited in *Kortright v. Buffalo Com. Bank*, 20 Wend. (N. Y.) 94; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *American Asylum v. Phoenix Bank*, 4 Conn. 172; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *Wilkinson v. Providence Bank*, 3 R. I. 22. *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.) 243; *Birmingham Fire Ins. Co. v. Com.*, 92 Pa. St. 72.

Instances.—The purchaser of shares in a building and loan association is not entitled to a mandamus to compel the association to transfer them to him

on their books. He has an adequate remedy in a suit for damages. *State v. People's Building and Loan Assoc.*, 43 N. J. L. 389.

Mandamus will not lie to compel the officers of a bank to transfer stock from a vendor to a purchaser except under a judicial sale; in that case the bank official becomes a public officer *pro hac vice*. *State of Georgia Bank v. Harrison*, 66 Ga. 696.

The purchaser of shares in such a corporation, where the incidental rights of a stockholder do not depend on the ownership of these specific shares, is not entitled to a writ of mandamus to compel their transfer. *Freon v. Carriage Co.*, 42 Ohio St. 30; s. c., 51 Am. Rep. 794.

2. *State v. St. Louis Paint Mfg. Co.*, 21 Mo. App. 526.

Nor to compel a corporation to issue stock, under an apparently illegal contract which calls for full paid stock in consideration of services worth only one-third the face value of the shares. *State v. Timken*, 48 N. J. L. 87.

3. *Ohio etc. R. Co. v. People*, 120 Ill. 200; s. c., 30 Am. & Eng. R. R. Cas. 509.

though not absolutely impossible, is from any cause not within the power of the defendant. But whatever the grounds may be whenever it is apparent that the defendant is unable to perform the act sought to be thus enforced, the writ, as a general rule, will be denied.¹ There are many instances, in cases where the duty is clear and imperative, in which mandamus is held to lie, notwithstanding the thing required to be done involves the performance of a multiplicity of acts requiring the exercise of judgment and discretion on the part of the defendant as to such details.² Thus the writ of mandamus has been awarded to compel a company to operate its railroad as one continuous line;³ to compel it to operate a railway on a bridge on a continuous portion of its main line, and to desist from using "transfer trains" across it;⁴ to compel the running of passenger trains to the terminus of the road;⁵ to compel it to construct and maintain fences and cattle guards;⁶ to compel it to build a bridge and keep it in repair;⁷ to compel it to construct its road across streams so as not to interfere with navigation;⁸ to compel the company to run daily trains;⁹ to compel it to use a train to transport passengers to a particular point;¹⁰ to compel the delivery of grain at a particular elevator;¹¹ to compel the grading of its track so as to

1. *People v. Chicago etc. R. Co.*, 55 Ill. 95; *People v. Lieb*, 85 Ill. 484; *People v. Trustees*, 86 Ill. 613; *Cristman v. Peck*, 90 Ill. 150; *People v. Hatch*, 33 Ill. 9.

2. *Ohio etc. R. Co. v. People*, 120 Ill. 200; s. c., 30 Am. & Eng. R. R. Cas. 509.

3. *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

4. *U. S. v. Union Pac. R. Co.*, 4 Dill. (U. S.) 479; *Affirmed*, 1 Otto (U. S.) 343.

5. *State v. Hartford etc. R. Co.*, 29 Conn. 538.

The Hartford and New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road, and the use of it in connection with the steamboat line for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide water, and running to the station of the New York and New Haven Railroad Company in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide water.

This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. *Held*, that a mandamus ought to be issued to compel the railroad company to run passenger trains to the original terminus. *State v. Hartford etc. R. Co.*, 29 Conn. 538.

6. *People v. Railroad Co.*, 14 Hun (N. Y.) 371; *Cohn v. Goldman*, 76 N. Y. 284.

Mandamus is the proper proceeding to compel a railroad company to construct its fences in compliance with the provisions of the statute. *Ohio etc. R. Co. v. People*, 121 Ill. 483.

7. *People v. Boston etc. R. Co.*, 70 N. Y. 569; *People v. Troy etc. R. Co.*, 37 How. (N. Y.) Pr. 427; *State v. Wilmington Bridge Co.*, 3 Harr. (Del.) 312; *State v. Northeastern R. Co.*, 9 Rich. (S. Car.) 247.

8. *State v. Northeastern R. Co.*, 9 Rich. (S. Car.) 247; *State v. Northeastern R. Co.*, 9 Rich. (S. Car.) 247; *State v. Wilmington Bridge Co.*, 3 Harr. (Del.) 312; *In re Trenton Water Power Co.*, Spen. (N. Y.) 659.

9. *Re New Brunswick & Canada R. Co.*, 1.

10. *State v. Hartford etc. R. Co.*, 29 Conn. 538; *Rex v. Severn*, 2 Barn. & Ald. 646.

11. *Chicago etc. R. Co. v. People*, 56 Ill. 365.

make crossings convenient and useful;¹ to compel completion of railway;² to construct a viaduct;³ to compel the re-establishment of an abandoned station;⁴ to compel the replacement of a track taken up in violation of its charter;⁵ to restore a portion of its track which it had refused;⁶ to prevent the abandonment of a road once completed;⁷ to compel a company to exercise its franchise;⁸ to compel it to take tax receipts in payment for its charges;⁹ to carry cedar logs, though the company had

1. *Gould v. Oneonta*, 71 N. Y. 303; *Indianapolis R. Co. v. State*, 37 Ind. 486; *State v. Nicholson Pavement Co.*, 35 N. J. L. 397; *People v. Chicago etc. R. Co.*, 67 Ill. 118; *State v. Minneapolis & St. L. R. Co.* (Minn.), 39 N. W. Rep. 153.

2. *Farmers' etc. Co. v. Leavenworth etc. R. Co.*, 17 Am. Law Reg., N. S. 266; *State v. Southern Minnesota R. Co.*, 18 Minn. 40; *People v. Albany etc. R. Co.*, 24 N. Y. 261.

When a railroad company have obtained an act of parliament reciting that the formation of a railway from A to D will be beneficial to the public, and that the company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and the company, in exercise of the powers, have taken lands and thereupon made part of their line, they are bound by law to complete such line, not only to the extent to which they have taken lands, but to the farthest point, although the statute enacts only that "it shall be lawful" for them to make the railway. *Regina v. York etc. R. Co.*, 16 Eng. L. & Eq. 299. See also *Queen v. Eastern Counties R. Co.*, 10 Ad. & E. 531; *Queen v. York, Newcastle & Berwick R. Co.*, 16 Ad. & E., N. S. 886; *Queen v. Great Western R. Co.*, 1 El. & Bl. 253; reversed on error in the exchequer chamber, 1 El. & Bl. 874; *Queen v. Bristol Dock Co.*, 2 Ad. & E., N. S. 64. But see *Queen v. Rochdale & Halifax Turnpike*, 12 Ad. & E., N. S. 448; *Queen v. Bristol & Exeter R. Co.*, 4 Ad. & E., N. S. 162; *King v. Brecknock Canal Co.*, 2 Ad. & E. 217.

3. *State v. Missouri etc. R. Co.*, 33 Kan. 176; *High's Extraordinary Legal Remedies*, §§ 319, 320, and cases there cited; §§ 276 and 290, and cases there cited; *Cooke v. Boston etc. R. Co.*, 133 Mass. 185; s. c., 10 Am. & Eng. R. R. Cas. 328; and note and cases there cited; *Cambridge v. Charleston etc. R. Co.*, 7 Met. (Mass.) 70; 1. & C. R.

Co. v. State, 37 Ind. 489; *In re Trenton Water Power Co.*, Spen. (N. J.) 659; *Habersham v. Savannah etc. Canal Co.*, 26 Ga. 665.

Where a duty rests upon a railroad company to construct a viaduct over its railroad tracks where the same cross a public street in a city, mandamus will ordinarily lie to compel the railroad company to so construct such viaduct. But where a city of the first class by ordinance orders three railroad companies jointly to construct a viaduct, and the ordinance is vague and indefinite with respect to the dimensions of the viaduct and the materials to be used in its construction, and its construction as ordered by the city would require a change of the grade of certain streets of the city in violation of certain provisions of the statutes, *held* that mandamus will not lie to enforce the construction of such viaduct. *State v. Missouri etc. R. Co.*, 33 Kan. 176.

4. *State v. New Haven etc. R. Co.*, 37 Conn. 154; *State v. New Haven etc. R. Co.*, 41 Conn. 134.

Y being a flourishing town, the county seat, and the largest and only important place in the county, a railroad stopped its trains there, but afterwards ran all its trains through, without stopping, to a point four miles beyond, where there were only a few houses, and speculators were attempting to build up a town as a rival to Y. *Held* that Y might compel the railroad to stop its trains, establish a depot, and afford it other proper facilities for transacting business. *Northern Pac. R. Co. v. Territory*, 3 Wash. Ter. 303.

5. *King v. Railway Co.*, 2 Barn. & Adol. 644.

6. *Rex v. Severn*, 2 Barn. & Ald. 646.

7. *Talcott v. Pine Grove*, 1 Flipp. (U. S.) 145.

8. *People v. Albany etc. R. Co.*, 24 N. Y. 261.

9. *Mobile etc. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125.

never before carried the same;¹ to receive and transport freight upon such terms as are reasonable and usual, and to perform its duties as a common carrier;² and to pay a tax upon its capital stock.³

Many of these cases, however, it will be found, are controlled by special statutory provisions.⁴ Where the charter of the company expressly requires that a certain duty shall be performed, the company may be compelled by mandamus to perform this, like any other specified duty enjoined by its charter or by other statutory provision.⁵ And in order to compel by mandamus the performance of a duty by a railroad company the difficulties in obeying it should be taken into consideration in determining

1. *Rutherford v. Grand Trunk*, 20 Lower Canada Jurist 11.

2. *People v. New York Co.*, 28 Hun (N. Y.) 545; *People v. New York etc. R. Co.*, 63 How. (N. Y.) Pr. 291.

Plaintiff was the manufacturer of a nonintoxicating beverage known as "New Era Beer." Defendant, a common carrier, refused to transport this product into Iowa, basing its refusal on the prohibitory liquor law of Iowa. The words "intoxicating liquor" in this law (Code Iowa, ch. 6, title 11) are declared by subsequent statute to include "beer." Held that as the product was denominated "beer," with nothing to show that it was not intoxicating, defendant had a right to assume that it was intoxicating, and, therefore, prohibited, and govern itself accordingly, and that, as defendant had a discretion in regard to the evidence whereby it might be satisfied that the product was lawful, mandamus would not lie to compel its transportation. *Milwaukee Malt Extract Co. v. Chicago etc. R. Co.*, 73 Iowa 98.

3. A railroad company which has leased its road and owns no personal property of material value may be compelled by mandamus from this court to pay a tax on its capital stock when it has obtained a *certiorari* removing the assessment into this court, and a rule staying further proceedings on the warrant. *Person v. Warren R. Co.*, 3 Vroom (N. J.) 441.

4. *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *Ohio etc. R. Co. v. People*, 121 Ill. 483.

5. *State v. Missouri Pac. Co.*, 80 Mo. 117; *People v. Long Island R. Co.*, 31 Hun (N. Y.) 125.

In *State v. Hartford etc. R. Co.*, 29 Conn. 538, a railroad company had

abandoned part of its track and refused to run passenger trains on it.

In proceedings by the attorney general asking a mandamus to compel the railroad company to run trains over such portion of the road for the accommodation of the public, the court observed: "We hardly know what principles of law are thought to be involved in the case. The respondents certainly were bound to make their road (if at all) within the time prescribed in the charter, and, having made it, to put it into use—every material part of it—and keep it in use until discharged by the legislature. And this continuous duty is in no manner inconsistent with the power in the company (which has been so much dwelt upon in the argument) to regulate and control the manner of using the road by wholesome rules and by-laws. These, we admit, are necessary and allowable, but then they must be such as are really promotive of the original design of the charter, and not such as tend to defeat that design."

Though the writ of mandamus will lie at the instance of a private individual against a corporation to compel the performance of a duty enjoined by its charter, to be executed for the benefit of the relator or the class of individuals to which he belongs, the allowance of the writ in such cases must be controlled by the principle that it is the absence of an adequate legal remedy that gives the court jurisdiction to proceed by mandamus. Two things must concur; a specific legal right and the absence of an effectual legal remedy. *State v. Paterson etc. R. Co.*, 14 Vroom (N. J.) 505; s. c., 10 Am. & Eng. R. R. Cas. 334; 2 Dill. on Mun. Corp., §§ 665, 686; *State v. Holliday*, 3 Halst. 205; *State v. Union*, 8 Vroom

whether, in view of all the facts shown, the people have made out such a case as to entitle them to the relief prayed.¹

Mandamus will not lie to compel a railroad company to do an act where they are vested by a clause in their charter with a discretion as to the time and manner of its performance.²

(b) ABANDONMENT OF ROAD.—Where a railroad company owns by consolidation two lines of road, and can substantially accommodate the people of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, it should not be compelled by mandamus to operate both lines at a great sacrifice of money upon the fanciful idea that the sovereignty of the State is wounded by its omission to operate both lines.³

(c) ERECTION OF DEPOT.—A railroad company may be compelled by mandamus to erect and maintain a depot, this duty being imposed upon it by law.⁴

(d) COMMUTATION TICKETS.—Mandamus will lie to compel a railroad company to issue a commutation ticket to one entitled.⁵

(e) DISCRIMINATION.—Where a railroad company is found to discriminate and is ordered to reduce its rates, mandamus is a proper remedy to enforce such order.⁶

(f) DAMAGES FOR LAND TAKEN.—Where a railway company or other corporation is vested with the right of eminent domain it may be compelled by mandamus to take the necessary steps for summoning a jury to assess damages for the property taken or damaged, and it may even be required by the writ to make payment of the amount of damages so assessed in the absence of any other specific or adequate remedy.⁷

(N. J.) 343; *Queen v. Hull & Selby R. Co.*, 6 Q. B. 70; *Moses on Mandamus* 176, 178; 2 Redf. on Railways, 279, 286.

1. *Ohio etc. R. Co. v. People*, 120 Ill. 200.

2. *State v. Canal etc. R. Co.*, 23 La. An. 333.

3. *People v. Rome etc. R. Co.*, 103 N. Y. 95; s. c., 28 Am. & Eng. R. R. Cas. 35.

4. *Railroad Commrs. v. Portland etc. R. Co.*, 63 Me. 269; *People v. New York etc. R. Co.*, 40 Hun (N. Y.) 570; s. c., 17 Abb. (N. Y.) N. Cas. 304.

5. *State v. Delaware etc. R. Co.*, 48 N. J. L. 55; s. c., 23 Am. & Eng. R. R. Cas. (N. J.) 470; s. c., 57 Am. Rep. 543.

A railroad company, chartered as a carrier of passengers and freight, is under no obligation to establish commutation rates for a particular locality, but when it has established such rates and commutation tickets are sold thereat

to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him and a violation of the principle of equality which the company is bound to observe in the conduct of its business. *Atwater v. Delaware etc. R. Co.*, 48 N. J. L. 55; s. c., 57 Am. Rep. 543.

6. *State v. Fremont etc. R. Co.*, 22 Neb. 313; *Wells v. Northern Pacific R. Co.*, 23 Fed. Rep. 469; s. c., 10 Sawy. (U. S.) 441.

7. *High's Ex. L. Rem.*, § 318; *King v. Waterworks Co.*, 6 Ad. & E. 355; *Queen v. Eastern Counties R. Co.*, 2 Ad. & E., N. S. 347; *Green v. Deptford Pier Co.*, 8 Ad. & E. 910; *Queen v. Trustees of Swansea Harbor*, 8 Ad. & E. 439. See *Chesebro v. Circuit Judge*, Mich. 38 N. W. Rep. 658; *State v. Grand Island & W. C. R. Co.* (Neb.),

(g) HIGHWAYS.—Mandamus is an appropriate remedy to compel the restoration of a highway by a railway to its proper condition, and, in this respect, to the company to perform its charter duties.¹

10. **Canals.**—Mandamus will issue to compel a canal company to bridge its ditch as ordered by the county supervisors.²

11. **Telephone Corporations.**—Telephone companies being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the telephone; and where no good reason is assigned for a refusal by a telephone company to furnish a telephone instrument to a person who desires to become a subscriber, and tenders a full compliance with all the rules established for other subscribers, a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.³

43 N. W. Rep. 419; see *Re Spring Valley etc. Works*, 17 Cal. 132; *Shine v. Kentucky Cent. R. Co.*, 85 Ky. 117.

S, being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S, now demanded compensation and obtained a mandamus nisi to proceed to arbitration under the Railway Act, 1868. *Held*, that the plaintiff was not entitled; that S having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed. *Thompson v. Canada Cent. R. Co.*, 3 Ontario Q. B. Div. 136; s. c., 14 Am. & Eng. R. R. Cas. 431.

1. *State v. Hannibal etc. R. Co.*, 86 Mo. 13; s. c., 29 Am. & Eng. R. R. Cas. 604. *High's Ex. L. Rem.*, § 320; 2 *Rover on Railroads* 934.

2. *Fresno Co. v. Fowler Switch Canal Co.*, 68 Cal. 359.

3. *State v. Nebraska Telephone Co.*, 17 Neb. 126; s. c., 8 Am. & Eng. Corp. Cas. 1; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1; *Central Union Telephone Co. v. State*, 118 Ind. 194.

A public telephonic company having furnished telephonic facilities to one telegraph company with the consent of its licensor cannot refuse to furnish like facilities to all other telegraph companies, notwithstanding it is for-

bidden to do so by its contract with the owner and licensor of the patent. Such portion of the contract is void. *Commercial Union Tel. Co. v. New England Telephone & Telegraph Co.*, 17 Atl. Rep. (Vt.) 1071.

"The case of *State v. Telephone Co.*, 22 Alb. Law J. 363, was an application for *mandamus* to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its licence from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. *THAYER, J.*, said: 'In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph, or telephone company may avoid the performance of any part of the paramount duty they owe to the entire public by contract obligations which they may enter into, even with the patentee of an invention.' In *Transfer Co. v. Telephone Co.*, 24 Alb. Law J. 283, the plaintiff was a proprietor of public omnibuses and carriages, and the defendant was a telephone company, and also proprietor of public carriages. Upon an application

by plaintiff for an injunction to restrain the defendant from removing its telephone from the plaintiff's office and from refusing to transact its (plaintiff's) telephone business pursuant to contract, the defendant insisted that a mere rival in one branch of its business could not force it to afford it facilities which it had provided for another branch of its business. The court said 'that the real contention between the plaintiff and defendant is confined to their carriage and *coupe* services; defendant insisting that, as against plaintiff, a rival in the business, it has the right to a monopoly in the use of its own telephonic methods of communicating and receiving orders for *coupes*; that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business . . . that defendant is engaged in two distinct employments—one in operating a telephonic exchange, and the other in operating a carriage or *coupe* service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business it occupies the same position towards the plaintiff as it does towards the rest of the public; that defendant is a *quasi* public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carrier.' In *Telephone Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. Rep. 809, the court holding the same view, said: 'The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. . . . They have no power to discriminate, and, while offering readily to serve some, refuse to serve others.'

A recent case is that of *State v. Telephone Co.*, 23 Fed. Rep. 539 (Cir. Ct. E. D. Mo.), which arose upon a state of facts nearly identical with those in the case at bar. BREWER, J., in giving the opinion of the court, from which TREAT, J., dissented, said: 'Now, the question is whether the court

can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual or company than that permitted by its licence from the patentee. I believe fully in the sacredness of property, but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the 'channels of commerce,' that moment he subjects that property to the laws which control commercial transactions. . . . A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis: 'My licence is to establish a telephonic system open to the doctors and the merchants, but shutting out you, gentlemen of the bar.' The moment it establishes a telephonic system here it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service. So my conclusion is that, notwithstanding the terms of this licence, which seemed to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges. The application for mandamus will be sustained.' The supreme court of Nebraska has rendered a similar decision in *State v. Telephone Co.*, reported in 22 N. W. Rep. 237. The same question was before the supreme court of Pennsylvania in *Telephone Co. v. Com.*, 3 Atl. Rep. 825, which contains a full review of the decided cases,

VIII. PRIVATE PERSONS.—Mandamus will not issue against a private citizen.¹

1. **Infants.**—A court will guard the interests of infant litigants by mandamus whether protected by their guardian or not.²

2. **Guardian.**—Mandamus does not lie to compel a guardian to pay a claim against his ward which the probate court has adjudged valid; the proceeding must be by action.³

IX. MUNICIPAL CORPORATIONS—1. Generally.—Whilst the writ of mandamus may perhaps be awarded to set municipal corporations in motion, and to compel action upon the particular matters over which they may have jurisdiction, it will in no manner interfere with the exercise of that discretion nor control or dictate the judgment or decision which shall be reached.⁴ And where the duty to be performed is purely ministerial in its character mandamus is the proper remedy to enforce its performance.⁵ So where an act of the legislature gives power to or imposes an obligation upon a municipal corporation to do a certain act or duty, such as to direct the city councils to appropriate money to pay certain

and in which the same doctrine is held. See also *People v. Telephone Co.*, 19 Abb. N. C. 466 (decided in 1887).⁶ TYLER, J., in *Commercial Union Tel. Co. v. New Eng. Tel. & Tel. Co.*, 17 Atl. Rep. (Vt.) 1071.

1. *State v. Powers*, 14 Ga. 388.

2. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

3. *Smith v. Burton*, 48 Mich. 643.

4. *Pfister v. State*, 82 Ind. 382; *People v. Mayor of New York*, 10 Wend. (N. Y.) 393; *In re Town Board of Lloyd*, 7 N. Y. Supp. 165; *State v. Demaree*, 80 Ind. 519; *Supervisor of Sand Lake v. Supervisor of Berlin*, 2 Cow. (N. Y.) 485; *U. S. v. County Commrs., Morr.* (Iowa) 42; *Supervisors of Will Co. v. People*, 110 Ill. 511; *State v. Bonner, Busb. L.* (N. Car.) 253; *State v. Francis*, 95 Mo. 44; *Dechert v. Com.*, 113 Pa. St. 229; *Ottawa v. People*, 48 Ill. 233; *Howe v. Crawford County*, 47 Pa. St. 361; *Wintz v. Board of Education*, 28 W. Va. 227.

Courts of law have uniformly refused to allow the rule for a mandamus to issue to compel a corporation to act in any particular manner where such corporation was invested with discretionary power. But mandamus may be resorted to to compel an inferior officer to do the act which is sought to be enforced in all cases where the officer has no discretion and where he is under obligation to do the specific act and there is no adequate remedy in the or-

dinary course of law. *McDougall v. Bell*, 4 Cal. 177.

Where a statute does not impose an absolute obligation upon a county board to perform a certain act but clothes it with an ultimate discretion in the matter, or where the statute is merely directory as to the act, and not mandatory, creating an absolute duty, mandamus will not lie to compel the board to perform the act. *Supervisors of Will Co. v. People*, 110 Ill. 511.

Approval of Security.—Mandamus to compel a municipal council to act on a liquor bond offered for its approval will not be granted where the ground on which the council refused is not clearly shown.

5. *Mau v. Liddle*, 15 Nev. 271; *Humbolt Co. v. Churchill Co.*, 6 Nev. 30; *People v. Common Council of New York*, 45 Barb. (N. Y.) 473; *Ex parte Common Council of Albany*, 3 Cow. (N. Y.) 358; *People v. Collins*, 7 Johns. (N. Y.) 549; *People v. Supervisors of Ontario*, 85 N. Y. 323; *People v. Green*, 64 N. Y. 499; *People v. Supervisors of Sullivan Co.*, 56 N. Y. 249; *Lafayette v. State*, 69 Ind. 218; *Overseers of Jersey Shore*, 82 Pa. St. 275; *Henry v. Taylor*, 57 Iowa 72; *Morley v. Power*, 5 Lea (Tenn.) 691; *State v. Shakespeare (La.)*, 6 So. Rep. 592; *Com. v. Mayor*, 5 Watts (Pa.) 152.

Thus where the law specially enjoins a duty upon the county commissioners and leaves them no discretion, mandamus is the proper remedy to en-

expenses, and provides no specific legal remedy to enforce performance thereof, the court will grant a writ of mandamus to command the doing of such act or duty.¹

And where a municipal officer neglects and refuses to perform some act or duty which the law requires him to perform, any party directly injured in consequence and who is without other legal remedy may have recourse to a writ of mandamus. The court will not, however, attempt to control the exercise of any discretionary power vested in the officer unless he appears to be acting in bad faith.² Nor will it compel him to act after his

force the performance of the law. *Mau v. Liddle*, 15 Nev. 271.

1. *Commrs. v. Philadelphia*, 3 Brews. (Pa.) 596. See *Commrs. of Henry*, 31 Ohio St. 211. See *Will County Supervisors v. People*, 101 Ill. 511; *McArthur v. Township of Duncan*, 34 Mich. 27.

A mandamus will lie to the corporation of a city neglecting to make an assessment for buildings destroyed to open a road, which, by an act of the legislature, they were authorized to estimate and compensate for. *Shoolbred v. Corporation of Charlestown*, 2 Bay (S. Car.) 63.

Under Mass. Stat. 1875, ch. 185, authorizing the taking of land for a park in Boston, and Stat. 1886, ch. 304, providing that the council may issue bonds and that upon its voting so to do the park commissioners shall at once proceed to construct the park, mandamus to compel the council to make an appropriation will not issue at the instance of persons whose lands have been assessed for betterments, although such lands are so situated that access cannot be had to them until the park is completed. *Boston Water Power Co. v. Boston*, 143 Mass. 546.

2. *Hull v. Supervisors*, 19 Johns. (N. Y.) 259; *People v. Supervisors*, 12 Johns. (N. Y.) 414; *In re Nelson*, 1 Cow. (N. Y.) 417; *In re Baily*, 2 Cow. (N. Y.) 479; *Gourley v. Allen*, 5 Cow. (N. Y.) 644; *People v. Dutchess etc. R. Co.*, 58 N. Y. 154; *Com. v. Park*, 10 Phila. (Pa.) 444; *Com. v. Pittsburg*, 34 Pa. St. 496; *Goodrich v. Chicago*, 20 Ill. 445; *Ottawa v. People*, 48 Ill. 233; *People v. Cass Co.*, 77 Ill. 438; *People v. La Salle Co. Supervisors*, 84 Ill. 303; *Supervisors v. U. S.*, 4 Wall. (U. S.) 435; *County Commrs. v. Duckett*, 20 Md. 468; *Sights v. Yarnalls*, 12 Gratt. (Va.) 292; *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 435; *Meyer v. Carolan*, 9 Tex. 250; *Louisville v.*

Kean, 18 B. Mon. (Ky.) 9; *Com. v. Henry*, 49 Pa. St. 530; *State v. Wilmington*, 3 Harr. (Del.) 294; *Michigan City v. Roberts*, 34 Ind. 471; *State v. Robinson*, 1 Kan. 188; *Thurston v. Elmira Auditors*, 82 N. Y. 80; *State v. Earle*, 42 N. J. L. 94; *Williamsport v. Com.*, 90 Pa. St. 498; *State v. Starling*, 13 S. Car. 262; *School Trustees v. Kay*, 8 Ill. App. 30; *State v. Studheit*, 11 Neb. 359; *Just v. Wise*, 42 Mich. 573; *Rice v. Shay*, 43 Mich. 380; *Waite v. Washington*, 44 Mich. 388; *Mau v. Liddle*, 15 Nev. 271; *Stone v. Small*, 54 Vt. 498; *State v. Fiedler*, 43 N. J. L. 400; *Cantlin v. Hancock*, 12 Phila. (Pa.) 464; *Barrett v. New Orleans*, 33 La. An. 542; *Morley v. Power*, 5 Lea (Tenn.) 691; *State v. Springfield School Directors*, 74 Mo. 21; *State v. Rainey*, 74 Mo. 229; *Tippton v. Jones*, 77 Ind. 307; *McBride v. Grand Rapids*, 47 Mich. 236; *U. S. v. Brooklyn*, 10 Biss. (U. S.) 466; *State v. Fuller*, 18 S. Car. 246; *Cheney v. Newton*, 67 Ga. 477; *State v. Jackson Co. Commrs.*, 19 Fla. 17; *Polk v. James*, 68 Ga. 128; *State v. Stone*, 69 Ala. 206; *Roscommon v. Midland Co. Supervisors*, 49 Mich. 454; *State v. Staley*, 38 Ohio St. 259; *State v. Brown*, 38 Ohio St. 344; *State v. New Orleans*, 34 La. An. 1149; *State v. Baton Rouge*, 34 La. An. 1197; *Appleby v. New York*, 41 Hun (N. Y.) 481; *People v. Thacher*, 42 Hun (N. Y.) 349.

Mandamus will not lie to control the discretion of the common council of New Orleans in the matter of providing for the alimony of the city. *U. S. v. New Orleans*, 31 Fed. Rep. 537.

The comptroller of Philadelphia is invested with a discretionary power which he is entitled to exercise free from all interference and mandamus will not lie to review his action. *Dechert v. Com.*, 113 Pa. St. 229. So is the board of education or its president in

term office has expired.¹ It is issued only in cases where the plaintiff has a clear legal right to the performance of some official or corporate act by a public officer or corporation and no other adequate specific remedy exists.²

2. Demand of Performance.—The writ will not be granted to compel the corporate authorities of a village or other body to do an act it has never been asked to do. The petition should show a demand for performance of the act and a refusal.³

approving the trustee's appointment of teachers. *Wintz v. Charleston Education Board*, 28 W. Va. 227.

The duties of officers entrusted with the letting of contracts for public work to the lowest responsible bidder are not of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus. *State v. McGrath*, 91 Mo. 386; *People v. Contracting Board*, 27 N. Y. 378; *People v. Croton etc. Board*, 49 Barb. (N. Y.) 259; *Free Press Assoc. v. Nichols*, 45 Vt. 7; *People v. Contracting Board*, 33 N. Y. 382.

So highway commissioners in taking steps to construct bridges by asking county aid. *People v. Highway Commrs.*, 118 Ill. 239.

A statute which obliged several railroad corporations having their tracks in a city to unite in one station, and provided for the discontinuance of some of the existing tracks, and the extension by the city of a street therein, enacted that the city should maintain a suitable track upon the extension of the street, or partly upon the extension and partly upon the discontinued railroad location, to be connected with the tracks of one or more of the railroads in the city, "for the accommodation of the business establishments on the line of said extension which were accommodated by the tracks of" a certain railroad when the act was passed. *Held*, that after the city had in its discretion constructed a track for the purposes named this court could not, on a petition for a writ of mandamus, exercise a supervisory power over the mode in which it was done and determine whether a track in another place would better accommodate the petitioner. *Rice Machine Co. v. Worcester*, 130 Mass. 575.

To Institute Suit Against County Clerk.—A petition for a mandamus sought to compel a county board to re-

quire a county clerk whose term of office had expired to forthwith pay to the county treasurer certain moneys alleged to be in his hands belonging to the county, and in default thereof to require the relator as State's attorney to commence suit on the official bond of the clerk for the recovery of such moneys. It appeared that the county board had once acted on the matter and refused to make such order. It was *held* that the petition failed to show a case that would justify the granting of the writ, such matters being purely within the discretion of the county board, and a demurrer to the answer was sustained to the petition, and the same dismissed. *People v. McCormick et al.*, 106 Ill. 184.

1. *State v. Kirman*, 17 Nev. 380.

2. *Cincinnati etc. R. Co. v. Commrs. of Clinton Co.*, 1 Ohio St. 77; *State v. Commrs. of Jefferson Co.*, 11 Kan. 67; *Atchison etc. R. Co. v. Commrs. of Jefferson Co.*, 12 Kan. 127; *State v. Mo. Pac. R. Co.*, 33 Kan. 176; *High Ex. Rem.*, §§ 17, 333; *People v. Mayor*, 10 Wend. (N. Y.) 393; *Van Rensselaer v. Sheriff*, 1 Cow. (N. Y.) 501; *Mobile etc. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125. See *Parker v. Portland*, 54 Mich. 308.

As a general rule, a proceeding by mandate will not be sustained where the plaintiff has an adequate legal remedy; but, under section 1168, Rev. Stat. 1881 (Ind.), a writ of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust or station. *Gardner v. Haney*, 86 Ind. 17.

3. *People v. Hyde Park*, 117 Ill. 462; *Kemmerer v. State*, 7 Neb. 133; *People v. Whittemore*, 4 Mich. 27; *Dobbs v. Stauffer*, 24 Kan. 12; *State v. Hull*, 17 Minn. 429; *State v. Bacon* (S. Car.), S. E. Rep. 765; *Bryson v. Spaulding*, 20 Kan. 427.

Where a proceeding by mandamus is

3. To Do an Unlawful Act.—A writ of mandamus will not be awarded for the performance of an act which for any reason has become unlawful to be performed.¹

4. Approval of Bond.—If an officer or board of officials vested by law with discretionary powers refuse to accept or approve an official bond, mandamus is the proper remedy to compel action but not to interfere with the exercise of official discretion or judgment.²

Where a power of this doubtful kind is conferred on a judicial officer, and the public interests will be best subserved by holding it to be of a judicial nature, the courts are always so inclined to hold.³ In the matter of approving official bonds, the duty of deciding upon the sufficiency of the sureties involves the exercise of such judgment and discretion as to be of a *quasi* judicial nature, and that the exercise of the power will not be controlled by mandamus.⁴

instituted by a private individual, as a taxpayer, against a county clerk and treasurer to require them to keep the books pertaining to their respective offices in a particular manner, it must appear that a demand for that purpose was made upon such officers before the action was commenced. *State v. Eberhardt*, 14 Neb. 201.

In *Moses on Mandamus*, 204, it is said: "The petition for a mandamus should present to the court a *prima facie* case of duty on the part of the defendant to perform the act demanded and an obligation to perform it; otherwise the alternative writ will not be granted. It should also appear from the petition that a demand has been made on the defendant to do the thing he is sought to be compelled to do, and that he has refused and neglected to do it. *Stephens Nisi Prius*, 2318-19; *People v. Walker*, 9 Mich. 328."

In *Redfield on Railways* (5th ed.) 659, note 6, it is said: "It is first indispensable to demand of the party against whom the application is to be made to perform the duty. See also *State v. Governor*, 1 Dutch. (N. J.) 331; *State v. Lehre*, 7 Rich. (S. Car.) 234; *State v. Davis*, 17 Minn. 429.

In *State v. Rahway*, 33 N. J. L. (4 Vr.) 111, it was held that to authorize a mandamus against the common council of a city there need not be a positive refusal by the common council to perform the duty; it is sufficient to show a manifest intention not to perform it.

Upon an application for a writ of

mandamus against the township committee of Union, to compel them to borrow money to pay a judgment, it appears that a demand was made upon one member and the clerk of the committee to perform this duty on May 24th, and the rule to show cause in this case was allowed June 1st following and there was no meeting of the township committee in the interval. Held, that the interval is too brief to support a presumption of a refusal of the committee to perform their duty. *Magie v. Union*, 42 N. J. L. 531.

1. *People v. Hyde Park*, 117 Ill. 462; *Hall v. Steele*, 82 Ala. 562; *People v. Fowler*, 55 N. Y. 262.

A writ of mandamus will not be awarded to compel an official act that it may have been the duty of the officer to perform at the time the proceeding was commenced, but which has since been forbidden by law. *Hall v. Steele*, 82 Ala. 562.

2. *In re Prickett*, Spencer (N. J.) 134; *State v. Lewis*, 10 Ohio St. 46; *Nelson v. Edwards*, 55 Tex. 389; *Arapahoe Co. v. Crotty*, 9 Colo. 138; *Lewis v. Marion*, 14 Ohio St. 515; *Ex parte Harris*, 52 Ala. 87; *Beebe v. Robinson*, 52 Ala. 67; *Ex parte Thompson*, 52 Ala. 98. See also *Thompson v. Holt*, 52 Ala. 491.

3. *Ex parte Harris*, 52 Ala. 87; *Ex parte Thompson*, 52 Ala. 98.

4. *McDuffie v. Cook*, 65 Ala. 430; *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321; *Ex parte Harris*, 52 Ala. 87. See *Briggs v. Hopkins* (R. I.), 13 Atl. Rep. 109.

5. Liquor Bond.—The writ will not be granted to compel a municipal council to act on a liquor bond offered for its approval where the ground on which the council refused is not clearly shown.¹

6. Issuing of Bonds.—Mandamus lies where the plaintiff has a clear legal right to compel the issuing of bonds by a municipal corporation.²

7. Payment of Bonds.—Mandamus is the proper remedy of holders of city bonds to compel city treasurer to pay interest thereon or city government to raise funds by taxation to pay them, where expressly directed to do so by charter which authorized their issue.³

1. *Negley v. Sturgis*, 44 Mich. 1. Mandamus to compel a village board to approve a liquor dealer's bond will be denied if there is nothing to show that the refusal to approve it was capricious or to rebut the presumption that the board has fairly passed upon all the questions which determine the sufficiency of the bond and the reliability of the sureties. *Parker v. Portland*, 54 Mich. 308.

In an application for a mandamus to compel a township board to approve of a druggist's liquor bond, the return showed that after hearing the testimony of the relators and their witnesses they found that one of the sureties upon the bond offered for approval was insufficient, not being worth the amount of the bond over and above his debts and exemptions. *Held*, that there being nothing in the return showing that the discretionary power of the township board was not exercised reasonably and in good faith, mandamus should be denied. *McHenry v. Township Board of Chippewa* (Mich.), 31 N. W. Rep. 602.

2. *Smalley v. Yates*, 36 Kan. 519; *People v. Brennan*, 39 Barb. (N. Y.) 522; *Summit County Commrs. v. People*, 10 Colo. 14; *Santa Cruz R. Co. v. Santa Cruz County Supervisors*, 62 Cal. 239; *Platt v. Peble*, 29 Ill. 54. Compare *Ham v. Toledo etc. R. Co.*, 29 Ohio St. 174.

Where a city of the second class, through its mayor and council, enters into an agreement to execute and deliver to a lawful purchaser thereof certain water works bonds of the city which have been duly carried by a vote of the electors of the city, and the purchaser of such bonds fully complies with all of the terms of the agreement upon his part, and the mayor and council refuse to comply with their official

duty in that respect, *held*, mandamus will lie to compel the mayor and council to execute and deliver the bonds to the purchaser of the same according to the terms of the agreement of the parties. *Smalley v. Yates*, 36 Kan. 519.

A county, under a statute authorizing the funding of its floating indebtedness by an election conducted in substantial conformity to the statute, voted to issue bonds as a means of funding such indebtedness. *Held*, that the plaintiff, a holder of county warrants constituting a part of such floating debt, was entitled, upon tendering his warrants, and refusal on the part of the county commissioners to issue to him bonds to the amount of such warrants, to a mandamus to compel them to do so. *Board of Commrs. of Summit Co. v. People* (Colo.), 14 Pac. Rep. 47.

3. *Kennedy v. Sacramento*, 19 Fed. Rep. 580; 5 Am. & Eng. Corp. Cas. 553; *State v. County Commrs.*, 19 Fla. 17; *Shelley v. St. Charles*, 30 Fed. Rep. 603; *Loague v. Taxing District of Brownsville*, 36 Fed. Rep. 149; *Hopple v. Brown Township*, 13 Ohio St. 311; *Shelby Co. v. Cumberland etc. R. Co.*, 8 Bush (Ky.) 209; *Com. v. Allegheny Co.*, 32 Pa. St. 218; *Com. v. Pittsburgh*, 34 Pa. St. 496; *McLendon v. Anson Co.*, 71 N. Car. 38; *Columbia Co. v. King*, 13 Fla. 452; *Greene Co. v. Daniel*, 102 U. S. 189; s. c., 3 Am. & Eng. R. R. Cas. 105; *State v. Rainey*, 74 Mo. 229; s. c., 7 Am. & Eng. R. R. Cas. 183; *Winter v. Montgomery*, 65 Ala. 403; s. c., 7 Am. & Eng. R. R. Cas. 307; *Decatur Co. v. Indiana* (Ind.), 12 Am. & Eng. R. R. Cas. 604; *Wolff v. New Orleans*, 103 U. S. 358; s. c., 12 Am. & Eng. R. R. Cas. 625; *Knox Co. v. Aspinwall*, 24 How. (U. S.) 376; *Supervisors v. United States*, 4 Wall. (U. S.) 435; *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 433; *Riggs v. Johnson Co.*, 6 Wall.

But mandamus does not lie to compel a municipal corporation to raise money to pay bonds so long as it is an open question whether the bonds are a legal obligation on the corporation and whether the relator is a *bona fide* holder of them, as those are questions for the trial court.¹

A provision in a city charter that the city shall not be sued upon bonds issued by it is no answer to a proceeding by mandamus to compel an officer of the city to perform a duty in connection with the bonds enjoined upon him by the law under which they were issued.²

8. Granting Licence.—Where municipal authorities are by law entrusted with jurisdiction over certain matters, such as the granting of licences, the decision of which rests in their sound discretion and requires the exercise of their judgment, mandamus will not lie to control or in any manner interfere with their decision, since the courts will not direct in what manner the discretion of inferior tribunals and officers shall be exercised.³

(U. S.) 166; *Weber v. Lee Co.*, 6 Wall. (U. S.) 210; *United States v. Keokuk*, 6 Wall. (U. S.) 514; *Supervisors v. Rogers*, 7 Wall. (U. S.) 175; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Cass Co. v. Johnson*, 95 Wall. 360; *United States v. Clark Co.*, 96 U. S. 211; *United States v. New Orleans*, 98 U. S. 381; *Welch v. St. Genevieve*, 1 Dill. (U. S.) 130; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *Rusch v. Des Moines Co.*, *Woolv.* (U. S.) 313; *United States v. Badger*, 6 Biss. (U. S.) 308; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *Knox County v. Aspinwall*, 24 How. 376; *English v. Supervisors*, 19 Cal. 172; *Maddox v. Graham*, 2 Met. (Ky.) 56; see *State v. Whitesides*, 30 S. Car. 579; *State v. Harper*, 30 S. Car. 586; *Swigert v. Hamilton County* (Ill.), 22 N. E. Rep. 609.

A peremptory mandamus may issue to a city treasurer to compel him to pay the overdue interest on the city bonds, although the money in his hands may have been appropriated by city councils to other uses; provided the amount thus withdrawn from the city treasury is not absolutely needed for the ordinary expenses of the city. *Reading v. Hopson*, 90 Pa. St. 498.

On the hearing of an order to show cause why a peremptory mandamus should not issue in a case to enforce the levy and collection of a tax to pay interest upon bonds of a city, the validity of the bonds was questioned by the city, and various questions, both of law and of material facts affecting their validity, were raised. *Held*, that it was error to

grant the writ before the relator had established his right in an ordinary action at law. *State v. Mayor etc. of Manitowoc*, 52 Wis. 423.

But mandamus will not issue to compel payment of interest on interest. *Davis v. Porter*, 66 Cal. 658.

1. *Loomis v. Rogers Township Board*, 53 Mich. 135.

2. *Meyer v. Porter*, 65 Cal. 67; 5 Am. & Eng. Corp. Cas. 561.

3. *State v. Cramer*, 96 Mo. 75; *Louisville v. Kean*, 18 B. Mon. (Ky.) 9; *People v. Supervisors of San Francisco*, 20 Cal. 591; *Ex parte Persons*, 1 Hill (N. Y.) 655; *Schlaudecker v. Marshall*, 72 Pa. St. 200; *People v. Thacher*, 42 Hun (N. Y.) 349; *Dunbar v. Frazer*, 78 Ala. 538; *State v. Board of Commrs. Tippecanoe Co.*, 45 Ind. 501; *Walsford v. Weidlein*, 23 Kan. 601. See also *Purdy v. Sinton*, 56 Cal. 133; *People v. Crotty*, 93 Ill. 180; see *Hall v. Steel*, 82 Ala. 562; *State v. Bonnell*, 119 Ind. 494; *Port Royal Min. Co. v. Hagood* (S. Car.), 9 S. E. Rep. 686.

In proceedings to obtain mandamus to compel a city to grant a ferry licence the return stated that under the legislative power delegated to it "to regulate, tax and licence all ferries within the limits of the city," defendant had granted exclusive licence to another, that public necessity did not require a second ferry, and that once before the city, acting in its discretion, had refused to grant plaintiffs a licence. *Held*, on demurrer to the return, that the discretion of the municipal corporation could not be controlled in such case by man-

If, however, the licence has been refused under mistake of the law and it is shown that the applicant is clearly entitled to the licence, the error may be corrected by mandamus.¹ So under a general ordinance of a city for licencing dram-shops, the city authorities have no right to make an arbitrary discrimination in granting licences. They cannot grant the same to a favored few and refuse it to another who has in all respects complied with the ordinance and laws of the State, and who is admitted to be in every respect a suitable person.²

9. Inspection of Public Records.—In this country, the records, public books and by-laws of municipal corporations are of a public nature, and if such a corporation should refuse to give inspection thereof to any person having an interest therein, or, perhaps for any proper purpose to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of mandamus would lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions, to secure the safety of the originals.³ Where the claim is for a continuous use of the record office and its public contents from

damus. *State v. Cramer*, 96 Mo. 75. See *Oxford Ferry Co. v. Comms. of Sumner Co.*, 19 Kan. 293.

Under the Illinois act regulating the practice of dentistry (Hurd, Rev. Stat. 1885, ch. 91, p. 816) it lies in the discretion of the State board of dental examiners, in issuing licences for the practice of dentistry to graduates of dental colleges, to determine what colleges are reputable colleges within the meaning of the act. But if this discretion is abused from personal or selfish motives to bar the graduates of a particular college from practice, mandamus will lie to compel the issuance of a licence. *Ill. Board of Dental Examiners v. People*, 123 Ill. 227.

A court of record in New York city has power to issue an alternative writ of mandamus to review the refusal of the commissioners of excise of said city to grant relator an hotel licence, under Laws N. Y. 1886, ch. 496, which provides that it shall be lawful in such cases for the person refused to apply to any court of record in the city for a writ of mandamus to review the action of said commissioners, and that said commissioners in their return to said writ shall include all evidence and all papers on which the action was based. *People v. Woodman*, 1 N. Y. Supp. 335.

Where the city council of Wheeling passed an order to issue an innkeeper's licence on the first of May, and the inn

keeper before that date sued out a mandamus *nisi* against the officer whose duty it would be to issue the licence, it was held the officer might, in his return, allege a noncompliance on the part of the inn keeper with an order subsequently passed by the council taxing the licence. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

Signing Licence.—Under the Mass. Pub. Stats., ch. 100, § 5, and the Stat. of 1882, ch. 164, the mayor of a city, in signing a licence for the sale of intoxicating liquors, performs a merely ministerial duty; and if a licence is granted by the board of aldermen the signing by the mayor may be enforced by mandamus. *Braconier v. Packard*, 136 Mass. 50.

But in *Deehan v. Johnson*, 141 Mass. 23, it was held that mandamus will not lie to compel the mayor of a city to sign a licence granted by the board of aldermen of the city to the petitioner to be a common victualler if the mayor is not satisfied that the petitioner has complied with all the provisions of the Pub. Stats., ch. 102, § 8, so as to entitle him to a licence.

1. *Thomas v. Armstrong*, 7 Cal. 286.

2. *Zanone v. Mound City*, 103 Ill. 552. See *Bean v. County Court*, 53 Mo. App. 635.

3. *Dillion's Mun. Corp.*, 3rd ed., § 848, 303; *People v. Reilly*, 38 Hun (N. Y.) 433. See *Hawes v. White*, 66 Me.

day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great, if not insuperable, difficulty in enforcing the claim by mandamus. Where the case presents a single occasion and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile.¹

305; *O'Hara v. King*, 52 Ill. 303; *State v. Rachac*, 37 Minn. 372; *Diamond Match Co. v. Powers*, 51 Mich. 145; s. c., 8 Am. & Eng. Corp. Cas. 144; *Cormack v. Wolcott Register etc.*, 17 Am. & Eng. Corp. Cas. (Kan.) 309

In order to entitle a taxpayer to a writ of mandamus for the inspection of public documents, it is not essential that he be legally capable of maintaining an action in his own behalf. *State v. Williams*, 41 N. J. L. 332.

1. *Diamond Match Co. v. Powers*, 51 Mich. 145; s. c., 8 Am. & Eng. Corp. Cas. 144.

In *Buck v. Collins*, 51 Ga. 395, the court said: "But no person has a right to examine or inspect the records of his office except in his (clerk's) presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or scratch may be made in a minute that may alter a record. A leaf may be extracted in a minute; and if one man may of right take a record book and abstract its contents, work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and, if this may be done except under the clerk's immediate inspection, no record can be safely kept. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, from day to day, until his book is finished. He has the right to the services of the public officer for months together without pay; for not only the law, but every principle of propriety, requires that no person shall inspect the books except under the watchful observation of the clerk."

The supreme court of Colorado have decided that the right of a person to

examine the records is not open for all. The court in *Bean v. People*, 7 Colo. 202, says: "We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the entire records for future profit in their private business the privilege of using continuously the public property and of monopolizing from day to day, for months and years, a portion of the time and attention of a public officer, against his will, and without recompense."

The supreme court of Michigan have also decided this question, founded upon a statute much broader than the statutes of some of the other States. The court say: "The right once conceded, there is no limit to it until every public office is exhausted. The inconveniences which such a system would engraft upon public officers; the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right—are conclusive against the existence thereof. . . . The language of the act referred to does not, in clear and unmistakable terms, include a case like the present, and such a one should not be conferred by construction. The object of the act was to enable persons having occasion to make examination of the records for any lawful purpose . . . to have suitable facilities therefor." *Webber v. Townley*, 43 Mich. 534.

But under the Wisconsin and Minnesota statutes relating to the duties of the register of deeds, such register cannot exclude from the examination of the records in his office a person whose examination is for the purpose of making a set of abstract books for his own use. *Hanson v. Eichstaedt*, 69 Wis. 538; 20 Am. & Eng. Corp. Cas. 137. See also *State v. Rachac*, 37 Minn. 372.

10. Inspection of Poll Books.—One whose object is to vindicate some public or private right is entitled to inspect the registration lists, poll books, and lists in the custody of the recorder of voters of a city, and mandamus will lie to compel the recorder of voters to grant such inspection.¹

11. To Correct Records.—Mandamus will lie for the purpose of correcting errors in the records of the proceedings of municipal bodies.²

12. Custody of Municipal Books.—Mandamus is the proper remedy to compel the old trustees of an incorporated village, attempting to hold over, to deliver to the new board the books, papers and articles of personal property in their possession belonging to the village; and to prevent their interfering with the new trustees in the exercise of their office.³

13. Distribution of Public Funds.—Mandamus is the proper remedy to compel public officers to pay over to the proper local officers the amount of the public funds to which they are entitled by the law,⁴ or to pay to the State treasurer the State's

A recorder is not compellable by mandamus to allow abstract makers to use his office and the county records for the purpose of abstracting the entire records of the land titles of the county for sale. *Bean v. People*, 7 Colo. 200.

So the register of deeds will not be compelled by mandamus to permit any person to make copies of the entire records in his office for the purpose of making a set of abstract books for private use or speculation; and no such right is given by Comp. Laws Kan. 1885, § 211, ch. 25. *Cormack v. Wolcott*, 37 Kan. 391.

1. *State v. Hoblitzelle*, 85 Mo. 620.

2. *Farrell v. King*, 41 Conn. 448; *Ellis v. Bristol Co. Commrs.*, 2 Gray (Mass.) 370; *People v. Matteson*, 17 Ill. 167; *People v. Hilliard*, 29 Ill. 419; *Rex v. Harris*, 3 Burr. 1421; *Bower v. O'Brien*, 2 Ind. 423.

Mandamus will not lie to compel the registrar of conveyances for the parish of Orleans to erase from the records a tax deed, in the absence of a final judgment of a competent court declaring the nullity of the tax sale, even if the purchaser at such sale is made a party. *State v. Batt (La.)*, 4 So. Rep. 495.

3. *Stone v. Small*, 54 Vt. 498; *Kimball v. Lamprey*, 19 N. H. 215; *Strong, ex parte*, 20 Pick. (Mass.) 484; *Conlin v. Aldrich*, 98 Mass. 557; *American R. Frog Co. v. Haven*, 101 Mass. 398; *Walter v. Belding*, 24 Vt. 658; *King v. Payn*, 1 Nev. & P. 524; *King v. Ingram*, 1 Black W. 50; *Keokuk v. Merri-*

am, 44 Iowa 432; *King v. Buller*, 8 East R. 389; *King v. Wildman*, 2 Strange 879; *Borough of Calne*, 2 Strange R. 948; 3 Black. Com. 110; 6 Bacon Ab., Mand. D. 439.

Mandamus is a proper remedy against an ex-mayor to obtain possession of a seal, books, papers, muniments, etc., the property of the corporation; and a pretended intrusion into or retention of the office of mayor will not justify the withholding of such property so as to drive the informant to resort to *quo warranto*. *People v. Kilduff*, 15 Ill. 493.

4. *East Saginaw v. Saginaw Co. Treas.*, 44 Mich. 273. See *State v. Hollinshead*, 47 N. J. L. 439; *Roscommon v. Midland County Supervisors*, 49 Mich. 454; *State v. Hammell*, 31 N. J. L. 446; *U. S. v. Corporation of Washington*, 2 Cranch C. Ct. 174; *State v. Warren County*, 2 Ohio 10; *State v. Roderick* 23 Neb. 505; *School District No. 2 v. School District No. 1*, 3 Wis. 333.

Mandamus will not lie against a county treasurer to compel him to pay over funds received by his predecessor for the benefit of a railway company, and transferred by him to the county fund, in the absence of proof that the money was received by defendant from his predecessor, or is presumptively in his possession. *Minneapolis etc. R. Co. v. Becket*, 75 Iowa 183.

Mandamus cannot issue to a city treasurer to set apart moneys for a sinking fund, when those moneys had

proportion of taxes collected by such county treasurer.¹ So where a statement of account between a county and the State, showing a debt due to the State, is correctly and regularly made and the ascertained amount is seasonably certified in due form to the clerk of the county, it is the duty of the board of supervisors to make the proper appointment and if they refuse to do so they may be compelled by mandamus.²

14. School Boards.—Mandamus will issue to compel school boards to act where they refuse to act.³ But where a discretion is left to a board of school directors it cannot be controlled by mandamus, though the discretion be unwisely exercised. And when the act to be done is ministerial on a given state of facts, the writ lies, although they must judge, according to their best discretion, whether the facts exist, and whether they should perform the act.⁴ So a board of education is entitled to mandamus

already been expended by him, though illegally, at the date of the application. *Bates v. Porter*, 74 Cal. 224.

In a proceeding to compel a division of funds between an old and a new township, the trustee of the former, showing no substantial interest, cannot intervene. *Towle v. Shoenaman*, 110 Ind. 120.

School Fund.—Where money has been apportioned to a school township and received by the trustee thereof, some of which belongs to a school town afterwards organized, and he refuses to pay it over, he may be compelled by mandate to do so, and the school trustees of the town are the proper relators in such a suit. *Hon v. State*, 89 Ind. 249. See *State v. Geiver*, 35 La. An. 1148.

1. *Staley*, 38 Ohio 259.

2. *People v. Supervisors of Jackson Co.*, 24 Mich. 238. See *State v. Staley*, 38 Ohio 259; *People v. Reis*, 76 Cal. 269.

Mandamus was granted to compel a board of supervisors to provide for the payment of a balance credited upon the books of the county to a certain township, which belonged, with another, to a county set-off from the first, the credit having been made in pursuance of a mutual arrangement between the townships and the county indebted. *Higgins v. Supervisors of Midland Co.*, 52 Mich. 16.

To Compel County Court to Adjust Claim.—If the county court of a new county refuses to ascertain and adjust its proportion of the debt of the parent county, when properly presented to it for adjustment, it may be compelled to by mandamus. *Hemstead Co. v. Grave*, 44 Ark. 317.

3. *Case v. Blood*, 71 Iowa 632.

4. *Clark v. Board of Directors*, 24 Iowa 266; *Morley v. Power*, 5 Lea (Tenn.) 691; *State v. Duffy*, 7 Nev. 342; *Newby v. Free*, 72 Iowa 379; *Com. v. Williamson*, 30 Leg. Int. (Pa.) 406; *People v. School Officers*, 18 Abb. (N. Y.) Pr. 165; *People v. Regents*, 30 Mich. 473.

Duty of Trustee.—It is the duty of the trustee of a school township to apply the tuition funds of the township, when received, to the payment of its indebtedness for tuition, and the performance of such duty by the proper trustee may be enforced by writ of mandate. *State v. Coopridge*, 96 Ind. 279; *Board etc. v. State*, 61 Ind. 379; *Jessup v. Carey*, 61 Ind. 584; *Smith v. Johnson*, 69 Ind. 55; *Duke v. Beeson*, 79 Ind. 24; *Gardner v. Haney*, 86 Ind. 17.

Change of Boundaries.—Where plaintiff and others, residents of the district township of M, petitioned the directors of said district, and also the directors of the adjoining independent district of E, to have certain territory in which they lived detached from the district township and attached to the independent district, and the directors of the independent district had acted favorably to the petitioners, but the directors of the district township refused to act at all, held that mandamus would lie to compel them to act in the premises. *Hightower v. Overhauser*, 65 Iowa 347; *District Township of Eden v. Independent Dist. of Templeton*, 72 Iowa 687.

Awarding Contract for School House.—Where the school board, in inviting proposals for the erection of a school

to compel its treasurer to pay its funds to the proper depository under the law.¹ But where a school fund is placed in compliance with the charter in the hands of a town treasurer to be paid out by him upon warrants signed by the president of the board of education, the common council have no control over the fund and they cannot compel the treasurer by mandamus to retain a portion of the fund and apply it to the payment of certain special assessments against school property.²

Mandamus will lie to compel the board of education of a city to admit a child to the public schools.³ So where it is the duty of the directors of a school district to provide equal school facilities for the blacks and whites and they apportion the school funds and limit the school terms to each class according to their scholastic population, mandamus will lie to compel them to provide a school according to the requirements of the statute.⁴

Mandamus will issue to compel the directors of district township to restore a schoolhouse to the site from whence it has been removed.⁵ Mandamus may issue to enforce the granting of a petition for the formation, under the statute, of a new school district out of existing districts.⁶ But the writ will not issue to compel school directors to grant a petition for the restoration of

house, stated: "The contract will be awarded to the lowest responsible bidder. The board reserve the right to reject any and all bids," *held* that mandamus would not lie, at the instance of one who claimed to be the lowest responsible bidder, to compel the board to award the contract to him. *Hanlin v. Ind. Dist. of Charles City*, 66 Iowa 69.

Renting School House.—School directors may, in a proper case in the exercise of their lawful discretion, cause the school to be taught in a rented house instead of the public school building, and their action in so doing cannot be reviewed in the proceeding by mandamus. *Scripture v. Burns*, 59 Iowa 70.

Sectarian Instruction.—Where plaintiff, a private person, sought by writ of mandamus to compel school directors to observe and enforce the law forbidding sectarian instruction in the public schools, *held*, that the relief was properly refused, because it did not appear that plaintiff had demanded of the directors the performance of the duty sought to be enforced. *Scripture v. Burns*, 59 Iowa 70.

To Turn Over Insurance Money.—Mandamus will not lie to compel school directors to pay over to the county treasurer insurance money re-

ceived on a loss by fire on a school building in their district, to be divided between it and a new district recently formed out of it, where they have actually expended the money in the erection of a new school building, pursuant to the unanimous vote of the district electors. *Elder v. Territory* 3 Wash. T., 438.

1. *Port Huron Board of Education v. Runnels*, 57 Mich. 46. See *Hillis v. Ryan*, 4 Greene (Iowa) 78.

2. *State v. Board of Council* (N. J.), 18 Atl. Rep. 571.

3. *People v. Board of Education of Detroit*, 18 Mich. 400; *State v. Osborne*, 24 Mo. App. 309; *State v. Duffy*, 7 Nev. 342. See also *People v. Board of Education of Detroit*, 18 Mich. 400; *Clark v. Board of Directors*, 24 Iowa 266; *Dove v. Independent School District*, 41 Iowa 689; *Smith v. Directors*, 40 Iowa 518; *People v. Board of Education*, 127 Ill. 613.

Mandamus will not lie to compel the admission of a child to a public school which is full. *Re Nicoll*, 44 Hun (N. Y.) 340.

4. *Maddox v. Neal*, 45 Ark. 121; s. c., 55 Am. Rep. 540.

5. *Atkinson v. Hutchinson*, 68 Iowa 161.

6. *School Trustees v. People*, 121 Ill. 552.

territory to a school district, the statute giving an adequate remedy by appeal.¹

(a) **ADOPTION OF TEXT BOOKS.**—Where a statute makes it the absolute duty of the directors of the district school board to introduce into the schools under their charge the text books adopted by the president's meeting, they cannot by an exercise of their discretion as to the time of introducing such books defeat the will of said meeting and evade the requirements of the statute. And where they fail to perform the duty imposed upon them by statute mandamus is the proper proceeding to compel its performance.²

15. Overseers of the Poor.—A mandamus lies to compel the overseers of the poor to receive and maintain a pauper under an order of removal unappealed from.³

X. AUDITING AND PAYMENT OF CLAIMS—1. Generally.—Where it is made the duty of disbursing officers to audit or pay all accounts, debts and demands, the amounts of which are fixed by law and justly chargeable against a municipal corporation and they refuse to do so, mandamus should be allowed unless the relator has another legal and specific remedy. If the relator has a clear, direct and adequate remedy by action at law, no case will be shown for the exercise of the extraordinary jurisdiction of the court to issue the writ of mandamus.⁴ So as a general rule,

1. *Barnett v. Earlham District Directors*, 73 Iowa 134.

Where the directors of a school district refuse to recognize, as a part of the district, territory alleged by the inhabitants thereof to be a part of such district, and to provide such territory with proper school facilities, mandamus will lie to compel them to grant the relief asked. *Hancock v. District Township of Perry*, 78 Iowa 550.

2. *State v. School Directors of Springfield*, 74 Mo. 21. See *Dobbs v. Stauffer*, 24 Kan. 12.

3. *Port Township v. Overseers of Jersey Shore*, 82 Pa. St. 275.

4. *Lexington v. Mulliken*, 7 Gray (Mass.) 280; *Boyce v. Russell*, 2 Cow. (N. Y.) 444; *Ex parte Lynch*, 2 Hill (N. Y.) 45; *Com. v. Commrs. of Allegheny*, 16 S. & R. (Pa.) 317; *Hester's Case*, 2 W. & S. (Pa.) 416; *State v. Union Township*, 8 Vroom (N. J.) 343; *State v. County Judge*, 5 Iowa 380; *State v. Orleans Judge*, 38 La. An. 43; *Com. v. Rodes*, 5 Mon. (Ky.) 318; *Bamford v. Hollingshead*, 47 N. J. L. 439; *Mansfield v. Fuller*, 50 Mo. 338; *Ward v. County Court*, 50 Mo. 401; *Wheelock v. Auditor*, 130 Mass. 486; *Bryant v. Moore*, 50 Mich. 225; *State v. Mayor of Lincoln*, 4 Neb. 260; *State*

v. Township Committee, 37 N. J. L. 84; *Portwood v. Montgomery Co.*, 52 Miss. 523; *U S. v. Ottawa*, 28 Fed. Rep. 409; *Elmendorf v. Board of Finance*, 41 N. J. L. 135; *Mich. Paving Co. v. Detroit*, 34 Mich. 201; *Hull v. Supervisor of Oneida*, 19 Johns. (N. Y.) 259; *Commrs. of Johnson Co. v. Hicks*, 2 Ind. 527; *People v. Clark Co.*, 50 Ill. 213; *Brown v. Ruse*, 69 Tex. 589; *People v. Chenango Co.*, 11 N. Y. 563; *People v. New York*, 25 Wend. (N. Y.) 680; *People v. Thompson*, 25 Barb. (N. Y.) 73; *People v. Wood*, 35 Barb. (N. Y.) 653; *State v. Supervisors of Sheboygan*, 29 Wis. 79; *Burnet v. Auditor*, 12 Ohio 54; *State v. County Judge*, 5 Iowa 380; *Crandall v. Amador Co.*, 20 Cal. 72; *People v. Green*, 58 N. Y. 295; *People v. Booth*, 49 Barb. (N. Y.) 31; *People v. Myers*, 3 N. Y. Supp. 365; *People v. Haws*, 37 Barb. (N. Y.) 440; *State v. Titus*, 47 N. J. L. 89; *State v. Mount*, 21 La. An. 755; *Sessions v. Boykin*, 78 Ala. 328; *McArthur v. Township of Duncan*, 34 Mich. 27; *Mackenzie v. Baraga*, 39 Mich. 554; *State v. Hamilton Co.*, 19 Ohio 116; *Needham v. Thresher*, 49 Cal. 393; *McCoy v. Justices etc.*, 6 Jones (N. Car.) L. 488. *Compare State v. Brown*, 30 La. An., pt. 1, 78.

mandamus will lie to compel a disbursing officer to pay an order legally drawn upon funds in his hands, subject to the payment of such order.¹ And the rule in this respect is not changed by reason of the officer having, through inadvertence or misapprehension of duty, made payment to another who had no claim upon, or pretence of right to, the fund thus paid out.² But where, by reason of a complication of extraneous circumstances not specifically provided for by the statute, a well founded doubt arises, either as to the right of the applicant to receive the fund, or the duty of the officer to pay it out, mandamus is not the proper remedy. The right in such case being doubtful, the claimant must resort to some other appropriate remedy to determine it.³ So the courts will not allow one creditor to gain a preference over another by the device of applying for a writ of mandamus to compel an officer to pay a sum of money accruing to

A claim being for a certain and ascertained amount, its allowance and audit by the town council is equivalent to a judgment at law, and mandamus will lie to enforce its payment. *Kelly v. Wimberly*, 61 Miss. 548.

Where both the general law and the village charter make it the duty of the village trustees to provide for the payment of claims against the village, they will be compelled by mandamus to make provision. *People v. Peekskill*, 38 Hun (N. Y.) 332.

Mandamus will issue to compel a town treasurer to pay warrants drawn by the acting moderator, although the title of the latter to the office is questioned. The court will not consider that question in this collateral proceeding. *School District v. Root*, 61 Mich. 373.

Mandamus to compel one municipality to pay an indebtedness to another as agreed upon by representatives of both, *held*, properly denied, where the proceedings to determine the debt did not clearly appear to be those prescribed by statute. *Portsmouth v. Bay City*, 57 Mich. 420.

1. *People v. Johnson*, 100 Ill. 537; 39 Am. Rep. 63; *State v. Earle*, 42 N. J. L. 94; *Devine v. Harvie*, 7 B. Mon. (Ky.) 439; *Raisch v. Board of Education (Cal.)*, 22 Pac. Rep. 890; *Tennessee etc. R. Co. v. Moore*, 36 Ala. 371; *People v. Van Tassel (Mich.)*, 40 N. W. Rep. 847. See *People v. Haws*, 23 How. (N. Y.) Pr. 107; 37 Barb. (N. Y.) 440; *People v. Conolly*, 2 Abb. (N. Y.) Pr., N. S. 315; *People v. Glowacki*, 2 S. C. (N. Y.) 436; *People v. Green*, 1 Hun (N. Y.) 1; 3 S. C. (N. Y.) 90; *State v.*

Scott, 15 Neb. 147; *Just v. Wise*, 42 Mich. 573; *California Bank v. Shaber*, 55 Cal. 322; *Joos v. McCandless (Pa.)*, 8 Atl. Rep. 159; *People v. Kent County Supervisors*, 38 Mich. 421; *Crawley v. Mershon*, 61 Ga. 284.

A contractor to build a court house, who has not done the work according to contract, is not entitled to a mandamus to compel the justices of the county to pay the sum agreed on. *Dameron v. Cleveland*, 1 Jones (N. C.) L. 484.

The city of New Orleans may contest the account of the criminal sheriff, although approved by the clerk and judge; and only after he has obtained judgment thereon can he ask for a mandamus to compel its payment. *State v. New Orleans*, 30 La. An., pt. 1, 82.

2. *People v. Smith*, 43 Ill. 219; *People v. Bender*, 36 Mich. 195.

3. *People v. Dulaney*, 96 Ill. 503; *People v. Klokke*, 92 Ill. 134; *People v. Johnson*, 100 Ill. 537; s. c., 39 Am. Rep. 63; *State v. Applegate (N. J.)*, 16 Atl. Rep. 59; *Dement v. Rokker*, 126 Ill. 194; *State v. Ross (Nev.)*, 14 Pac. Rep. 827; *Crise v. Auditor*, 17 Ark. 572; *Foot v. Board of Suprs. (Miss.)*, 6 So. Rep. 612; *Avery v. Township Board*, 73 Mich. 622; *State v. County Commrs. (S. Car.)*, 9 S. E. Rep. 692; *Schuck v. City of Pittsburgh (Pa.)*, 11 Atl. Rep. 651; *People v. Green*, 66 Barb. (N. Y.) 630; *People v. Supervisors of Kings*, 23 How. (N. Y.) Pr. 89; *Portsmouth Township v. Bay City*, 57 Mich. 420.

A person who claimed to be the holder and owner of certain ditch

the debtor out of funds to be thereafter received by such officer, there being no real opposition by the officer to making payment.¹

2. Auditing Claim.—Where the auditor has not the right to fix the amount to be drawn, the claim must be audited and passed upon by the proper officers.² It is not the province of mandamus to settle differences of opinion between municipal authorities and claimants as to the amount due for services rendered.³ Disputed accounts or claims against the municipality should be referred to the arbitrament of a jury or to the ordinary process of the courts, and not by proceedings in mandamus.⁴

And the fact that the person aggrieved or complaining has, by neglecting his remedy at law, placed himself in such a position that he can no longer avail himself of its benefits, constitutes no ground for interference by mandamus.⁵

orders, asked for a writ of mandamus to compel the board of supervisors to provide for their payment. The board answered that they had no knowledge as to whether the relator was holder and owner of the orders as claimed. *Held*, that the answer was proper; and that relator would not be entitled to the writ unless her right to the orders was admitted or proved. *Brownell v. Gratiot v. Super.*, 49 Mich. 414.

1. *State v. Burbank*, 22 La. An. 298.

2. *Putnam County v. Allen*, 1 Ohio St. 322; *Ex parte Black*, 1 Ohio St. 36; *People v. Common Council of Detroit*, 34 Mich. 201. See *Bryant v. Moore*, 50 Mich. 225; *State v. Earle*, 42 N. J. L. 94; *Crandall v. Amador County*, 20 Cal. 72; *People v. Clark Co.*, 50 Ill. 213; *People v. Brennan*, 18 Abb. (N. Y.) Pr. 100; *State v. Turpan*, 9 Am. & Eng. Corp. Cas. (Ohio) 126; *Garrard County Court v. McKee*, 11 Bush (Ky.) 234; *State Board of Education v. West Point*, 5 Miss. 638.

This highest of judicial writs will not issue to compel a county treasurer to pay an auditor's checks for assessment expenses, where the accounts for which the checks were issued have not been examined and approved by the county commissioners, as required by the act of 1875, § 23 (15 Stat. 993), and subsequent legislation. *State v. Fuller*, 18 S. Car. 246.

In *State v. Furnas County Commrs.*, 10 Neb. 361, it is *held* that a party having a valid claim against a county cannot, by mandamus, compel the county commissioners to audit his claim and issue a warrant therefor until he has

appealed to the district court, as provided in Neb. Laws 1879, 365, §§ 33, 37.

Where a judgment against the town is rendered by a court having jurisdiction of the parties and the subject matter, auditing it is a mere ministerial act not involving the exercise of official discretion, and the performance of it can be coerced by mandamus. *Lower v. U. S.*, 91 U. S. (1 Otto) 536.

Where a claim has been audited by the proper officers, mandamus will not lie to compel the comptroller to draw a warrant for more than the amount audited by such board. *State v. Hallock* (Nev.), 22 Pac. Rep. 123.

3. *Johnson Co. Commrs. v. Hicks*, 2 Carter (Ind.) 527.

4. *High's Ex. L. Rem.*, § 339; *Burnet v. Auditor*, 12 Ohio 54; *Com. v. Commrs. of Allegheny*, 16 S. & R. (Pa.) 317. But see *Ex parte Loy*, 59 Ind. 235.

Mandamus will issue to compel county supervisors to permit a claimant to amend informalities in the form of his claim, as presented. *People v. Wayne County Supervisors*, 45 Hun (N. Y.) 62.

5. *State v. Supervisors*, 29 Wis. 79; *Dunklin Co. v. District*, 23 Mo. 449; *Blecker v. St. Louis Law Commr.*, 30 Mo. 111.

The rule is that where there is unreasonable delay the court will, in the exercise of its discretion, refuse to issue the writ. *Moses Mand.* 190; 1 Redf. Railw. 658, and the cases there cited. *State v. Earle*, 42 N. J. L. 94. See also *King v. Stainforth*, 1 M. & S. 32; *People v. Delaware Common Pleas*, 2 Wend. (N. Y.) 256; *People v.*

3. Exercise of Jurisdiction.—Where auditing officers exceed their jurisdiction in allowing claims, mandamus will not lie to compel payment of such claims.¹ But if a board of supervisors of a county refuse to act on a claim against the county presented to them for the reason that they have not the power to approve of it, mandamus is the proper remedy to test this preliminary jurisdictional question.²

Mandamus will not issue to compel a county officer to audit a charge pursuant to an order of the court where there is no legislative authority for compelling the county to bear such expenses.³

4. To Sign Warrant.—One who has entered into a valid contract with a municipal corporation cannot, after having performed the same on his part, compel by mandamus the corporation to facilitate the satisfaction of the demand by signing a warrant for it, payment, since he has an ample remedy by action against the city.⁴ But where, by the regulations of a municipal corporation, money in its treasury can only be drawn upon an order signed by a city officer, and the duty of such officer in respect thereto is wholly ministerial, a mandamus will issue to compel such officer to sign such an order for a sum of money appropriated to pay a claim by the body entrusted within such municipality with the power of appropriation.⁵

Seneca Common Pleas, 2 Wend. (N. Y.) 264.

1. *People v. Laurence*, 6 Hill (N. Y.) 244.

2. *People v. Supervisors*, 28 Cal. 430; *San Francisco Gas Co. v. Supervisors*, 11 Cal. 42; *Frank v. San Francisco*, 21 Cal. 668; *Emeric v. Gilman*, 10 Cal. 404; *People v. Cortland Co.*, 24 How. (N. Y.) Pr. 119; *People v. New York*, 21 How. (N. Y.) Pr. 322; *People v. Supervisors of Delaware Co.*, 45 N. Y. 196; *Bright v. Supervisors of Chenango*, 18 Johns. (N. Y.) 242; *Hull v. Supervisors of Oneida*, 19 Johns. (N. Y.) 259; *People v. Supervisors of Macomb*, 3 Mich. 475; *Thurston v. Elmira Auditors*, 82 N. Y. 80.

3. *People v. Greene County Supervisors*, 39 Hun (N. Y.) 299; *Ex parte Tully*, 4 Ark. 220; *People v. Brennan*, 1 Abb. (N. Y.) Pr., N. S. 184; *Wilson v. Jenkins*, 72 N. Car. 5; *Shaffer v. Jenkins*, 72 N. Car. 275.

4. *People v. Opdyke*, 40 Barb. (N. Y.) 306; *People v. Havemeyer*, 4 S. C. (N. Y.) 365; s. c., 47 How. (N. Y.) Pr. 494. Thus where the relator, having performed certain work and labor under and in pursuance of contracts between him and the city of New York, procured his account therefor to be ap-

proved by the city inspector, examined and found correct by the auditor and approved by the comptroller, but the common council did not order it to be paid nor take any specific action in relation to it. *Held*, the relator was not entitled to a writ of mandamus to compel the mayor to countersign a warrant drawn by the comptroller upon the chamberlain for the amount of the debt. *People v. Wood*, 35 Barb. (N. Y.) 653.

So where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of the city of Brooklyn by the comptroller, is entitled to the money, there being another claimant who has sued the city therefor, the mayor is not obliged to sign the warrant and cannot be compelled to do so by mandamus. *People v. Booth*, 49 Barb. (N. Y.) 31.

5. *State v. Fiedler*, 43 N. J. L. 400; *People v. Flagg*, 16 Barb. (N. Y.) 503; *State v. Mount*, 21 La. An. 352; *Jack v. Moore*, 66 Ala. 184.

An objection to a resolution appropriating money to pay a claim against the corporation, interposed by way of veto by a mayor having a veto power, and overcome by the requisite vote, cannot be again urged by the mayor, to avoid doing a mere ministerial act to

5. **Payment of Warrants.**—Mandamus will not issue to compel the payment of a warrant properly drawn upon the city treasury.¹ One who seeks mandamus to compel a fiscal officer of a municipality to make a payment must first obtain a judgment against the municipality.²

6. **Payment of Salary.**—Mandamus is the proper remedy to enforce the payment by a municipal corporation of an official salary, where the amount is fixed.³ So mandamus to compel a

effectuate such appropriation. *State v. Fiedler*, 43 N. J. L. 400.

When a claim against the county has been audited and allowed by the commissioners court, the issue of a warrant on the county treasurer for its payment is a ministerial duty devolved by law on the probate judge; but that court has no power to compel him to draw his warrant, and the remedy to compel his obedience, the order not being void on its face, is a mandamus from the circuit court, at the suit of the person in whose favor the claim is allowed. *Jack v. Moore*, 66 Ala. 184. See also *People v. Auditors of Wayne Co.*, 5 Mich. 223; *State v. Buckles*, 39 Ind. 272; *State v. Richter*, 37 Wis. 275; *Apgar v. Trustees*, 5 Vroom (N. J.) 308; *Ryan v. Hoffman*, 26 Ohio St. 109; *People v. Green*, 56 N. Y. 466.

The common council of Newark passed, over the veto of the mayor, a resolution appropriating money to pay a stenographer employed by a committee to take testimony. *Held*, it being the duty of the mayor to countersign the warrant drawn for such appropriation, a refusal to perform it would be enforced by mandamus. *State v. Haynes* (N. J.), 11 Atl. Rep. 151.

In *State v. Ames*, 31 Minn. 440, where a claim against the city, of a class for the payment of which the council is empowered to make an appropriation, having been first audited and adjusted by the comptroller, and an appropriation for its payment made and authorized by the requisite and duly recorded vote of the council, when an order for its payment, in due form, and duly signed by the clerk, is presented to the mayor for his signature, it was held that it was his duty to sign it within such reasonable time as may be necessary for him to ascertain whether the council has kept within its jurisdiction, and whether the appropriation has been authorized by the necessary vote. Upon the refusal so to sign an order, he may be compelled to sign by mandamus.

1. *Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184.

2. *State v. Snodgrass*, 98 Ind. 546. The holder of county warrants brought suit thereon in the federal court against the county. It was contended that the remedy was by an application for mandamus and not by suit. *Held*, that this contention was untenable; that the foundation of an application for mandamus must be a judgment first obtained. *Jerome v. Rio Grande County Commrs.*, 18 Fed. Rep. 873; s. c., 5 McCrary C. Ct. 639.

In *State v. Gaudy*, 2 Neb. 232, it is held that a writ of mandamus will be granted against county treasurer to compel the payment of county warrants, if they are legally issued and there are funds in the treasury.

3. *McBride v. Grand Rapids*, 47 Mich. 236; *State v. Starling*, 13 S. Car. 262; *Honea v. Monroe*, 63 Miss. 171; *Reynolds v. Taylor*, 43 Ala. 420; *Just v. Township of Wise*, 42 Mich. 573; *People v. Auditors of Wayne*, 13 Mich. 233; *People v. Auditors of Wayne Co.*, 5 Mich. 223; *Peterson v. Manistee*, 36 Mich. 8; *Dayton v. Rounds*, 27 Mich. 82; *State v. Stone*, 69 Ala. 206; *People v. Smith*, 77 N. Y. 347; *State v. Ocean County Freeholders*, 48 N. J. L. 70; *Morley v. Power*, 5 Lea (Tenn.) 691. Compare *People v. New York*, 25 Wend. (N. Y.) 680; *Ex parte Lynch*, 2 Hill (N. Y.) 45; *People v. Thompson*, 25 Barb. (N. Y.) 73; *State v. Hannon*, 38 Kan. 593; *Respublica v. Commissioners of Philadelphia*, 4 Yeates (Pa.) 181; *Walcott v. Mayor etc.*, 51 Mich. 249; s. c., 6 Am. & Eng. Corp. Cas. 87; *People v. Mayor etc. of New York*, 25 Wend. (N. Y.) 680.

Where an officer cannot sue a corporation, he may compel payment of his salary by means of a mandamus. *People v. Supervisors*, 32 N. Y. 473; *People v. Edwards*, 15 Barb. (N. Y.) 529; *Commonwealth v. Johnson*, 2 Binn. (Pa.) 275; *Baker v. Johnson*, 41 Me. 15; *Taylor v. School Committee*,

school district assessor to pay a school order for salary will be allowed where the court is satisfied there is no valid defence.¹

But an officer *de jure* of a municipal corporation cannot have a mandamus to compel the payment of his salary by the controller, where it has already been paid to another person *de facto* in possession of the office.² Nor can the right to an office be determined in a proceeding by mandamus to compel the payment of salary to a person claiming such office, or in a proceeding to compel the performance of official duty alleged to be obligatory by reason of the official character of the claimant. In such cases he who has the better *prima facie* right must be recognized until, by contesting the election, or by proceedings in *quo warranto*, the rights of the parties are finally determined.³

5 Jones L. (N. Car.) 98; Thurston v. Elmira Auditors, 82 N. Y. 80; McBride v. Grand Rapids, 47 Mich. 236; State v. Starling, 13 S. Car. 262; Newport v. Berry, 80 Ky. 354; s. c., 4 Am. & Eng. Corp. Cas. 659. But this writ will not lie to control a discretion as to the amount to be allowed. People v. Supervisors, 1 Hill (N. Y.) 362; People v. Mayor etc., 9 Wend. (N. Y.) 508; Runkle v. Commrs., 97 Pa. St. 328.

An action at law, where salaries may be recovered like other debts by means of it is, however, the ordinary remedy. Boyce v. Russell, 2 Cow. (N. Y.) 444; *In re* Lynch, 2 Hill (N. Y.) 45; People v. Mayor etc. of New York, 25 Wend. 680; People v. Thompson, 25 Barb. 73; Reynolds v. Taylor, 43 Ala. 420.

If no appropriation has been made for the payment of the salary of a judge, a mandamus will not lie to the auditor of public accounts to pay the same. *Ex parte* Tully, 4 Ark. 220.

Where, after decisions in the supreme court on a question of title to office, the fiscal officer of the municipal corporation pays the salary to the successful claimant, and afterwards the court of last resort reverses such decision and declares the adverse party to be entitled, *held*, that a mandamus would not lie at the suit of the latter to compel payment again of the salary for the same period, to him, in the absence of any appropriation for the purpose. People v. Brennan, 1 Abb. (N. Y.) Pr., N. S. 184. But see People v. Brennan, 30 How. (N. Y.) Pr. 417.

There seems to be some variance on the question as to whether mandamus is the proper remedy to require municipal authorities to pay salaries which are

due from a municipal corporation to its officers. Some of the text writers on the subject of mandamus regard such claims as an indebtedness of the corporation which may be enforced by an action on the case for a neglect of corporate duty. This view does not seem, however, to be supported by the weight of the authorities. In Just v. Township of Wise, 42 Mich. 573, it was held that mandamus and not assumpsit was the proper remedy to compel a township board to pay a valid order for labor performed, given by the highway commissioners on the township treasurer.

Another Action Pending.—While a petition to the court of common pleas under Mass. Stat. 1859, ch. 249, § 3, by the keeper of a jail, dissatisfied with the amount of the salary allowed him by the county commissioners, is pending, payment of the sum so allowed will not be enforced by mandamus. Adams v. Hampden County, 82 Mass. (16 Gray) 41.

1. Martin v. Tripp, 51 Mich. 184. See Rogers v. People, 68 Ill. 154.

County boards of education are courts of limited jurisdiction, and before they can try an application for an order to pay money to a teacher, it must appear that the account has been audited by the county commissioner. For a refusal by a county school commissioner to audit a claim, mandamus will lie to compel him to do so. Cheney v. Newton, 67 Ga. 477.

2. People v. Brennan, 45 Barb. (N. Y.) 457.

3. State v. John, 81 Mo. 13; s. c., 9 Am. & Eng. Corp. Cas. 238; People v. Lane, 55 N. Y. 217; Winston v. Moseley, 35 Mo. 146; State v. Auditor, 34 Mo. 375.

7. Payment of Judgments and Other Liabilities.—A writ of mandamus will lie to compel a municipal corporation to pay a judgment rendered against it, or other corporate liability,¹ there being no other adequate remedy, as an execution cannot be levied upon the property of such corporation.² It lies to compel municipi-

1. *Olney v. Harvey*, 50 Ill. 453; *Marathon v. Oregon*, 8 Mich. 372; *People v. Cairo*, 50 Ill. 154; *Brown v. Crego*, 32 Iowa 498; *Chicago v. Sansum*, 87 Ill. 182; *Duncan v. Mayor of Louisville*, 8 Bush (Ky.) 98; *Rice v. Walker*, 44 Iowa 458; *Webb v. Commrs. of Beaufort*, 70 N. Car. 307; *Uzzle v. Commissioners*, 70 N. Car. 564; *Craven Co. v. Pamlico Co.*, 73 N. Car. 298; *McLendon v. Commrs. of Anson*, 71 N. Car. 38; *Leach v. Commrs*, 84 N. Car. 829; *City Council v. Hickman*, 57 Ala. 338; *Devereau v. Brownsville*, 29 Fed. Rep. 742; *Com. v. President of Anderson Road*, 7 Serg. & R. (Pa.) 6; *Frank v. San Francisco*, 21 Cal. 668; *Cairo v. Everett*, 107 Ill. 75; *Coy v. Lyons City Council*, 17 Iowa 1; s. c., 85 Am. Dec. 539; *Fisher v. Charleston*, 17 W. Va. 595; *Wells v. Mason*, 23 W. Va. 456; *Supervisors v. U. S.*, 4 Wall. (U. S.) 435; *Galena v. Amy*, 5 Wall. (U. S.) 705.

Where a municipal charter has been repealed and the same territory reorganized into a new corporation, mandamus will lie to compel it to pay a judgment against the original corporation. *Devereau v. Brownsville*, 29 Fed. Rep. 742.

Mandamus will not lie against city officials to compel payment of a judgment against the city to an attorney claiming a lien upon the judgment, if the judgment was, after the filing of the lien, assigned by the judgment plaintiff, and satisfaction entered by the assignee, and no proceedings have been taken to set aside such satisfaction or determine the attorney's rights. *Chambers v. Territory*, 3 Wash. T. 280.

Injuries Caused by Mobs.—A claim for damages for injuries to property caused by a mob or riot (in the city and county of San Francisco) is not to be presented in the first instance to the board of supervisors for allowance, as in the case of other claims, but a judgment must first be had, and thereupon the board *must* order it to be paid unless they shall determine to appeal. And upon the refusal of the county treasurer to pay the claim mandamus was the proper rem-

edy. *Bank of California v. Shober*, 55 Cal. 322.

Injuries by Dogs.—Action against the township and not mandate against the township trustee is the proper remedy for one whose sheep have been killed by dogs to enforce his claim to an allowance from the dog tax. *Shelby v. Randles*, 57 Ind. 390.

Allowing Credits.—Mandamus will not lie to compel the allowance of credits to the county treasurer for moneys by him paid out pursuant to law—either before or after the expiration of the statutory time for appeal from the decision of the county board. *State v. Board etc. of Sheboygan Co.*, 29 Wis. 79.

2. *State v. Guttenberg*, 39 N. J. L. 660; *Alden v. Alameda Co.*, 43 Cal. 270; *Com. v. Allegheny Co.*, 32 Pa. St. 218; *Com. v. Pittsburgh*, 34 Pa. St. 496; *Com. v. Allegheny Co.*, 37 Pa. St. 277; *Walkley v. Muscatine*, 6 Wall. (U. S.) 481; *Mayor v. Lord*, 9 Wall. (U. S.) 409; *Heine v. Levee Commrs.*, 19 Wall. (U. S.) 655; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Supervisors v. U. S.*, 18 Wall. (U. S.) 71; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Lexington v. Mulliken*, 7 Gray (Mass.) 280; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *State v. Madison*, 15 Wis. 33; *State v. Milwaukee*, 25 Wis. 122; *Flagg v. Palmyra*, 33 Mo. 440; *Brown v. Crego*, 32 Iowa 498; *State v. Buffalo Co.*, 6 Neb. 454; *Columbia Co. v. King*, 13 Fla. 421; *State v. Burbank*, 22 La. An. 318; *Pegram v. Cleveland Co.*, 64 N. Car. 557; *Carroll v. Board of Police*, 28 Miss. 38; *Klein v. Warren Co.*, 51 Miss. 878; *Klein v. Smith, Co.*, 54 Miss. 254; *State v. Mount*, 21 La. An. 352; *Reynolds v. Taylor*, 43 Ala. 420; *People v. Brennan*, 39 Barb. (N. Y.) 536; *Babcock v. Goodrich*, 47 Cal. 488.

Where a duty exists in a city to pay a specific and ascertained charge, it would be unjust to both parties, debtor and creditor, to permit or require a suit at law when the judgment cannot be collected by execution. The township

pal officers to provide specifically in the forthcoming yearly budget, out of the funds to arise from the general tax therein levied, means for paying all judgments against the city then registered in the office of the administrator of public accounts, and unsatisfied, in the order of their registry.¹

Whenever money has been collected by the treasurer upon a tax levied to pay a judgment against the county it is the duty of the treasurer to pay it over to the plaintiff on demand. The payment in such case is an act the performance of which the law specially enjoins as a duty resulting from the office held by the defendant. For a refusal to perform this act mandamus will lie and the writ is granted on the petition of the private party aggrieved when the public interest is not concerned.²

8. Exceptions to General Rule.—The general rule, however, that mandamus will not lie when the party has another remedy is not universally true in relation to corporations and ministerial officers.³ Notwithstanding their liability to an action on the case for a neglect of duty they may be compelled by mandamus to exercise their functions according to law⁴ in cases where the relator should bring his action against the town and recover judgment and would probably have to proceed by mandamus to compel the town authorities to levy a tax to pay it.⁵

9. Discretion of Auditing Boards.—Mandamus does not lie to compel municipal authorities invested with discretionary powers to make any particular decision or to set aside a decision already made. The writ may properly issue to compel action upon a claim presented, but not to direct any particular action or compel the allowance of any specified sum.⁶

ought not to be put to useless expense by the fault of its officers and the creditor ought not to be put to delay or a double pursuit. *Marathon v. Oregon*, 8 Mich. 378; *Harrington v. County Commrs. of Berkshire*, 22 Pick. (Mass.) 263; *People v. Supervisors of St. Lawrence*, 5 Cow. (N. Y.) 292; *People v. Township Board of La Grange*, 2 Mich. 187; *People v. Supervisors of King's Co.*, 16 Wend. (N. Y.) 520; *Miller v. Bridgewater*, 4 Zab. (N. J.) 54; *People v. Supervisors of Westchester*, 4 Barb. (N. Y.) 64; *Treat v. Middletown*, 8 Conn. 243.

1. *State v. New Orleans*, 30 La. An., pt. 1, 129.

2. *State v. Marshall Co.*, 7 Iowa 186; *State v. Johnston Co.*, 10 Iowa 157; *Dishon v. Judge*, 10 Iowa 212; *State v. Davenport*, 12 Iowa 335; *State v. Keokuk*, 9 Iowa 438; *Coy v. Lyons City Council*, 17 Iowa 1; *State v. Judge*, 7 Iowa 390; *State v. Jones Co. Judges*, 13 Iowa 139; *Bryan v. Cottell*, 15 Iowa

538; *Murphy v. Board of Directors*, 30 Iowa 429.

3. *State v. Wilson* 17 Wis. 694; *Buck v. Lockport*, 6 Lans. (N. Y.) 253.

4. *People v. Mead*, 24 N. Y. 114; *Regina v. Southampton*, 101 E. C. L. 4.

5. *State v. Wilson*, 17 Wis. 694.

6. *People v. Chapin*, 104 N. Y. 96; *Dechert v. Com.*, 113 Pa. St. 229; *Cicotte v. Wayne Co.*, 59 Mich. 509; *State v. Commrs. of Hamilton*, 26 Ohio St. 364; *City of Chicago v. O'Hara*, 60 Ill. 413; *Board of Supervisors*, 60 Ill. 481; *People v. Board of Apportionment*, 52 N. Y. 224; *People v. Wood*, 35 Barb. (N. Y.) 653; *People v. Livingston Co.*, 26 Barb. (N. Y.) 118; *People v. Johnson*, 17 Cal. 305; *Board of Police v. Grant*, 17 Miss. 77; *Runkle v. Com.*, 97 Pa. St. 328; *People v. Johnson*, 100 Ill. 537; *People v. Auditors of Wayne Co.*, 10 Mich. 307; *Mixer v. Supervisors of Manistee Co.*, 26 Mich. 422; *Videto v. Supervisors of*

So when a claim against a county has been audited and allowed by the board of county commissioners acting within the limits of their jurisdiction, their action is final unless appealed from, and stands as a *quasi* judgment, which can only be set aside by a proper proceeding for that purpose upon the ground of fraud or mistake.¹ A subsequent allowance of the claim, followed by a disallowance on the same day does not affect the case, as the allowance was not an adjudication of the merits.²

10. Misappropriation.—Mandamus is not the proper remedy in cases of mere misappropriation.³

11. Want of Funds.—Auditing officers will not be compelled by mandamus to act upon claims unless there are funds in the treasury for the payment of such claims.⁴ Mandamus will not lie, even if payment is made to the wrong person and there is no

Jackson Co., 31 Mich. 116; Barry Co. v. Supervisors of Manistee Co., 33 Mich. 497; Clark v. Supervisors of Ingham Co., 38 Mich. 658.

When the auditor is called upon to countersign a warrant his duty is not merely ministerial, but he is invested with a discretionary power which he is entitled to exercise free from all interference and mandamus will not lie to review his action. Dechert v. Com., 113 Pa. St. 229.

1. Richland Co. v. Miller, 16 S. Car. 236; Tilden v. Supervisors of Sacramento Co., 41 Cal. 68; Com. v. County Commrs. 5 Binn. (Pa.) 536; People v. Supervisors of Albany, 12 Johns. (N.Y.) 414; People v. Supervisors of N. Y. 1 Hill (N. Y.) 362; and see Carroll v. Board of Police, 28 Miss. 38; State v. Commrs. of Hamilton Co., 26 Ohio St. 364; Portwood v. Montgomery Co., 52 Miss. 523. Compare People v. Supervisors of Westchester, 73 N. Y. 173; People v. Greene County Supervisors, 14 Abb. (N. Y.) N. Cas. 29; Thurston v. Elmira Auditors, 80 N. Y. 80.

When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled, by mandamus, to change its decision and grant the warrant; 1st, because its action on the application is judicial; 2nd, because an appeal lies from its order to the circuit court. State v. Macon Co. Court, 68 Mo. 29.

When a board of supervisors have acted on a claim and disallowed it, a writ of mandamus will not be issued to reverse or renew its judgment, even when the statute denies any other rem-

edy. Tilden v. Sacramento Co., 41 Cal. 72.

A succeeding board of county commissioners has no authority to review and revise the action of its predecessor in auditing and allowing a claim against the county. State v. Kirby, 17 S. Car. 563.

2. Board of Supervisors v. Catlett's Exrs. (Va.), 9 S. E. Rep. 999.

3. Township Board etc. v. Boyd, 58 Mo. 276; Bates v. Porter, 74 Cal. 224; Haumeister v. Porter (Cal. Pac. Rep. 187. Compare State v. Board of Council (N. J.), 18 Atl. Rep. 571.

4. Lancaster Co. v. State, 13 Neb. 523; Com. v. Commrs. of Philadelphia Co., 1 Whart. (Pa.) 1; Com. v. Commrs. of Phila., 2 Whart. (Pa.) 286; Com. v. Commrs. of Lancaster Co., 6 Binn. (Pa.) 5; People v. Haws, 36 Barb. (N. Y.) 59; Talbot v. Mayor etc., Bay City (Mich.), 38 N.W. Rep. 890; State v. Calhoun, 27 La. An. 167; Stevens v. Saginaw County Supervisors, 62 Mich. 579; Murphy v. Reeder, Township Treasurer, 56 Mich. 505; *Ex parte* Tully, 4 Ark. 220; State v. Neely (S. Car.), 9 S. E. Rep. 664; Dubordieu v. Butler, 49 Cal. 512. Compare State v. Hoffman, 35 Ohio St. 435; Johnston v. Sacramento County Supervisors, 65 Cal. 481.

The relator must show that respondent is in charge and control of funds legally applicable to the demand. State v. Smith, 8 S. Car. 127; State v. Jumel, 31 La. An. 142.

The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness when the result would be to withdraw from the treasury all the

money left within the officers' control from which he may make payment to the person who should have received it.¹ So it will not lie to compel payment from a special assessment which has been adjudged invalid.²

The fact that there are no funds in the treasury to meet expenses necessarily incurred is no reason why the proper officers should not audit such an account, though it might necessarily delay the payment. They may be compelled to do so by mandamus.³

If there are funds in the treasury and the claim has been allowed by the proper officers, mandamus is the proper remedy to compel the auditor to issue a warrant for such claim.⁴

In proceedings by mandamus to compel the auditor to pay a warrant the court is not authorized to ascertain the difference in

funds necessary for the support of the county government, and thus to disrupt and disorganize it. *State v. Macon Co. Court*, 68 Mo. 29.

Under Rev. St. Ill., 1889, ch. 113, § 41, which provides that when municipal bonds are declared void by the courts, and there remains in the State treasury a balance of funds to the credit of the bond fund of such municipality, and there are no other valid bonds issued by it, the auditor of public accounts shall draw his warrant for the amount of such balance, which shall be paid thereon to the municipality, mandamus will not lie to compel the auditor to draw his warrant for the balance due to the credit of void county bonds, where there are outstanding valid bonds of such county to which the balance in the treasury may be legally applied, and the proportion of such balance that belongs to the void bonds has not been ascertained. *Swigert v. Hamilton Co. (Ill.)*, 22 N. E. Rep. 609.

In *Campbell v. Polk Co.*, 49 Mo. 214, it was held that when a county warrant was made payable out of a particular fund the holder of such warrant, after such fund had been exhausted, could not recover against the county in an action thereon. In *Pettis Co. v. Kingsbury*, 17 Mo. 479, it was held that a contractor who had built a bridge to be paid for out of the road and canal fund could not compel the county to pay a warrant (drawn payable out of said fund) with the common fund of the county.

1. *People v. O'Keefe*, 100 N. Y. 572.

2. *People v. East Saginaw*, 40 Mich. 336.

3. *People v. Supervisors*, 22 How. (N. Y.) Pr. 71; *Buffington v. Clinton*, 28

La. An. 132; *State v. Dubuclet*, 28 La. An. 85; *State v. Clinton*, 28 La. An. 47; *State v. Clinton*, 28 La. An. 72.

4. *State v. Buckles*, 39 Ind. 272; *Clarke v. Jersey City*, 42 N. J. L. 94; *State v. Stone*, 69 Ala. 206.

A contract of county commissioners for the recopying of the plats of the county for use in the auditor's office, the estimated expense of which exceeds five hundred dollars under the statute is void, as against the county, unless it be made with the lowest responsible bidder in accordance with the provisions of the statute. Where such contract is made in disregard of the provisions of the statute, a mandamus will not be awarded to compel the auditor of the county to draw a warrant on the treasurer for the payment of the sum allowed by the commissioners as the amount due on the contract. *Ohio v. Yeatman*, 22 Ohio St. 546.

Mandamus is the appropriate remedy to compel the county treasurer to pay when he refuses to pay a demand which the board of supervisors have legally audited or allowed, or directed to be paid. *People v. Edmonds*, 19 Barb. (N. Y.) 468.

Where the county court refuses to draw their warrant on the treasurer of the county, directing him to pay an account which has been allowed by the circuit court to the clerk of said court for office rent, a mandamus is an appropriate remedy to compel them to do so. *Boone Co. v. Todd*, 3 Mo. 140.

A school township trustee can be compelled by mandamus to apply the tuition funds received by him to the payment of the township's indebtedness for tuition. *State v. Coopridger*, 96 Ind. 279.

value indicated. When anything remains to be done or fact to be ascertained, relief cannot be afforded by mandamus.¹

12. Laches.—Mandamus will not issue to enforce payment of a claim against a county after unreasonable delay on the part of the petitioner for the writ.² So it will not issue to compel the meeting of directors of two municipal subdivisions to agree on a division of assets where they cannot agree.³

13. Statute of Limitations.—Mandamus against disbursing officers is barred by the statute of limitations.⁴

XI. MUNICIPAL TAXATION.—Mandamus will lie against a municipal corporation to compel the proper authorities thereof to levy a tax for the purpose of raising money to pay its debts when the duty is so plain and imperative as to admit of no element of discretion in its exercise.⁵

1. *Clayton v. McWilliams*, 49 Miss. 311; *Board of Police v. Grant*, 9 S. and M. (Miss.) 77, 90; *Swan v. Work*, 24 Miss. 439.

2. *State v. Appleby*, 25 S. Car. 100. See *Board of Supervisors of Catlett's Exrs. (Va.)*, 9 S. E. Rep. 999.

3. *Case v. Blood*, 68 Iowa 486.

4. *Auditor v. Halbert*, 78 Ky. 577; *Prescott v. Gonser*, 34 Iowa 175; *Board of Supervisors v. Gordon*, 82 Ill. 435. See *State v. Halliday*, 60 Mo. 596.

In New York, under section 414 of the code of civil procedure, the time within which mandamus may be resorted to is the same as that within which an action may be brought to obtain a remedy for the same injury. *People v. French*, 12 Abb. (N. Y.) N. Cas. 156.

In Ohio there is no statutory limitation as to the time within which mandamus may be obtained. But it is held that in determining what constitutes such unreasonable delay as will justify the refusal of the writ, regard may be properly had to the circumstances which justify the delay, to the character of the case, to the nature of the relief demanded and to the question whether or not the defendant or other persons have been injured by the delay. *Chinn v. Trustees*, 32 Ohio St. 236.

In some of the states it is held that there is no statute of limitations which cuts off the right of a party to apply for the writ. *State v. Kirby*, 17 S. Car. 563; *Klein v. Supervisors of Smith Co.*, 54 Miss. 254; *State v. Meagher*, 57 Vt. 398; *People v. Supervisors of Westchester*, 12 Barb. (N. Y.) 446.

5. *Coy v. Lyons City Council*, 17 Iowa 1; s. c., 85 Am. Dec. 539; *State v. Jackson Co. Commrs.*, 19 Fla. 17; *Palmer v. Stacy*, 44 Iowa 340; *Labette*

Co. v. United States, 112 U. S. 217; *Wisdom v. Memphis*, 2 Flipp. (U. S.) 285; *Kelly v. Wimberly*, 61 Miss. 548; *Klein v. Supervisors of Smith Co.*, 54 Miss. 254; *Board of Police v. Grant*, 9 S. and M. (Miss.) 77; s. c., 47 Am. Dec. 102; *State v. New Orleans*, 36 La. An. 687; *State v. Davenport*, 12 Iowa 335; *State v. Milwaukee*, 25 Wis. 122; *State v. Smith*, 11 Wis. 65; *Watts v. Police Jury of Carroll*, 11 La. An. 141; *Cape v. Collins*, 37 Ark. 649; *United States v. City of Sterling*, 2 Biss. 408; *Labette Co. Commissioners v. United States*, 112 U. S. 217; *Deere v. Rio Grande Co.*, 33 Fed. Rep. 823; *City of East St. Louis v. United States*, 7 S. Ct. Rep. 739; *Tarver v. Commissioner's Court*, 17 Ala. 527; *People v. Supervisors of Columbia Co.*, 10 Wend. (N. Y.) 363; *Lee Co. v. State*, 36 Ark. 276; *People v. Bennett*, 54 Barb. (N. Y.) 480; *People v. Supervisors of Chenango*, 8 N. Y. 317; *Knox v. Aspirwall*, 24 How. (U. S.) 376; *People v. Zilwaukee*, 10 Mich. 274; *State v. Buchanan*, 24 W. Va. 362; *Boro v. Phillips Co.*, 4 Dill. 216; *Morgan v. Commonwealth*, 55 Pa. St. 456; *State v. Harris*, 17 Ohio St. 608; *Cass Township v. Dillon*, 16 Ohio St. 38; *Wilkinson v. Cheatham*, 43 Ga. 258; *People v. Supervisors Herkimer*, 56 Barb. (N. Y.) 452; *People v. Supervisors of Otsego*, 53 Barb. (N. Y.) 564; *State v. Harris*, 17 Ohio St. 608; *Morgan v. Commonwealth*, 55 Pa. St. 456; *Rodman v. Larue Co.*, 3 Bush (Ky.) 144; *Lutterloh v. Cumberland Co.*, 65 N. Car. 403; *Pegram v. Cleveland Co.*, 64 N. Car. 557; *Schoolbred v. Corporation of Charleston*, 2 Bay. (S. Car.) 63; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Supervisors v. United States*, 4 Wall. (U. S.) 435; *Mayor v. Lord*, 9

If the board of supervisors have no power or authority under the statute to levy a tax to pay an indebtedness, a court cannot confer upon them the power, and hence cannot compel them by mandamus to levy the tax.¹ Nor will a municipal corporation be compelled by mandamus to levy a tax in excess of the amount authorized by law for the payment of a judgment against the corporation.² Nor will it lie to compel the levy of a tax for the payment of county orders drawn on a fund which is exhausted.³ So if the amount of indebtedness by the city authorities be uncertain and unliquidated,⁴ or the validity of the claim is questioned, the writ of mandamus will not lie to compel the levy of a tax to pay the debt.⁵

Mandamus will lie to enjoin collection of a tax under a new law, until its alleged unconstitutionality can be determined.⁶

Wall. (U. S.) 409; Butz v. Muscatine, 8 Wall. (U. S.) 575; Galena v. Amy, 5 Wall. (U. S.) 705; Lehigh Coal & Navigation Co.'s Appeal, 112 Pa. St. 360; Justices of Clark v. Paris etc. Co., 11 B. Mon. (Ky.) 154; People v. Schenectady, 35 Barb. (N. Y.) 408; Nelson Co. Court v. Washington Co. Court, 14 B. Mon. (Ky.) 96.

Where the circuit court has jurisdiction of the subject matter and of the parties in a suit against a municipal corporation, its judgment against the corporation, until reversed or set aside, is absolutely conclusive in a proceeding by mandamus to compel the corporate authorities to levy and collect a tax to discharge the same, as to the right of the plaintiff therein to receive and the duty of the defendant to pay the amount of it. Cairo v. Campbell, 116 Ill. 305.

The circuit court may by mandamus compel the county court to levy a county tax to pay a bill for medical services rendered a poor negro woman afflicted with small-pox, under the employment of the county judge. Rodman v. Larue Co., 3 Bush (Ky.) 144.

Mandamus will not be withheld because the superintendent has made an ineffectual attempt at an assessment. Himmelmann v. Cofran, 36 Cal. 411.

Orders were drawn by highway commissioners upon a township treasurer, payable out of any funds in the treasury belonging to a road district. On application for a mandamus to compel the township to levy taxes for payment of these orders, it was held that since the township did not appear to have had the benefit, either rightfully or wrongfully, of the district fund, the mandamus must

be denied. People v. Zilwaukee, 10 Mich. 274.

Relevy.—Except at the time fixed for levying general taxes, a mandamus will not lie to compel the council of a "city of the second class" to reassess and relevy an informal tax under laws of 1867, 120. State v. Wyandotte, 4 Kan. 430.

1. Patterson v. Spearman, 37 Iowa 36; State v. Shreveport, 29 La. An. 658; U. S. v. Town of Guttenberg, 39 N. J. L. 660; State v. Maysville, 12 S. Car. 76; State v. Fournet, 30 La. An. 1103; State v. County of Macon, 99 U. S. 582; State v. Davenport, 12 Iowa 335; Coy v. Lyons City Council, 17 Iowa 1. See Supervisors v. Klein, 51 Miss. 807; U. S. v. New Orleans, 2 Woods 230; Vance v. Little Rock, 30 Ark. 435.

Mandamus will not lie to compel county authorities to lay a tax for payment of warrants, where the question of incurring the debt was not submitted to popular vote as required by law, and the relator acquired the warrants with notice of the facts. Pach v. Supervisors of Presque Isle, 36 Mich. 377.

2. U. S. v. County of Macon, 99 U. S. 582; People v. Haws, 37 Barb. (N. Y.) 440.

3. Cabaniss v. Hill, 74 Ga. 845.

4. State v. Board of Education West Point, 50 Miss. 638. See Lehigh Coal & Nav. Co.'s Appeal, 112 Pa. St. 360; Sheridan v. Fleming, 93 Mo. 321.

In State v. Trustees etc., 61 Mo. 155, it was held that the claim must be first reduced to judgment as contemplated by the statute before mandamus would lie to levy a tax.

5. State v. Manitowoc, 52 Wis. 423.

6. State v. Young, 38 La. An. 923.

Respect must be had to the law fixing the time and prescribing the mode for levying and collecting taxes. Taxes cannot be levied or collected at any other time nor in any other manner than that designated by law.¹

1. **The Levy of Tax to Pay Judgment.**—That a mandamus is generally the proper remedy to enforce the levy of taxes for the payment of judgments against municipal corporations when the ordinary process of execution is inadequate seems both to follow from the reason of the thing and to be settled by many adjudications.² Usually the money required to satisfy such judgment must be the proceeds of taxation.³ The duty to pay is clearly and conclusively established by the judgments, and execution failing, all ordinary legal remedy is exhausted, so that the conditions which justify a resort to mandamus exist, viz., a clear legal right requiring the performance of a specific duty and no other adequate means of redress.⁴ The United States courts have frequently employed the writ for this purpose. And the supreme courts hold that its propriety is no longer questionable.⁵ Nor is

1. *Supervisors v. Klein*, 51 Miss. 807.

2. *Cairo v. Everett*, 107 Ill. 75.

3. *Coy v. Lyons City Council*, 17 Iowa 1; *Galena v. Amy*, 5 Wall. (U. S.) 705.

4. *Olney v. Harvey*, 50 Ill. 455. See *Louisiana v. St. Martin's Parish Police Jury*, 111 U. S. 716.

Mandamus to compel the levy of a tax to pay a judgment against a county is in the nature of an execution, and the county cannot deny the effect of the judgment. *Harshman v. Knox County*, 122 U. S. 306.

5. *Cairo v. Everett*, 107 Ill. 75; *State v. Madison*, 15 Wis. 30; *State v. Supervisors of Beloit*, 20 Wis. 79; *Wells v. Town of Mason*, 23 W. Va. 456; s. c., 8 Am. & Eng. Corp. Cas. 562; *State v. Milwaukee*, 20 Wis. 91; *State v. Racine*, 22 Wis. 258; *Gorgas v. Blackgouch v. Gregory*, 65 N. Car. 143; *Lutterloh v. Cumberland Co.*, 65 N. Car. 403; *State v. Jackson County Commrs.*, 19 Fla. 17; *Hitchcock v. Galveston*, 4 Woods C. Ct. 308; *Coy v. Lyons City Council*, 17 Iowa 1; *Olney v. Harvey*, 50 Ill. 455; *Frank v. San Francisco*, 21 Cal. 680; *Galena v. Amy*, 5 Wall. 705. See *Clay v. McAleer*, 115 U. S. 616; *Weber v. Lee Co.*, 6 Wall. (U. S.) 210; *Beaulieu v. Pleasant Hill*, 14 Fed. Rep. 222; *Moore v. Town of Edgefield*, 32 Fed. Rep. 498; *Boynton v. Newton*, 34 Iowa 510; *Soutter v. Madison*, 15 Wis. 30; *State v. Commrs. of Buffalo*, 6 Neb. 454; *U. S. v. Board of Supervisors*, 2 Biss. 77; *U. S. v. County Court*, 7 S. Ct. Rep. 1171; *Devereaux*

v. City of Brownsville, 29 Fed. Rep. 742; *City of East St. Louis v. U. S.*, 7 S. Ct. Rep. 739; *U. S. v. County Court*, 7 S. Ct. Rep. 1171. Compare *Georges Creek Coal & Iron Co. v. Allegany County Commrs.*, 59 Md. 255; *State v. St. Martin Parish Police Jury*, 33 La. An. 1122.

Where the prayer in a petition for a mandamus is in the alternative, that the defendant, a city, cause a levy of a tax to be made for the payment of a judgment against it, if the money on hand shall be insufficient to discharge the same, a judgment will be authorized directing payment out of a levy made after suit brought, and before the hearing, to the extent authorized by the charter, treating the due proportion of the amount levied as levied for the benefit of creditors of the city, to be so applied when the levy shall be collected. *East St. Louis v. Underwood Ex'x*, 105 Ill. 308.

A judgment creditor of a municipal corporation entitled by his original contract to be paid out of specific tax levies, which agreement the corporation failed to comply with, is entitled, in mandamus proceedings, to a writ ordering the levy and collection of a sufficient tax to pay his judgment according to the assessment roll of the year in which the levy is made. *State v. Police Jury*, 111 U. S. 716; s. c., Am. & Eng. Corp. Cas. 510.

If the charter of a city be repealed, and the territory and inhabitants reorganized into "taxing districts," under

it necessary that the creditor should first demand the levy of such tax. The demand of payment is held to include a demand to do any particular thing necessary to such payment.¹

So whenever the duty of levying a tax to satisfy a judgment against a municipal corporation is plainly and specifically imposed by law upon the corporate authorities, or the ordinary remedy by execution is unavailing and it is the plain and unmistakable duty of the corporate officers vested with the taxing power to exercise that power for the purpose of satisfying the judgment, mandamus will go to compel the levying and collecting of the necessary tax.²

the control of commissioners to whom the power of taxation for current expenses and compromise bonds is given, such "taxing district" is the successor of the city in the municipal obligations, and mandamus to the commissioners will lie to enforce by taxation the payment of judgments against the original corporation. *Devereaux v. City of Brownsville*, 29 Fed. Rep. 742. See *State v. Police Jury Parish of Jefferson (La.)*, 8 So. Rep. 88.

A judgment creditor of a municipal corporation is not entitled to a writ of mandamus to compel the assessment and levy of a tax to pay his claim, when a sufficient tax has already been assessed and levied, but has not been fully collected. *Huey v. Jackson Parish Police Jury*, 33 La. An. 1091.

1. *Cairo v. Everett*, 107 Ill. 75; *State v. Jacksonville*, 22 Fla. 21.

A demand upon a city council for the payment of a judgment recovered against the city, if made at any time before the day fixed by law for the adoption of the ordinance for the levy of the municipal taxes, will be sufficient to justify a proceeding by mandamus to compel the levy of taxes with which to satisfy the judgment. *Cairo v. Campbell*, 116 Ill. 305.

Where the law authorizing city bonds made it the duty of the council from time to time to levy a tax to pay interest and principal and did not make that duty contingent upon a demand being made; held, that after judgment upon the bonds or coupons, mandamus would lie to compel the levy of a tax to pay the judgment without demand made. *State v. Racine*, 22 Wis. 259. See *Fisher v. Charleston*, 17 W. Va. 595.

In a petition for a mandamus to compel a city council to levy a tax for the purpose of paying a judgment against the city, allegations that execu-

tion had been issued and returned *nulla bona*; that the relator "has demanded payment of said judgment of the treasurer of said city, and the said treasurer has failed and refused to pay the same or any part thereof;" and "that the common council of said city have failed to make any provision, by the assessment of taxes or otherwise, to pay or satisfy said judgment, but refuse so to do," show a sufficient demand and refusal of payment. *State v. Milwaukee*, 20 Wis. 87.

2. High on Mand., § 377; *Frank v. San Francisco*, 21 Cal. 668; *Coy v. Lyons City Council*, 17 Iowa 1; *Gorgas v. Blackburn*, 14 Ohio 252; *State v. Racine*, 22 Wis. 258; *State v. Milwaukee*, 20 Wis. 91; *State v. Supervisors*, 20 Wis. 79; *State v. Madison*, 15 Wis. 30; *Gooch v. Gregory*, 65 N. Car. 143; *Supervisors v. U. S.*, 4 Wall. (U. S.) 435; *Lutterloh v. Cumberland Co.*, 65 N. Car. 403; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Benbow v. Iowa City*, 7 Wall. (U. S.) 313; *U. S. v. Brooklyn*, 10 Biss. (U. S.) 466; *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130; *U. S. v. Muscatine Co.*, 2 Abb. (U. S.) 53; s. c. *sub nom. Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Boynton v. District Township of Newton*, 34 Iowa 510; *Britton v. Platte City*, 2 Dill. (U. S.) 1; *Mayor v. Lord*, 9 Wall. (U. S.) 409; *Wisdom v. Memphis*, 2 Flipp. (U. S.) 285; *State v. Rahway*, 43 N. J. L. 338; *Stevenson v. District Township*, 35 Iowa 462. See also *Fisher v. Mayor*, 17 W. Va. 628; *U. S. v. Vernon Co.*, 3 Dill. (U. S.) 281; *U. S. v. Mobile*, 4 Woods C. Ct. 536; *Sheridan v. Fleming*, 93 Mo. 321; *Worthington v. Hilton*, 13 L. T. R., N. S. 463; *U. S. v. Buchanan Co.*, 5 Dill. (U. S.) 285.

The judgment conclusively determined that the town was chargeable for the sum for which the judgment

Mandamus will not issue to compel a city to levy a tax to pay a judgment where the facts necessary to the action of the court are not proved,¹ or where the judgment has been obtained by fraud or is dormant.²

2. The Levy of a Tax to Pay Bond Debts.—Mandamus lies to compel a city to levy a tax to pay its bonds or interest on its bond debts, and, for the purpose of doing justice thereby to an individual relator, the court may make a preliminary order separating his portion of the debt from that held by others.³ But it will not issue to pay interest upon bonds where their validity is questioned by the city, and various questions, both of law and of material facts, affecting their validity are raised.⁴

was rendered, and it is the duty of the common council of all towns in the State to annually make up and enter on their journal an accurate estimate of all sums which are or may be lawfully chargeable to such town, and which ought to be paid within the year, and to order a levy of so much as may in its opinion be necessary to pay the same. The payment of such judgment against a town, however erroneous, if no writ of error has been taken, should be so provided for by taxation; and if it be not done and it cannot be collected by execution, its payment should be enforced by mandamus. *Wells v. Mason*, 23 W. Va. 456.

Duty to Levy a Continuing One.—The duty of levying a municipal tax in satisfaction of a judgment against the corporation is treated as a continuing duty and it does not terminate with the levying of a single tax which is collected only in part, but ends only where the whole amount is collected and the judgment paid. *State v. City of Madison*, 15 Wis. 30. See also *Benbow v. Iowa City*, 7 Wall. (U. S.) 313; *Robinson v. Butte Co.*, 43 Cal. 353.

Where the party entitled to the money collected by virtue of a tax levied in aid of a railroad company agrees that, if a designated proportion of the tax is paid within a stipulated time the tax payers shall be released from the payment of the remainder, mandate will not lie to compel collection of the difference between the amount levied and the amount paid under the agreement. *Board of Commrs. v. State*, 109 Ind. 596.

Where a writ of mandamus commanded a municipal corporation to forthwith levy a specific tax on the taxable property of the city for the year 1865, sufficient to pay a specified judgment, interest and costs, and to collect the

tax and pay the judgment, or to show cause to the contrary, by the next term of court, a return "that the defendants, in obedience of the order of the court, did proceed to levy a tax of one per cent upon the taxable property of said city, for the purpose of paying the judgment named, and other claims, and that said tax is sufficient in amount to pay the said judgment and other claims," was held insufficient on demurrer. *Benbow v. Iowa City*, 7 Wall. (U. S.) 313.

Right to Intervene.—In an action against an officer to compel the performance of a legal duty in the levying of a tax, a tax payer cannot intervene on the ground that the tax would be void when levied. *Harwood v. Quinby*, 44 Iowa 385.

Power of Federal Courts.—The federal courts may exercise the same authority by mandamus to compel the payment of a judgment against a municipal corporation as may be exercised by the State courts. *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166.

Appointment of Marshal by Federal Court to Enforce Mandate.—The federal courts have the power to appoint a marshal as a commissioner, to levy and collect a tax against a municipal corporation when the board of supervisors have disobeyed or evaded the law of the State or the peremptory mandate of the federal court. *Supervisors v. Rogers*, 7 Wall. (U. S.) 175; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522.

1. *U. S. v. Elizabeth*, 24 Fed. Rep. 851.

2. *State v. School Dist. No. 2*, 25 Neb. 301.

3. *Ex parte Parsons*, 1 Hugh 282. See *Shelley v. St. Charles Co.*, 30 Fed. Rep. 603; *State v. City of Rahway* (N. J.), 8 Atl. Rep. 106.

4. *State v. Manitowoc*, 52 Wis. 423.

Where, on application for mandamus to levy taxes to pay bonds, it appears that the tax, if levied in one year, would be a burden on the tax payers, the court may apportion the levy over such number of years as not to be oppressive.¹

3. Taxation for School Purposes.—Where trustees of a village are required by statute to raise money by the levy of a tax for the support of schools, mandamus will go to compel the levy of such taxes.² So it lies to compel a board of education to appropriate moneys in the treasury for the purpose, towards the payment of negotiable bonds issued for school purposes, or to levy such tax as may be necessary to complete such payment.³

4. Payment of Taxes.—Mandamus lies to compel the proper officer to issue his warrant of distress against a collector of taxes neglecting to collect and pay over the same, according to the assessor's warrant.⁴ So a tax payer, on payment of his taxes, and

1. *State v. School Dist. No. 7*, 22 Neb. 700.

2. *People v. Bennett*, 54 Barb. (N. Y.) 481.

The writ will lie to require a board of school directors to levy a tax for building a school house, the electors of the school district having voted to erect the house. *Cooper v. Nelson*, 38 Iowa 440.

A mandamus will lie against the common council of the City of Beaver Dam to compel them to raise by taxation the necessary and proper amount for educational purposes, designed by law when the same has been determined by the board of education of the city. *State v. Smith*, 11 Wis. 65. See *State v. Madison*, 15 Wis. 30; *State v. Supervisors*, 20 Wis. 79; *State v. Racine*, 22 Wis. 258; *State v. Milwaukee*, 25 Wis. 122.

The school board of a district having certified to the county commissioners that it was necessary to levy a certain tax on the property of the district for a special fund, as required by Gen. St., Colo., ch. 97, § 67 (Laws 1887, pp. 398, 399), on petition for a mandamus to compel the county commissioners to levy the special tax by the people at the relation of the district, the supreme court has original jurisdiction. *People v. Co. Comms.*, 7 Colo. 190.

A peremptory writ of mandamus will not be issued against a board of county commissioners to compel it to levy taxes upon the taxable property situated within a school district to pay interest, etc., on the bonds of the school district, unless the right is clear and the school district has had an oppor-

tunity to be heard. *Cassatt v. County Comms.*, 39 Kan. 505.

Report of Taxes.—On application for mandamus to compel the board of directors of a school district to report to the county board the amount of taxes necessary to be levied and collected for the payment of a judgment against the district, the answer alleged that the court rendering the judgment had no jurisdiction over the defendant; that the judgment was obtained by fraud; and that the judgment was dormant. It appeared that the judgment had been rendered more than five years prior to the commencement of the proceedings, and was dormant, and that in a proceeding to revive the judgment the question of the want of jurisdiction could be litigated. *Held*, that the application for a mandamus should be dismissed without prejudice in order that proceedings to revive the judgment might be first had. *State v. Babcock*, 25 Neb. 278.

Refusal to Sign Report.—One B, moderator of a school district, refused to sign a report to the county clerk of the lawful taxes voted by his district at the annual meeting. *Held*, that it being a duty enjoined by law, he would be compelled by mandamus to sign the same. *State v. Studheit*, 11 Neb. 359.

3. *State v. Board of Education of Perrysburg*, 27 Ohio St. 96.

4. *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Tremont School District v. Clark*, 33 Me. 482; *School District No. 8 v. Perkins*, 49 N. H. 538. See *Brown v. Crego Treasurer*, 32 Iowa 498; *State v. Supervisors of Beloit*, 20 Wis. 79; *State v. Madison*, 15 Wis. 30. *Compare*

the tax collector's refusal to give him a receipt therefor, to which he is entitled, has a remedy by mandamus.¹

5. Refunding Taxes Illegally Collected.—When the board of supervisors are authorized to cause taxes illegally assessed and paid in their county to be repaid, and they fail to perform that duty, they will be compelled by mandamus to proceed and perform such duty.² So when required by law to hear and determine applications for the recovery of taxes which have been illegally imposed, they will be required by mandamus to act upon an application of this nature.³

6. Erroneous Assessments.—Mandamus lies to compel assessors to correct an erroneous assessment after their refusal to make the proper correction.⁴ The remedy for an erroneous assessment is by application to the board of equalization from whose decision an appeal may be taken to the circuit court. But the writ will not lie to compel the officers of a county to strike out an assessment alleged to be erroneous.⁵ It lies in behalf of a nonresident illegally assessed to compel the assessors to strike the assessment from the assessment roll.⁶

XII MUNICIPAL AID BONDS.—Where municipal authorities are authorized by law to levy a tax sufficient to pay the interest and

State *v.* Boulton, 26 La. An. 259; State *v.* Pinckney, 3 Strobb. (S. Car.) 400.

A writ of mandamus will lie to compel the payment by a corporation of taxes assessed, as provided by Vt. Rev. Laws, § 284, on its capital stock owned by nonresidents. St. Albans *v.* National Car Co., 57 Vt. 68.

Where the party entitled to the money collected by virtue of a tax levied in aid of a railroad company agrees that if a designated proportion of the tax is paid within a stipulated time the tax payers shall be released from the payment of the remainder, mandate will not lie to compel collection of the difference between the amount levied and the amount paid under the agreement. County of Huntington *v.* State (Ind.), 10 N. E. Rep. 625.

Refusal to Accept Payment of Taxes.

—The State tax collector cannot be compelled by mandamus to receive the three per cent. State bonds called "baby bonds" in payment for lands forfeited to the State and again offered for sale when the property is burdened with back taxes. State *v.* Houston, 38 La. An. 533.

An application for mandamus to compel respondent to receive certain money in payment of taxes and to furnish receipted bills therefor cannot be construed to be an application to redeem

from a tax sale. People *v.* Cady, 6 N. Y. Supp. 546.

1. People *v.* Washburn, 20 Cal. 318.

2. People *v.* Supervisors of Otsego Co., 53 Barb. (N. Y.) 564; People *v.* Supervisors of Ulster Co., 65 N. Y. 300; People *v.* Supervisors of Herkimer Co., 56 Barb. (N. Y.) 452; State *v.* Van Winkle, 46 N. J. L. 117. Compare Younger *v.* Santa Cruz County Supervisors, 68 Cal. 241; Butler *v.* Supervisors of Fayette, 46 Iowa 326.

3. People *v.* Supervisors of Essex Co., 70 N. Y. 228.

Prior to repeal of an act authorizing repayment of certain taxes, a circuit court granted a mandate against a board of commissioners ordering the allowance by them of just claims for the refunding of such taxes. After the passage of the act, the board having refused to allow such claims, an attachment was issued by the court to compel obedience to its mandate, whereupon the board allowed the claims. Held, that the action of the board was a nullity, and vested no rights in the claimants. Henderson *v.* State, 58 Ind. 244.

4. People *v.* Olmsted, 45 Barb. (N. Y.) 644.

5. Meyer *v.* County of Dubuque etc., 43 Iowa 592.

6. People *v.* Barton, 44 Barb. (N. Y.) 148.

ultimately satisfy the principal of outstanding bonds of the county, they must fairly exercise their judgment with a view to effect the end contemplated, and if they refuse to do so may be compelled by the writ of mandate.¹

Bonds issued in payment of a subscription to a railroad company, signed by a majority of the court of county commissioners in the presence of the probate judge, who certified to that fact, and for the payment of which it was made the duty of the commissioner's court to levy and assess a special tax each year, are not such claims as need be presented for allowance before commencing suit to enforce their payment.² But the holder who resorts to the courts of the United States must there reduce the bonds or the coupons to judgment before he is entitled to the remedy by mandamus.³

Where a city charter requires a certain per cent. of taxes levied and collected to be devoted to the payment of its bonds and coupons as a class of indebtedness, the recovery of a judgment against the city on such bonds will not merge the indebtedness in the judgment so that it will lose its proper classification. The origin of the debt will fix its classification, which will remain, however numerous the mutations which the form of the debt may undergo.⁴

1. *Robinson v. Butte Co.*, 43 Cal. 353; *Columbia Co. v. King*, 13 Fla. 421; *Pegram v. Cleveland Co.*, 64 N. Car. 557; *State v. Commrs. of Clinton Co.*, 6 Ohio St. 280; *Com. v. Commrs. of Allegheny Co.*, 37 Pa. St. 277; *Com. v. Commrs. of Allegheny*, 32 Pa. St. 218; *Com. v. Pittsburgh*, 34 Pa. St. 496; *Knox Co. v. Aspinwall*, 24 How. (U. S.) 376; *Shelby Co. Court v. Cumberland etc. R. Co.*, 8 Bush (Ky.) 209; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Commrs. Court v. Rather*, 48 Ala. 433; *State v. Anderson Co.*, 8 Baxt. (Tenn.) 249; *Sedgwick Co. v. Bailey*, 11 Kan. 631; *Flagg v. Palmyra*, 33 Mo. 440; *People v. Mead*, 24 N. Y. 114. See *People v. Supervisors of Ulster*, 16 Johns. (N. Y.) 59; *Cassatt v. Board of Co. Commrs. (Kan.)*, 18 Pac. Rep. 517; *People v. Mitchell*, 35 N. Y. 551; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Allen*, 52 N. Y. 538; *People v. Batchellor*, 53 N. Y. 128; *People v. Logan Co.*, 63 Ill. 374; *People v. Glann*, 70 Ill. 232; *People v. Cass Co.*, 77 Ill. 438; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Cincinnati etc. R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Clarke Co. v. Paris etc. Co.*, 11 B. Mon. (Ky.) 143; *Louisville etc. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) 637; *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 425.

Mandamus will lie against the mayor and common council of the city of Rahway compelling them to raise and collect by tax, as other city taxes are levied and collected, the deficiency as reported to the said common council by the board of water commissioners of said city, on application of a water bond holder, to whom interest on bonds is due. *State v. Mayor of Rahway*, 9 East Rep. 604.

There are some authorities to the contrary, holding that when the municipality has not entered into any binding contract of subscription with the railroad company, a mandamus will not lie at the instance of the latter. *Crawford Co. v. Louisville etc. R. Co.*, 39 Ind. 192; *Sankey v. Terre Haute etc. R. Co.*, 42 Ind. 402; *Chicago etc. R. Co. v. Olmstead*, 46 Iowa 316.

2. *Greene Co. v. Daniel*, 102 U. S. 187; s. c., 3 Am. & Eng. R. R. Cas. 105; *Commrs. Court v. Rather*, 48 Ala. 433.

3. *Greene Co. v. Daniel*, 102 U. S. 187; s. c., 3 Am. & Eng. R. R. Cas. 105.

4. *East St. Louis v. Underwood Ex'x*, 105 Ill. 308.

The charter of East St. Louis limited the right of taxation for all purposes to one per centum per annum on the assessed value of all taxable property in the

1. Subscriptions.—Where the board of supervisors of a county are empowered to subscribe for the county to the capital stock of a railroad, they may be compelled to subscribe by writ of mandamus.¹ If a county is compelled by law to make such subscriptions, the corporation must tender its books to the officers of the county and demand the subscription before it can apply for a writ of mandamus.²

2. Issue of Bonds.—Mandamus is the usual and appropriate, if not the only, remedy to compel the issue by a county of its bonds in payment of a subscription to the capital stock of a corporation.³ The municipality may lawfully impose conditions upon which the subscription is to depend, and the corporate bonds to be issued, and until such conditions are complied with the courts will

city, and required the city council to levy a tax of three mills on the dollar on each assessment for general purposes, and apply it to the interest and sinking fund on its bonded debt, *held*, that the use of the remaining seven-tenths was within the discretion of the municipal authorities, and was not subject to judicial order in advance of an ascertained surplus. *East St. Louis v. U. S.*, 110 U. S. 321.

Title to the Bonds.—In proceedings by mandamus to compel a city to levy a tax to pay a judgment recovered on its bonds, an affidavit by the relator's attorney that the judgment has been assigned to the relator, and that the written assignment is in the affiant's possession, was held to be presumptive evidence of the relator's ownership. *State v. Racine*, 22 Wis. 258.

Validity of Bond.—On the hearing of an order to show cause why a peremptory mandamus should not issue in a case to enforce the levy and collection of a tax to pay interest upon bonds of a city, the validity of the bonds was questioned by the city, and various questions, both of law and of material facts, affecting their validity were raised. *Held*, that it was error to grant the writ before the relator had established his right in an ordinary action at law. *State v. Mayor etc. of Manitowoc*, 52 Wis. 423.

On application for a mandamus to compel a county treasurer to pay over money assessed and collected to pay town bonds, etc., it is a good defense to show that the necessary assent of the tax payers of the town was not obtained to authorize the issuing of such bonds. *People v. Mead*, 36 N. Y. 224.

1. Napa Valley R. Co. v. Napa Co., 30 Cal. 435.

It was held in *Ex parte Selma G. R. Co.*, 45 Ala. 696, that a writ of mandamus will be granted to enforce a lawful subscription for stock, and the issuance of bonds of the county in payment for the same, if the municipal authorities refuse to comply with the law upon the ground that it is void for want of conformity to the constitution of the State.

As to the jurisdiction of a court of equity to grant relief in cases of a railroad subscription where the plaintiff has an adequate remedy by a suit at law. See *State v. McCrillus*, 4 Kan. 250.

2. Oroville etc. R. Co. v. Plumas Co., 37 Cal. 354.

The commissioners having elected, in pursuance of the statute to deliver bonds of the county to the company in payment of the subscription, and having become bound to do so and afterwards refusing upon demand to deliver them, and showing no cause for such refusal, except that the act aforesaid was of doubtful constitutionality, a writ of mandamus is the proper remedy to enforce the delivery. *Cincinnati etc. R. Co. v. Clinton Co.*, 1 Ohio St. 77.

3. Atchison etc. R. Co. v. Jefferson Co., 12 Kan. 128; *Duncan v. Mayor of Louisville*, 8 Bush (Ky.) 98. Compare *Chicago etc. R. Co. v. St. Anne*, 101 Ill. 151.

Where the charter of a railroad company authorized the call of a township election to determine whether the town should subscribe a certain sum to the capital stock of the company upon the petition of ten legal voters of the town, and it appeared that there were but ten names signed to such call and that three of them were aliens and not voters, and that at the election held under such call three votes were cast in favor of the

not compel the issuing and delivery of the bonds by mandamus.¹ Where bonds issued by a township on a subscription to the stock of a railroad company are required by law to be countersigned by the town clerk before being delivered, mandamus will go to compel the countersigning of such bonds.²

The refusal of the commissioners of the county to issue and deliver the bonds, however wrongful, is not a breach of the obligation of the county which would give rise to an action against it for the recovery of damages. The breach of obligation in such a case would consist simply in the refusal on the part of the commissioners of the county to perform a ministerial duty the only remedy for which would be a proceeding at law in the name of the railroad company by a writ of mandamus.³

3. Another Action Pending.—The pendency of proceedings *quo warranto* against the persons claiming to compose a corporation to try their right to exercise corporate powers is no defence to an action for a writ of mandamus brought by the corporation to compel a county to subscribe to its capital stock and issue its bonds therefor.⁴

4. Judgment Upon Municipal Aid Bonds.—Mandamus is the appropriate remedy to compel municipal corporations to comply with their duty of levying and collecting taxes in payment of judgments obtained upon bonds or other obligations of the municipality issued by authority of law in aid of railway and other en-

subscription by persons not entitled to vote unless there was a majority of one vote against the proposition, and that these facts were known to the railroad company when they procured the supervisor to make the subscription and issue a part of the bonds of the town; *held*, on application for a mandamus to compel the supervisor to issue and deliver the remaining bonds, the facts being admitted by demurrer to the return of the writ, that on account of the fraud and illegality in the call and election and the subscription, the company was not entitled to have the bonds issued and delivered, it being a party to the fraud. *People v. Cline*, 63 Ill. 394.

1. *People v. Glann*, 70 Ill. 232; *People v. Waynesville*, 88 Ill. 469. See also *People v. Holden*, 91 Ill. 446.

Where a township voted a subscription of \$50,000 of the capital stock of railway company, to be paid in bonds, under a law providing that no bonds should be delivered nor any payment made under such subscription until an amount of work was done on such road in the town or on such part of the line of the road as the authorities issuing the bonds should designate, equal in value to the amount of bonds to be

issued, and the condition of the vote was, that the bonds were to be delivered when work was done in the township to the amount of such bonds; it was *held* that the building of the road through the town at a cost of only \$30,000, or even \$41,000, was not a substantial compliance with the conditions and that the court would not compel the issue of the bonds voted. *People v. Waynesville*, 88 Ill. 469.

When the law requires as a condition to the issuing of such bonds that the assent of a majority of the tax payers should be procured and that the instrument by which such assent is evidenced should be filed and recorded in the county clerk's office, the omission to file and record such assent is sufficient ground for refusing a mandamus to compel the issuing of the bonds to the railway company. *High on Ex. Rem.*, § 389; *Essex Co. R. Co. v. Town of Lunenburg*, 49 Vt. 143; *People v. Trustees of Fort Edward*, 70 N. Y. 28.

2. *Houston v. People*, 55 Ill. 398.

3. *Smith v. Bourbon County*, 127 U. S. 105; s. c., 22 Am. & Eng. Corp. Cas. 74.

4. *Oroville etc. R. Co. v. Plumas Co.*, 37 Cal. 354.

terprises.¹ The circuit court of the United States has authority to issue the writ in such cases.²

5. Corporation Concluded by Judgment.—A judgment upon municipal aid bonds cannot be collaterally questioned, and when application is made for mandamus to compel a municipal corporation to collect taxes in payment of such judgments the courts will not permit the correctness of the judgment to be impeached.³

6. Surrender of Illegal Bonds.—Municipal aid bonds deposited with the State treasurer under a law which is afterwards declared unconstitutional are in his official custody and he may be compelled to surrender them by mandamus.⁴

XIII. MUNICIPAL OFFICERS AND ELECTIONS—**1. Generally.**—Mandamus will lie to compel the holding of a municipal election when the duty is clearly obligatory and has been disregarded by the officers entrusted by law with its performance.⁵ So the court

1. High's Ex. Rem., § 393; Supervisors v. United States, 4 Wall. (U. S.) 435; Galena v. Amy, 5 Wall. (U. S.) 705; Mayor v. Lord, 9 Wall. (U. S.) 409; United States v. Sterling, 2 Biss. (U. S.) 408; United States v. Lee Co., 2 Biss. (U. S.) 77; Knox Co. v. Aspinwall, 24 How. (U. S.) 376; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535; Butz v. Muscatine, 8 Wall. (U. S.) 575; Benbow v. Iowa City, 7 Wall. (U. S.) 313; Welch v. Ste. Genevieve, 1 Dill. (U. S.) 522; United States v. Muscatine Co., 2 Abb. (U. S.) 53.

2. Knox Co. v. Aspinwall, 24 How. (U. S.) 376; Welch v. Ste. Genevieve, 1 Dill. (U. S.) 130; State v. Muscatine Co., 2 Abb. (U. S.) 53; s. c., *sub nom.* Lansing v. County Treasurer, 1 Dill. (U. S.) 522. *Contra*, Rusch v. Des Moines Co., 1 Woolw. (U. S.) 313; Rees v. Watertown, 19 Wall. (U. S.) 107; Barkley v. Levee Commrs., 93 U. S. 258.

In Knox Co. v. Aspinwall, 24 How. (U. S.) 376, GRIER, J., said: "By the 14th section of the Judiciary act of 1789 (1 St. at L.) it is enacted that courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law.' Now the 'jurisdiction' is not disputed and it is necessary to an efficient exercise of this jurisdiction that the court have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to per-

form, and by the performance of which alone the plaintiff's remedy can be effected. The fund to pay this judgment by the face of the contract is a special tax laid and to be collected by defendants. They refuse to perform a plain duty. There is no other writ which can afford the party a remedy which the court is bound to afford the party, if within its constitutional powers, except that afforded by this writ of mandamus."

3. Supervisors v. United States, 4 Wall. (U. S.) 435.

4. People v. State Treasurer, 23 Mich. 499; La Grange v. State Treasurer, 24 Mich. 468.

5. Sansom v. Mercer, 68 Tex. 488; McConike v. State, 17 Fla. 238; State v. Rahway, 4 Vroom (N. J.) 110; Lamb v. Lynd, 44 Pa. St. 336; People v. Town of Fairbury, 51 Ill. 149; King v. Mayor of Grampond, 6 T. R. 301; People v. Common Council of Brooklyn, 77 N. Y. 503; Attorney General v. City Council of Lawrence, 111 Mass. 90; High on Ex. Rem., § 401; Regina v. Mayor of Bradford, 4 Eng. Law & Eq. 194; State v. Holden, 19 Neb. 249; State v. Twenty-second District Judge, 35 La. An. 637.

Where the president and board of trustees of a town incorporated under the general law have neglected to give the requisite notice for holding the annual election for the new board within the year for which they were elected, as prescribed by law, and refuse afterwards to give notice and call a meeting of the qualified voters of such town for the election of their successors in office,

may properly by mandamus require the two branches of a city council to meet in convention as a required preliminary step to the election of someone to an office.¹

The validity of an election may be enquired and determined by mandamus.² But where election officers have proceeded illegally in counting the ballots and made and filed their report with the proper officer, a mandamus will not issue to compel them to reconsider their action or to act in a certain manner.³

The writ of mandamus will be allowed to compel municipal authorities to proceed and determine as to the election of an officer in the mode pointed out by the charter. And when they have proceeded and elected a person to an office in the way prescribed by the charter and refuse to admit him mandamus should be allowed.⁴ The writ will not be granted, however, unless the relator shows a clear right to the remedy, or at least a *prima facie* title to the office claimed by him.⁵

So mandamus is the proper remedy to invoke in cases involving the doing of what are ministerial acts,⁶ such as the canvass-

a mandamus will be awarded compelling them to do so. *People v. Town of Fairbury*, 51 Ill. 149.

1. *Gibbs v. Hampden*, 19 Pick. (Mass.) 298; *Morse, Petitioner*, 18 Pick. (Mass.) 443; *Strong, Petitioner*, 20 Pick. (Mass.) 484; *Rex v. Cambridge*, 4 Burr. 2008; *King v. Norwich*, 1 B. & Ad. 310; *Lamb v. Lynd*, 44 Pa. St. 336.

A township committee, having exercised its choice to call a special election to choose between two candidates who have had an equal number of votes at an annual township meeting, and having posted notices of such election, may be compelled by mandamus to proceed with the election, as they cannot rescind their action. *State v. Boden* (N. J.), 16 Atl. Rep. 58.

2. *Lawrence v. Ingersoll* (Tenn.), 12 S. W. Rep. 422.

3. *People v. Reardon*, 3 N. Y. 560.

4. *Mason Co. v. Minturn*, 4 W. Va. 300; *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244; *Ex parte Secomb*, 19 How. (U. S.) 15; *Carpenter v. County of Bristol*, 21 Pick. (Mass.) 258; *Springfield v. Hampden*, 4 Pick. (Mass.) 68; *United States v. Lawrence*, 3 Dall. (U. S.) 42.

5. *State v. Rahway*, 4 Vroom (N. J.), 111; *Supervisors of Mason Co. v. Minturn*, 4 W. Va. 300. See also *Mayor of Vicksburg v. Rainwater*, 47 Miss. 547; *State v. Board etc. of Trenton*, 17 Am. & Eng. Corp. Cas. (N. J.) 296; see *Klokke v. Stanley*, 109 Ill. 192; s. c., 9 Am. & Eng. Corp. Cas. 465; *People v. Village*

of Crotty, 93 Ill. 180; *Ex parte Harris*, 52 Ala. 87; *People v. Trustees*, 86 Ill. 613; *People v. Lieb*, 85 Ill. 484; *Ex parte Many*, 14 How. (U. S.) 24; *Ex parte Cutting*, 94 U. S. 14; *Re Morris*, 11 Gratt. (Va.) 292; 2 Dill. Mun. Corp. (3rd ed.), § 828; *People v. Chicago etc. R. Co.*, 55 Ill. 95; *Commissioners of Highways v. People*, 66 Ill. 339; *People v. Elgin*, 66 Ill. 507; *People v. Dulaney*, 96 Ill. 503; *People v. Johnson*, 100 Ill. 537.

The relator was a candidate for mayor. He received a sufficient number of votes to elect him, but was refused a certificate of election by the board of canvassers on the ground that he was disqualified to hold the office. Application was made for a peremptory writ of mandamus to compel them to grant the certificate. The return showed that the relator did not possess the qualification of inhabitancy; and the writ stated, "And if, perchance, construed not to have been an inhabitant of said city for one year, yet," etc. *Held*, that if the relator was disqualified, he had no right, at the hand of the court, to be armed with a certificate of election.—evidence of title to that to which he has no right. *State v. Newman*, 17 Am. & Eng. Corp. Cas. (Mo.) 516.

6. *State v. Cummings*, 17 Neb. 311; *State v. Batt*, (La.), 4 So. Rep. 495; *State v. Parish of St. Bernard* (La.), 2 So. Rep. 305; *State v. Sovereign*, 17 Neb. 173; *Dickson v. Hill*, 75 Ga. 369; *State v. Mayor etc.*, 43 N. J. L. 542; *Ramsey v. Clerk of Township*, 52

ing of election returns,¹ the issuing of certificates of election to

Mich. 344; *State v. Wilson* (Neb.), 38 N. W. Rep. 31; *Monroe Supervisors v. State*, 63 Miss. 135; *People v. Purviance*, 12 Ill. App. 216; *People v. French*, 24 Hun (N. Y.) 263; *People v. New York Police Board*, 107 N. Y. 235; *East Boston Ferry Co. v. Boston*, 101 Mass. 488; *Hawley v. Fairbanks*, 108 U. S. 543; *State v. Meadows*, 1 Kan. 90; *State v. Palmer*, 18 Neb. 644; *Parker v. Hubbard*, 64 Ala. 203; *Roberts v. Davidson*, 83 Ky. 279; *State v. Magill*, 4 Kan. 415; *State v. Shakespeare* (La.), 6 So. Rep. 592; *Rainey v. Clydelette*, 4 Heisk. (Tenn.) 122; *Bledsoe v. International R. Co.*, 40 Tex. 537; *People v. Registrar of Arrears* (N. Y.), 20 N. E. Rep. 611; *Ridley v. Dougherty* (Iowa), 42 N. W. Rep. 178; *McDiarmid v. Fitch*, 27 Ark. 106; *People v. Taylor*, 45 Barb. (N. Y.) 129.

City Marshal.—Under a city ordinance providing that the city marshal shall report to the city council "the names of all persons or firms engaged in the liquor traffic, and the place of business of each, and whether licenced or unlicenced, and shall notify any unlicenced liquor dealers to at once cease such traffic, and shall make complaint against all persons selling liquor without licence." *Held*, that the marshal's duty applied as well to wholesale as to retail liquor sellers, and for his neglect a private citizen might maintain mandamus. *State v. Cummings*, 17 Neb. 311.

County Superintendent.—Where, as by the Nebraska statute, the county superintendent of schools has authority to change the boundaries of school districts, so that all children may have the opportunity to attend school, the court will not interfere with his action. *State v. Palmer*, 18 Neb. 644.

County Treasurer.—Mandamus will not lie to compel a county treasurer to certify that all taxes are paid when taxes remain unpaid, although the same are illegal. *Smith v. Schroeder*, 15 Minn. 35 (Gil. 18) commented upon. *State v. Nelson* (Minn.), 42 N. W. Rep. 548.

Canvassers.—The powers of canvassers are, generally, ministerial only, and the regularity of their proceedings may, therefore, be enquired into by mandamus. *People v. Grand County Commrs.*, 6 Colo. 202.

County Clerk.—Neb. Comp. St. 1885,

ch. 26, § 103, directing the county clerk to fill vacancies in town offices by appointment, applies to the offices of the town board and town clerk in a new town, and mandamus will issue to compel the performance of the duty. *State v. Forney*, 21 Neb. 223.

Town Clerk.—A writ of mandamus will issue to compel a town clerk to record the proceedings of a town meeting, as publicly declared by the moderator; also to correct his record to conform to such declaration. *Hill v. Goodwin*, 56 N. H. 441.

Recorder.—Mandamus will lie to compel the recorder of a village to fulfil the duty, imposed upon him by the charter, of advertising and selling lands returned for delinquent paying taxes; and he cannot refuse to do so on the ground that he believes the action of the council in laying the particular tax to be illegal, especially if the proceedings are sufficiently fair on their face to protect ministerial action, and the work has been done and the tax in a great measure paid in. *Common Council of Hudson v. Whitney*, 53 Mich. 158.

1. *Hudson v. Slaughter*, 70 Ala. 546; *Long v. State*, 17 Neb. 60; *Davidson v. Smith*, 20 Iowa 466; *State v. Cavers*, 22 Iowa 343; *Atty. Gen. v. Barstow*, 4 Wis. 749; *People v. Van Cleve*, 1 Mich. 362; *Thompson v. Circuit Judge*, 9 Ala. 338; *Mayo v. Freeland*, 10 Mo. 629; *State v. Rodman*, 43 Mo. 256; *State v. Steers*, 44 Mo. 223, 229; *Bacon v. York Co. Commrs.*, 26 Me. 491; *Taylor v. Taylor*, 10 Minn. 107; *O'Ferrall v. Colby*, 2 Minn. 180; *Marshall v. Kerns*, 2 Swan (Tenn.) 68; *State v. Wilson* (Neb.), 38 N. W. Rep. 31; *Territory v. Bernalillo Co.*, 20 Am. & Eng. Corp. Cas. (New Mex.) 44; *State v. Carney*, 3 Kan. 88; 4 Wait, Act. & Def. 369; *Kisler v. Cameron*, 39 Ind. 488; *People v. Hilliard*, 29 Ill. 419; *In re Strong*, 20 Pick. (Mass.) 484; *High, Extr. Rem.*, §§ 60, 61; *People v. Supervisors of Kern*, 47 Cal. 205.

When a peremptory writ of *mandamus* has issued to a board of canvassers to count what purport to be election returns, they have no power to say that these are not returns. *Rice v. Smith*, 9 Iowa 570.

In *Bull v. Southwick*, 2 New Mex. 321, *Justice Bristol*, whose opinions are always able, in delivering the opinion of the court in that case, made

some observations worthy to be quoted and considered. In commenting on the history of the case then before him, he said: "As such board of canvassers they assumed judicial power to pass upon the illegality of and reject votes without any other ceremony than because partisan bystanders challenged them as illegal. In this way hundreds of votes were thrown out and the result of the election arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is, that if such judicial power should be conferred on mere canvassing boards, to be exercised at the close of a hotly contested election, in the absence of real parties interested, and almost always with the partisan advisers of such boards in the background, their sitting would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of star chamber."

Authority to Exclude Votes.—The general rule is, subject to modification by statute, that the powers of canvassers are ministerial, simply involving the labor of counting the votes returned, and determining who has received the highest number; they have no judicial power to reject votes polled. The regularity of their proceedings may be enquired into on mandamus. *People v. Grand Co. Commrs.*, 6 Colo. 202.

In *Brown v. Commrs.*, of Rush Co., 38 Kan. 436, it was held where election returns are regular in form, and genuine, a canvassing board has no authority to determine whether illegal votes have been received and included in said returns; and where, upon such investigation and determination, certain votes are excluded from such returns and canvass by said canvassing board, such exclusions are erroneous, and such canvassing board may be compelled by mandamus to reconvene, and recanvass such returns.

In *Lewis v. Commrs.*, 16 Kan. 102, it was said: "It is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to enquire into these alleged frauds, and decide upon the legality of the votes." But this is a mistake. Its duty is "almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the

result. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal." Also, see *State v. Stevens*, 23 Kan. 456; *State v. Commissioners*, 23 Kan. 268; *Hagerty v. Arnold*, 13 Kan. 367; *Dalton, clerk, v. State*, 11 Am. & Eng. Corp. Cas. 81.

It was held in *State v. Stevens*, 23 Kan. 456, however, that the court would not compel the canvassing board of a county to canvass the returns where it was shown that the returns were so grossly and manifestly untrue as to be of no value in ascertaining the will of the people.

Counting Votes as for Separate Persons.—In *State v. Williams*, 95 Mo. 541, it was held that where, in an election, votes were given for Matthew Ryan, Mattias Ryan, and M. Ryan, and the recorder counted them as for one person—Matthew Ryan—mandamus to compel him to count the votes as given for separate persons will not lie, there being no averment that Matthew Ryan, Mattias Ryan, and M. Ryan are not the same person. The court said: "It needs no citation of authorities to establish the proposition that the duty of respondents, in canvassing the returns of said election, are purely ministerial, and that words readily distinguishable in sound are not *idem sonans*; but it does not follow from this that Mattias was not intended for Matthew, or that initials prefixed to a surname may not identify the person. The rule governing in canvassing returns is stated by COOLEY as follows: 'The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom, in the light of such facts of public notoriety connected with the election as everyone takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or officers for which they are intended, provided the intent is sufficiently indicated by the ballot, in connection with such facts, so that extraneous evidence is not necessary for this purpose.' Cooley, Const. Lim. 623. In the case of *State v. Foster*, 38 Ohio St. 599, the above rule is quoted, and was acted upon; and it is there held, 'that when the returns showed that votes were cast for H. L. Morey, and were counted by the canvassers for Henry L. Morey, it not being averred that H. L. and Henry L. are not the same persons, *mandamus* will not issue to compel such votes to be counted for

the person entitled thereto,¹ and the issuing of a commission to a claimant duly elected.²

The writ has been granted against commissioners appointed by the county court to open the gates of a turnpike road.³ It has been sustained in favor of a teacher of a common school against the county trustee in his capacity as treasurer of the school board of directors.⁴ It has been deemed the appropriate and only adequate remedy on behalf of a teacher who has rendered services in accordance with law, and who is entitled to payment out of the school fund, to compel the necessary officers to draw their order for the payment of the money.⁵ And the proper remedy against the officers of a school district requiring them to conform to the law or to reinstate a teacher whom they have removed without authority for so doing.⁶ But it will not issue to

two persons.' This ruling was made in view of the authorities (they having been cited in that case) to which counsel for relator have cited us. It will be found, upon examination of the cases cited, that none of them were proceedings by *mandamus*, but by *quo warranto*. It will be observed that in this case it is not alleged either that M. Ryan, Mattias Ryan, and Matthew Ryan are different persons, or that the vote was cast for different persons. Had these allegations been made, the trial court would, under our ruling in the case of *State v. Garesche*, 65 Mo. 480, have investigated the question, and ascertained the specific legal duty of respondents in the premises. It is there held that, before issuing a writ of *mandamus* to a ministerial officer, the court must ascertain what is his specific duty in the premises."

Mandamus to recanvass the votes cast at an election cannot be maintained pending proceedings by the relator to contest the election. *State v. Matley*, 17 Neb. 564.

1. *Thompson v. Judge*, 9 Ala. 338; *State v. Judge*, 13 Ala. 805; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *Kisler v. Cameron*, 39 Ind. 488; *State v. County Judge*, 7 Iowa 186; *Barnes v. Gottschalk*, 3 Mo. App. 111; *Barnes v. Gottschalk*, 3 Mo. 222; *State v. Bailey*, 7 Iowa 390; *Strong v. Petitioner*, 20 Pick. (Mass.) 484; *Roberts v. Rivers*, 27 Ill. 242; *Ingerson v. Berry*, 14 Ohio (Ill.) 315; *Territory v. Bernalillo Co.*, 20 Am. & Eng. Corp. Cas. (N. M.) 44. *Compare Pond v. Parrott*, 42 Conn. 13; *Lawrence v. Ingersoll* (Tenn.), 12 S. W. Rep. 422; *State v. Garesche*, 3 Mo. 526.

Where a court has to judicially de-

termine that a candidate was legally elected, and a certificate is necessary for the purpose, the proper officers may be compelled to issue it. *Burke v. Monroe Co.*, 4 W. Va. 371.

Mandamus will not lie to give a certificate of election to one who does not possess the requisite qualifications. *State v. Newman*, 91 Mo. 445.

Mandamus to compel a county clerk to issue a certificate of election to a person shown by the returns to have been legally elected was denied when it would not have given substantial relief, and the question might be raised again in an issue as to the accuracy of the returns or by proceedings in the nature of *quo warranto*. *Sherburne v. Horn*, 45 Mich. 160.

The election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office, and a writ of *mandamus* will not lie to give him a certificate of election therefor. *State v. Newman*, 91 Mo. 445.

2. *Smith v. Easton County Supervisors*, 56 Mich. 217; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *State v. Gibbs*, 13 Fla. 55; *Ellis v. Bristol Commrs.*, 2 Gray (Mass.) 370; *State v. Robinson*, 1 Kan. 17; *State v. County Judge*, 7 Iowa 186; *Kisler v. Cameron*, 39 Ind. 488; *In v. Strong*, 20 Pick. (Mass.) 484; *People v. Rives*, 27 Ill. 242; *People v. Hilliard*, 29 Ill. 419; *Brower v. O'Brien*, 2 Ind. 423.

3. *White Creek Turnpike Co. v. Marshall*, 2 Baxt. (Tenn.) 104.

4. *Arrington v. Cotton*, 1 Baxt. (Tenn.) 316.

5. *Apgar v. Trustees*, 5 Vroom (N. J.) 308.

6. *Gilman v. Bassett*, 33 Conn. 298.

control the discretion of a public officer¹ or to correct judicial errors.²

Mandamus does not lie to compel officers to allow a claim; the power of the court in that proceeding extends no further than to require them to act upon it.³ So it does not lie to compel them to perform their general official duties in a particular manner.⁴

2. Mandamus to Admit to Municipal Office.—Mandamus will lie to compel a municipality to admit to office any person duly and properly elected where there is a vacancy in the office and no one claims to be holding the same.⁵ Where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, mandamus will not lie to compel the admission of another claimant, nor to determine the disputed

People v. Van Sicler, 43 Hun (N. Y.) 537. As to college professor, see *Bracker v. William and Mary College*, 3 Call (Va.) 573.

A mandamus will lie at the instance of a teacher of a public school under a valid contract to compel the directors of a school district who had unlawfully removed him to reinstate him as teacher, and to issue to him an order or warrant on the proper disbursing officer of the school fund for the instalments of his salary. *Morley v. Power*, 5 Lea (Tenn.) 691.

1. *U. S. v. New Orleans*, 31 Fed. Rep. 537; *Davison v. Solano County Supervisors*, 70 Cal. 612; *Wintz v. Charleston Education Board*, 28 W. Va. 227; *State v. Police Jury*, 39 La. An. 759; *People v. Commrs. of Highways*, 118 Ill. 239; *Springfield v. Hamden*, 42 Pick. (Mass.) 59; *Woodman v. Somerset Co. Commrs.*, 11 Shep. (Me.) 151; *Mayor etc. v. Rainwater*, 47 Mass. 547; *State v. Clary* (Neb.), 41 N. W. Rep. 256.

Mandamus will not lie to control the discretion of county supervisors in appointing road overseers on petition under Cal. Code, § 2642, as amended in 1883. *Davison v. Solano County Supervisors*, 70 Cal. 612. Or the board of education or its president in approving the trustee's appointment of teachers. *Wintz v. Charleston Education Board*, 28 W. Va. 227.

Election Inspectors.—In canvassing the votes cast at an election the inspectors refused to count a certain ballot for the relator because his name, as it appeared thereon, was scratched. The marks over the name were such as to call for an exercise of judgment by the inspectors as to whether it had been scratched or whether it was the inten-

tion of the person casting it to vote for the relator. *Held*, that this exercise of judgment by the inspectors could not be controlled by mandamus. *State v. Deane*, 23 Fla. 121.

2. *Weeden v. Town Council of Richmond*, 9 R. I. 128; *State v. Nemaha County Commrs.*, 10 Neb. 32.

3. *Portwood v. Supervisors of Montgomery*, 52 Miss. 523.

4. *People v. Whipple*, 41 Mich. 548; *State v. Dubuclet*, 28 La. An. 698.

Mandamus will not lie against a county auditor to compel the entry of taxes on the tax duplicate until the time for making up such duplicate comes. *Zanesville v. Auditor of Muskingum Co.*, 5 Ohio St. 589.

5. *Atty. Gen. v. Mayor*, 128 Mass. 312; *King v. Slatford*, 5 Mod. Rep. 316; *State v. Harlam County*, 25 Neb. 33; *McDermott v. Miller*, 45 N. J. L. 253; *State v. Rahway*, 33 N. J. L. 111; *State v. Kennv.*, 2 Am. & Eng. Corp. Cas. 349; *State v. Auditor*, 36 Mo. 70; *Lindsley v. Tuckett*, 20 Tex. 516; *Morley v. Power*, 5 Lea (Tenn.) 691; *Putnam v. Langley*, 133 Mass. 204; *People v. Matteson*, 17 Ill. 167; *People v. Head*, 25 Ill. 287; *People v. Hilliard*, 29 Ill. 413; *People v. Detroit*, 18 Mich. 338; *State v. Dunn*, Minor (Ala.) 46; *People v. Scrugham*, 20 Barb. (N. Y.) 302; *People v. Trustees of Saratoga Springs*, 7 N. Y. Supp. 125; *Ex parte Diggs*, 52 Ala. 381; *Ex parte Wiley*, 54 Ala. 226; *People v. Board of Police etc.*, 35 Barb. (N. Y.) 535. See *People v. Board of Police*, 9 Abb. (N. Y.) Pr. 257; *State v. McCullough*, 3 Nev. 202; *Clayton v. Carey*, 4 Md. 26. Compare *Hildreth v. Heath*, 1 Ill. App. 82.

The courts will not aid by mandamus an officer, illegally elected, in getting

title.¹ Nor will mandamus lie to put one in possession of an office to which his term has expired pending the proceedings,² or to induct a person into office during the pendency of an appeal in *quo warranto* between the same parties.³

The writ of mandamus is issued to admit to office not only the person who claims a right by election or appointment but also one who, having been admitted by election or appointment, has since been improperly removed.⁴

The charge of improper amotion from office may be based on the lack of good cause or the want of proper formalities, such as notice, opportunity to be heard, etc. It may therefore well be that a good cause for amotion existed, yet that the removal was erroneous because no notice was given, etc. But in such cases it is well settled that a mandamus to restore to office will

possession of the office to which he claims to have been elected. *Beal v. Ray*, 17 Ind. 554.

1. *Lewis v. Whittle*, 77 Va. 415; s. c., 5 Am. & Eng. Corp. Cas. 271; *Ellison v. Aldermen of Raleigh*, and note, 80 N. Car. 125; s. c., 5 Am. & Eng. Corp. Cas. 477; *State v. Kenny*, 2 Am. & Eng. Corp. Cas. and note, 349; *Kelley v. Edwards*, 69 Cal. 460; *People v. New York*, 3 Johns. Cas. (N. Y.) 79; *St. Louis Co. v. Sparks*, 10 Mo. 118; *State v. Auditor*, 36 Mo. 70; *People v. Matteson*, 17 Ill. 167; *People v. Head*, 25 Ill. 287; *People v. Hilliard*, 29 Ill. 413; *State v. Delieesseline*, 1 McCord (S. Car.) 52; *Bonner v. State*, 7 Ga. 473. But see *Harwood v. Marshall*, 9 Md. 83; *State v. Falconer*, 44 Ala. 696; *In re Reid*, 50 Ala. 439; *Rex v. Winchester*, 7 Ad. & El. 215; *Regina v. Derby*, 7 Ad. & El. 419; *Regina v. Slatter*, 11 Ad. & El. 502; *Regina v. Leeds*, 11 Ad. & El. 512; *Rex v. Sawyer*, 10 B. & C. 486; *Frost v. Chester*, 5 E. & B. 531; *Harwood v. Marshall*, 9 Ind. 83; *Strong's Case*, 20 Pick. 497; *People v. Stevens*, 5 Hill (N. Y.) 616; *People v. Kilduff*, 15 Ill. 492; *In re Diggs*, 52 Ala. 381; *Lindsey v. Luckett*, 20 Tex. 516; *State v. Pilot*, 21 La. An. 336; *Frey v. Michle* (Mich.), 36 N. W. Rep. 184; *State v. John*, 81 Mo. 13; *Underwood v. White*, 27 Ark. 382; *Biggs v. McBride* (Oreg.), 21 Pac. Rep. 878; *People v. Stephens*, 2 Abb. (N. Y.) Pr. N. S. 348; *Banton v. Wilson*, 4 Tex. 400; *Sudbury v. Stearns*, 21 Pick. (Mass.) 148. Compare *Conlin v. Aldrich*, 98 Mass. 557; *Harwood v. Marshall*, 9 Md. 83; *Putnam v. Langley*, 133 Mass. 204; *People v. Scrugham*, 20 Barb. (N. Y.) 302; *Ex parte Heath*, 3 Hill (N. Y.) 42.

Mandamus is not the proper remedy to try the title to a public office. The proceedings should be by *quo warranto*. *Meredith v. Supervisors of Sacramento*, 50 Cal. 433; *Warner v. Myers*, 4 Oreg. 72; *Denver v. Hobart*, 10 Nev. 28; *Brown v. Turner*, 70 N. Car. 93.

The court, on a petition for mandamus to obtain possession of an elective office, that, for example, of clerk of court, will not go behind the certificate of election if the petitioner has taken the oath and given bond. *State v. Dodson*, 21 Neb. 218; *State v. Jaynes*, 19 Neb. 161.

2. *Fitzpatrick v. Kirby*, 81 Va. 467; *Woodbury v. County Commrs.*, 40 Me. 304.

3. *Hannon v. Halifax County Commrs.*, 89 N. Car. 123.

4. *Moses Mand.* 129; *High Ex Rem.* § 67; *Howard v. Gage*, 6 Mass. 462; *Strong. Petitioner*, 20 Pick. (Mass.) 484, 495.

A mandamus will lie to restore to his office an inspector of tobacco removed by an irregular summary proceeding. *Singleton v. Commissioners*, 2 Bay (S. Car.) 105.

Mandamus is an appropriate remedy whereby the county court may be compelled to show cause why they refuse to approve and qualify a deputy appointed by the sheriff. From the judgment of the circuit court in such proceedings an appeal lies to the court of appeals. *Applegate v. Applegate*, 4 Metc. (Ky.) 236.

A mayor of a city cannot be compelled to make a nomination to the board of aldermen for the office of chief of police while a person is holding that office *de facto* and no one but the incumbent is claiming it, and while

not issue, notwithstanding the applicant has a perfect title.¹ So a writ of mandamus will not be allowed for the purpose of enquiring into the qualifications of electors or the legality of an election as affected by matters not apparent on the face of the returns.²

When it is used to place a person in possession of an office it confers no right. It merely places him in possession to enable him to assert his right, which in some cases he could not otherwise do.³ The writ will not lie to prevent a person from being disturbed or molested in the exercise of the functions and powers pertaining to his office.⁴

3. Commissioners—Generally.—Where a public duty is imposed upon county commissioners for public reasons, in the exercise of which there is no discretion left to them, mandamus is the appropriate remedy to compel the performance of that duty.⁵ But

an information in the nature of a *quo warranto* is pending to try his title to the office. *Attorney General v. New Bedford*, 128 Mass. 312. See *Oakes v. Hill*, 8 Pick. (Mass.) 47; *Strong's Case*, 20 Pick. (Mass.) 484; *Ellis v. County Commrs.*, 2 Gray (Mass.) 370.

A writ of error may issue from the Supreme Court of the United States to a judgment of a circuit court of the United States awarding a peremptory mandamus to restore to office where the matter in controversy is sufficient to give jurisdiction to the court. *Columbian Ins. Co. v. Wheelwright*, 7 Wheat. (U. S.) 534.

1. *High Ex Rem*, § 70; *Rex v. Campion*, 1 Sid. 14; *Rex v. Axbridge*, Cowp. 523; *Rex v. New Castle*, Bull. N. P. 207.

In *King v. Bristol*, 1 Dow. & R. 389, the court said: "It would be a very extraordinary proposition if the court thought itself warranted in commanding a corporate body to restore a person to office from which they had removed him from what appeared to them to be a sufficient cause when the very next moment they might exercise the same right on precisely the same grounds." See *State v. Teasdale*, 21 Fla. 652.

2. *State v. County of Coahoma* (Miss.), 3 So. Rep. 143.

The aldermen of a city, in canvassing the election returns, determined that the relator had been elected mayor, but declined to direct the clerk to issue the certificate of election, basing their refusal upon the fact that relator was not an inhabitant of the city as required by law. *Held*, that the election of a person to an office who does not pos-

sess the requisite qualifications gives him no right to hold the office or to claim a certificate of election; and his application for a writ of mandamus against the aldermen must therefore be refused. *State v. Aldermen of Pierce City* (Mo.), 3 S. W. Rep. 849.

3. *Brower v. O'Brien*, 2 Carter (Ind.) 423.

4. *Legg v. Mayor of Annapolis*, 42 Ind. 203.

5. *Richards v. County Commrs. etc.*, 120 Mass. 401; *State v. Young*, 84 Mo. 90; *Gather v. Green* (La.), 4 So. Rep. 210; *Chance v. Temple*, 1 Clark (Iowa) 179; *People v. Commrs. (Ill.)*, 22 N. E. Rep. 596; *Ex parte Jennings*, 6 Cow. (N. Y.) 518; *Throckmorton v. State*, 20 Neb. 647; *State v. Board etc.*, 101 Ind. 398. See *Pfister v. State*, 82 Ind. 382; *State v. Commrs. of Belmont*, 31 Ohio St. 451; *U. S. v. County Commrs.*, 1 Morris (Iowa) 42; *Knox Co. v. Aspinwall*, 24 How. (U. S.) 376; *State v. Commrs. of Baltimore*, 46 Md. 621; *McLaughlin v. County Commrs.*, 7 S. Car. 375; *State v. Ryan*, 2 Mo. App. 303; *People v. Jeffreds*, 4 Thomp. & C. (N. Y.) 398; *Kuechler v. Wright*, 40 Tex. 601; *Noble County Commrs. v. Hunt*, 33 Ohio St. 169; *Com. v. County Commrs.*, 6 Whart. 476.

A mandate will lie against a board of county commissioners to compel them to take action upon the petition of a taxpayer of a township asking them to take stock in a railroad company to the amount of money collected on a tax voted for that purpose. *Pfister v. State*, 82 Ind. 382.

Mandamus lies to compel county commissioners to act after proper application under *Swan & C., Ohio Stat.*

not to revise the exercise of a discretionary power.¹ Mandamus will not lie to compel county commissioners to revise their decision on a complaint for the abatement of a tax.² To revise their decision upon the merits of the claim of an owner of land for damages sustained by the construction of a railroad.³ To order a part of the expense incurred by a town in making a highway to be repaid out of the county treasury.⁴ To summon a jury to make an entirely new line of way from one terminus to another⁵; to pay a disputed bill until their liability is fixed by action,⁶ or to enforce the performance of duties not imposed by statute.⁷

(a) **OPENING HIGHWAY.**—A mandamus lies to compel commissioners to open a road laid out by the judges of the court on an appeal to them from the refusal of such commissioners to lay out the road.⁸ It will be granted without regard to the near ap-

proach, with reasonable promptness in either approving or disapproving the duties of a county recorder elect. *State v. Commrs. of Belmont*, 31 Ohio St. 451.

1. *State v. Fire Commrs. of Cleveland*, 26 Ohio St. 24; *Respublica v. County Commrs. of Philadelphia*, 4 Yeates (Pa.) 181; *Rose v. County Commrs.*, 50 Me. 243; *Proprietors of Kennebec Toll Bridge, Petitioners*, 11 Me. 263; *Com. v. County Commrs.*, 6 Whart. (Pa.) 476; *State v. Board of Commrs.*, 119 Ind. 444; *Woodman v. Somerset*, 24 Me. 151.

The action of highway commissioners in refusing to have what is claimed to be a public road ascertained and recorded will not be controlled by mandamus. *People v. Hulse*, 38 Hun (N. Y.) 388.

Fixing Compensation for Disabled Policemen.—The court will not interfere by mandamus with the action of the New York police commissioners in fixing the compensation for sick and disabled policemen. *People v. French*, 24 Hun (N. Y.) 263.

2. *Gibbs v. Hamden*, 19 Pick. (Mass.) 298; *Morse, Petitioner*, 18 Pick. (Mass.) 443.

3. *Smith v. Mayor and Aldermen of Boston*, 1 Gray (Mass.) 72.

4. *Ipswich Petitioners*, 24 Pick. (Mass.) 343; *Springfield v. Hampden*, 10 Pick. (Mass.) 59.

5. *Gloucester v. Essex*, 3 Metc. (Mass.) 375.

6. *Hester's Case*, 2 Watts & S. (Pa.) 416.

7. *State v. Knox County Commrs.*, 101 Ind. 398.

Where county commissioners are required by statute to perform a particular act not embraced in their general duties as commissioners, no appeal lies from their proceedings in the case, and the performance may be enforced by mandamus. *U. S. v. County Commrs.*, 1 Morris (Iowa) 42.

8. *People v. Champion*, 16 Johns. (N. Y.) 61; see *Hill v. Worcester Co. v. Gray* (Mass.) 414; *Jones v. Justices*, 1 Leigh (Va.) 584.

Mandamus will not be granted pending another action. *Oswego Highway Commrs. v. People*, 99 Ill. 587.

Where a peremptory writ of mandamus has been awarded against commissioners of highways, requiring them to open a certain road, it seems that it will be a sufficient excuse, on the part of the commissioners, for not obeying the writ, that after the writ was awarded, and before it was issued and served, the road thereby directed to be opened was vacated by an order of the same commissioners, made in pursuance of statute authority. *Swan Commrs. v. People*, 31 Ill. 97.

On an application for a peremptory writ of mandamus to compel county commissioners to open a road in their county, established by a special act of the legislature, which declared that the location should be complete on the filing of the plat and field notes of the survey in the registry of deeds of the counties through or into which the road passed,—the defendants having denied the filing of the plat, etc., as required by the statute,—it was *held*, that the writ could not issue. *Warner v. Hennepin Co. Commrs.*, 9 Minn. 139.

proach of the expiration of their offices; when the term of office expires their successors must obey the command of the writ.¹ So it lies to compel the county commissioners to issue their warrant for empanelling a new jury where one jury has already been summoned and acted without being able to agree.² Mandamus will lie to compel a township committee to assign a road to the overseers of the highways.³

(b) BRIDGES AND HIGHWAYS.—Mandamus will issue to compel the performance of the *quasi* public duty of building and keeping in repair necessary bridges or causeways.⁴ To compel a board of commissioners to approve or disapprove bridge plans submitted in accordance with statutory provision.⁵ So on application to a judge for the appointment of commissioners to condemn lands he may be compelled to act if such duty is imposed by statute and such a case is made as the statute directs.⁶

1. *People v. Collins*, 19 Wend. (N. Y.) 56.

2. *Mendon v. Worcester*, 10 Pick. (Mass.) 235.

3. *Anonymous*, 7 N. J. L. (2 Hals.) 192.

4. *State v. Bramwell* (Kan.), 18 Pac. Rep. 952; *State v. Demaree*, 80 Ind. 519; *State v. Gibson Co. Commrs.*, 80 Ind. 478; *State v. Cloud County Commrs.*, 39 Kan. 700; *Howe v. Crawford Co.*, 47 Pa. St. 361; see *People v. Supervisors of Dutchess*, 1 Hill (N. Y.) 50; *People v. Supervisors of New York*, 1 Hill (N. Y.) 362; *Brander v. Chesterfield Judges*, 5 Call (Va.) 548; *Haines v. People*, 19 Ill. App. 354; *Com. v. Justices*, 2 Va. Cas. 499; *Com. v. Justices of Fairfax Co.*, 2 Va. Cas. 9; *State v. Ousatonic Water Co.*, 51 Conn. 137. Compare *State v. Coleman*, 33 Mo. App. 470.

In *Howe v. Crawford Co.*, 47 Pa. St. 361, it was held that the duty enjoined upon the commissioners to repair bridges would be enforced by mandamus.

It was conceded in *People v. Dutchess Co.*, 1 Hill (N. Y.) 50, that the duty to keep bridges in repair was an imperative one, but a doubt was suggested as to whether the remedy for a failure to perform it would be by an indictment or by mandamus. The court of appeals of Virginia, in *Brander v. Chesterfield Judges*, 5 Call (Va.) 548, held that county officers could be compelled by mandamus to repair a public bridge. The same general doctrine is declared in *Pumphrey v. Mayor etc.*, 47 Md. 145; s. c., 28 Am. Rep. 446; and in *Co. Commrs. etc. v. Duckett*, 20 Md. 468.

Where the city council is obliged to

keep a street in repair, if they suffer it to so far fall into disrepair as to prevent passage thereon in carriages, and to render it dangerous for people having houses thereon to pass to and fro, and to endanger said houses, the abutters thereon have cause of action by reason of the special injury done to them, and may have mandamus to issue to the council. *Hammar v. Covington*, 3 Met. (Ky.) 494.

Mandamus will not issue to compel highway commissioners to rebuild bridges, if they neither have the necessary means nor the power to procure the means by taxation. *Bloomington Highway Commrs. v. People*, 19 Ill. App. 253; see *Justices v. Munday*, 2 Leigh (Va.) 165; *State v. Board of Commrs.*, 119 Ind. 448.

Private Bridge.—The court cannot, under the Michigan statute (*How. Stat.*, § 1379), compel the township commissioner to declare a private bridge a highway or require him to expend money of his township upon its repair. The public necessity of a bridge must be determined by the local authorities, and not by the courts. *Travis v. Skinner*, 72 Mich. 152.

Approach to Bridge.—County commissioners cannot be compelled by mandamus to construct an approach to a county bridge, erected by them on the site indicated by the bridge viewers, where the bridge does not connect with a public highway, as the commissioners have no power to appropriate private land, or to lay out a highway to the bridge. *Com. v. Loomis*, 128 Pa. St. 174. 5. *Commrs. v. Board of Public Works*, 39 Ohio St. 628.

6. *Chicago etc. R. Co. v. Wilson*, 27

(c) OBSTRUCTIONS IN STREETS AND HIGHWAYS.—Where the charter gives the city council full power to keep in repair the streets and to provide for keeping them in repair and to prohibit obstructions therein, mandamus is the proper remedy.¹ But if there is a remedy at law for obstructing a public highway and will afford a remedy convenient, beneficial and effectual in its nature, as a mandamus to compel the opening of the highway, a mandamus will not be awarded.² Nor will it be allowed when the legal existence of the road as a public road is in question.³

(d) ALLOWANCE OF FEES.—Where fees are to be determined by county commissioners or by a county court, mandamus will not lie to compel their allowance.⁴

4. **Supervisors.**—Where a board of supervisors have a discretion in the performance of certain duties and have once acted and exercised their discretion, a mandamus will not lie to compel them to act further.⁵ Mandamus will not lie to compel them to

Ill. 128; *Illinois Central R. Co. v. Rucker*, 14 Ill. 353.

To Vacate a Road.—In *New Jersey*, a mandamus will lie to the court of common pleas to make an appointment of surveyor to vacate a road which has been laid out and recorded, though never opened, where, after a proper application, they have refused to make such appointment. *State v. Judges*, 4 Halst. (N. J.) 246.

1. *People v. Bloomington*, 63 Ill. 207; *Hammar v. Corington*, 3 Met. (Ky.) 494; *State v. Orange*, 2 Vroom (N. J.) 131; *Uniontown v. Com.*, 34 Pa. St. 293; *People v. Thompson*, 32 Hun (N. Y.) 93; *People v. Commrs. (Ill.)*, 22 N. E. Rep. 596; *Patterson v. Vail*, 43 Iowa 142.

In such case mandamus will lie against a road supervisor to compel the removal of a fence or other obstruction placed by him across such highway. *Larkin v. Harris*, 36 Iowa 93; *Patterson v. Vail*, 43 Iowa 142.

Mandamus will not issue to compel the removal by a city officer of a structure in a public street in a sparsely populated part of the city erected by a railroad corporation under color of legislative authority. *People v. Manhattan R. Co.*, 20 Abb. (N. Y.) N. Cas. 393.

It is no reason for refusing a writ of mandamus to compel a public officer to abate a nuisance in a city street, that there are thousands of similar nuisances. *People v. Newton*, 20 Abb. (N. Y.) N. Cas. 386.

2. *Commrs. etc. v. People*, 73 Ill. 203; *Commrs. of Highways of Yorktown v. People*, 66 Ill. 339.

3. *State v. Buhler*, 90 Mo. 560.

Where a substantial doubt exists as to the right or power of an officer to perform a duty, mandamus will not lie to compel him to do so; it will not lie to compel a road overseer to remove an obstruction from a public road where there is a question as to the legal existence of the road as a public road. *State v. Buhler*, 90 Mo. 560.

4. *State v. County Court*, 83 Mo. 559.

The reason for this decision is that mandamus never lies to compel the performance of a discretionary judicial act, such as the allowance of fees. *State v. Marshall*, 82 Mo. 484; another reason exists where the claimant may appeal from the decision of the county court or county commissioners. This remedy being adequate excludes mandamus. *Boisliniere v. Board of Co. Commrs.*, 32 Mo. 375. See also, in this connection, *Williams v. Judge of Cooper Court*, 27 Mo. 225; *Blecker v. St. Louis Law Commr.*, 30 Mo. 111; *State v. Macon Co. Court*, 68 Mo. 48; *State v. Lafayette Co.*, 41 Mo. 22; *Miltonberger v. St. Louis Co. Court*, 50 Mo. 172; *State v. Byers*, 67 Mo. 706.

5. *People v. Supervisors of St. Lawrence*, 30 How. (N. Y.) Pr. 173; *Ex parte Farrington*, 2 Cow. (N. Y.) 407; *People v. San Francisco*, 27 Cal. 655; *Welch v. Board of Supervisors*, 23 Iowa 199.

Wis. Rev. Stat., ch. 19, § 113, confers on town supervisors the power of deciding upon the necessity of building or repairing bridges, where the cost of

issue a certificate to one whom they have declared not elected,¹ or to compel them to lay out a road where the necessary proceedings before them have not been had.²

Where a specific duty is imposed on the supervisors by statute and they do not conform to the statute, mandamus will issue to compel them.³ It will issue to compel supervisors to admit and allow the claims of county officers,⁴ or to compel a board of supervisors to levy a tax to repay a sum collected as a tax contrary to law, which the legislature have directed them to repay.⁵

5. De Facto Officers.—An officer *de facto* while in office may be compelled to perform official acts in behalf of another which the duties of such office dictate.⁶ Mandamus will not lie to eject a municipal officer *de facto* acting under color of right.⁷

6. To Compel Delivery of Books, Records, etc.—Mandamus affords the proper remedy to compel a county officer, duly removed, to surrender the office, books, records, etc.⁸ Or when an officer has resigned his office and his successor has been duly appointed and qualified and entered upon his duties,⁹ and it is not necessary to allege in the application that such successor is eligible to the office, as is the case in *quo warranto* to try title.¹⁰ But a mandamus will not issue to recover the records of an office from an individual who does not pretend to hold them by virtue of office.¹¹

so doing will not exceed \$300, and their judgment on that question cannot be controlled by mandamus. *Winslow v. Mt. Pleasant*, 16 Wis. 613.

1. *Magee v. Supervisors*, 10 Cal. 376.

2. *State v. Supervisors*, 9 Wis. 554.

3. *Adrian v. Supervisors of N. Y.*, 12 How. (N. Y.) Pr. 224. See *People v. Supervisors*, 21 How. (N. Y.) Pr. 322; *Boycé v. Supervisors of Cayuga Co.*, 20 Barb. (N. Y.) 294; *People v. Chenango*, 8 N. Y. (4 Seld.) 317.

4. *People v. Supervisors of New York*, 32 N. Y. 473. See *People v. Supervisors*, 24 How. (N. Y.) Pr. 119; *People v. Supervisors*, 28 Cal. 421.

5. *People v. Supervisors of Otsego*, 36 How. (N. Y.) Pr. 1.

6. *Kelly v. Wimberly*, 61 Miss. 548; *People v. Treasurer of Ingham*, 36 Mich. 416.

Contracts of Officer De Facto.—Where *de facto* officers of a municipality, being the governing body, contracted a debt on behalf of the municipality, passed the claim and ordered the treasurer to pay the bill, and the treasurer, having funds of the municipality, refused to pay upon presentation of the order duly signed, mandamus against the treasurer is the proper remedy to compel payment. *State v. Philbrick*, 49 N. J. L. 374.

7. *French v. Cowan*, 79 Me. 426.

8. *State v. Meeker*, 19 Neb. 444; *McGee v. State*, 103 Ind. 444; *Nelson v. Edwards*, 55 Tex. 389; *Com. v. Athearn*, 3 Mass. 287; *Taylor v. Henry*, 2 Pick. (Mass.) 397; *Hauffman v. Mills* (Kan.), 18 Pac. Rep. 516. See *Welchans v. Shirk*, 98 Pa. St. 17.

Where the relator's rights to possession of the books and papers, to procure which the writ is applied for, cannot be determined without an investigation into the respondent's right to the office whereof he is the *de facto* incumbent, mandamus will not lie. *State v. Williams*, 25 Minn. 340.

A committee appointed by a town to audit the accounts of the overseers of the poor, and to demand and receive from them the books of account belonging to the town, held by the overseers in their official capacity, have no such property in the books as will authorize them to apply in their own names for a mandamus to compel the surrender of the books. *Bates v. Plymouth*, 14 Gray (Mass.) 163.

9. *McGee v. State*, 103 Ind. 444; *Nelson v. Edwards*, 55 Tex. 389; *Runion v. Latimer*, 6 Rich. (S. Car.) 126.

10. *McGee v. State*, 103 Ind. 444.

11. *Hussey v. Hamilton*, 5 Kan. 462.

7. Public Records.—The power of a town clerk to amend his records is confined to the individual whose duty it was originally to make them, and is allowed to him only while he is in office, and against the abuse of this power the law has provided safeguards, not only in the selection of the officer and the sanctions it imposes upon him, but in the provisional remedy it affords by writ of mandamus.¹

Mandamus will lie to correct clerical errors in the assessment rolls while yet in the hands of the assessor.² So it lies to compel a county treasurer to permit the inspection of liquor bonds filed in his office.³

8. Removal of County Seat and County Offices.—Mandamus lies to compel the county commissioners to remove or locate the county seat.⁴ But where a statute requires, as a condition precedent to removal of a county seat, a bond to convey to the county a certain quantity of land at the new location, mandamus will not lie to compel the county commissioners to remove the county seat when they refuse because an invalid bond is tendered them.⁵

Mandamus lies to compel the county officer to keep his office at the county seat.⁶

Mandamus will not lie to compel a mere private person to deliver to the county clerk a book of surveys and plats of the county roads, although the same were made under order of the county court, and paid for by the county. *State v. Trent*, 58 Mo. 571.

1. *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590.

Clerk of School District.—The court will not grant a writ of mandamus, requiring the clerk of a school district to amend his records, where it appears that he has ceased to be clerk, and thus removed without the jurisdiction of the court. *Mason v. School Dist. No. 14*, 20 Vt. 487.

2. *People v. Wilson*, 7 N. Y. Supp. 627.

3. *Brown v. County Treasurer*, 54 Mich. 132.

4. *State v. Fetter*, 12 Wis. 632. See *Sauls v. Freeman*, 24 Fla. 223. See *State v. Juneau Co.*, 38 Wis. 554; *Tithe-row v. Grundy County Court*, 9 Mo. 118.

Mandamus does not lie to contest an election for the relocation of a county seat, Kan. Laws 1869, ch. 27, furnishing an adequate remedy in the ordinary course of law. *State v. Stockwell*, 7 Kan. 98.

5. *Condit v. Board of Commrs.*, 25 Ind. 422.

6. *Rice v. Shay*, 43 Mich. 380; *State v. Weid*, (Minn.), 40 N. W. Rep. 561;

State v. Board of Co. Commrs., 15 Am. & Eng. Corp. Cas. (Kan.) 43. See *People v. Grew*, 29 Mich. 121.

In an action brought to compel a sheriff to keep his office at the county seat, upon his answer that the town named is not the county seat, the validity of a law or election changing the county seat may be tried. *State v. Saxton*, 11 Wis. 27.

In an action of mandamus, brought in the supreme court in the name of the State of Kansas, by the attorney general, to compel the county officers of a certain county to hold their offices at the town of K, which is alleged to be the county seat of the county, *held*, that the supreme court has jurisdiction to hear and determine the case, although in the determination thereof it may be necessary to determine the result of an election held in the county to permanently locate the county seat of such county, and for frauds perpetrated in one of the townships of such county, to wholly ignore the returns from such township and the canvass thereof, and the declaration made by the board of canvassers that a place other than K had become by such election the permanent county seat of the county. *State v. Board of Commrs.*, 35 Kan. 640.

On mandamus to compel county officers to remove their offices to another town, in accordance with the vote of

XIV. MUNICIPAL IMPROVEMENTS—1. Generally.—Where the duty of making local improvements, such as streets, highways or bridges, or of keeping them in repair, is imposed upon municipal corporations, mandamus will lie to compel the performance of that duty.¹ But will not issue to compel highway commissioners to levy a tax for and to open a road or build a bridge where there is no clear duty on the part of the highway commissioners to do the act sought to be coerced.²

Where citizens construct part of a bridge or highway and the public authorities accept and treat it as a part of the public highway, it will be deemed such, and the rights and obligations existing with reference to it will be the same as though the county officers had themselves built it.³

2. Erection of Public Buildings.—Where the statute provides for the erection of certain public buildings by an inferior court, mandamus is the proper remedy to compel them to do it.⁴

3. Contracts of Municipalities.—When a municipal corporation has legally contracted for certain work to be done, and to be paid for in a certain specified way, the corporation may, on the completion of the work, be compelled by mandamus to carry out

the electors, *held*, that the mere charge by defendant that the election was fraudulent, without alleging specific acts, was not sufficient. *Hunter v. Patterson*, 14 Neb. 506.

In an action of mandamus brought in the supreme court by the attorney general in the name of the State, to compel county officers to hold their offices at a certain town, which is alleged to be the county seat, the court may go behind the election returns for fraud. *State v. Hamilton County Commrs.*, 35 Kan. 640.

1. *State v. Demaree*, 80 Ind. 519; *State v. Board of Commrs.*, 80 Ind. 478; *Uniontown v. Com.*, 34 Pa. St. 296; *Commrs. of York Co. v. Com.*, 72 Pa. St. 24; *Ottawa v. People*, 48 Ill. 233; *People v. San Luis Obispo Co.*, 50 Cal. 561; *People v. Bloomington*, 63 Ill. 207; *State v. Supervisors of Wood Co.*, 41 Wis. 28; *Trustees v. Kinner*, 13 Bush (Ky.) 334; *Pumphrey v. Mayor of Baltimore*, 47 Md. 145; *Richards v. Co. Commrs.*, 120 Mass. 401; *People v. San Francisco*, 36 Cal. 595; *Hammar v. Covington*, 3 Met. (Ky.) 494; *People v. Collins*, 19 Wend. (N. Y.) 56; *People v. Brooklyn*, 23 Barb. (N. Y.) 404; *Uniontown v. Com.*, 34 Pa. St. 293; *Com. v. Justices*, 2 Va. Cas. 9. *Compare Reading v. Com.*, 11 Pa. St. 196; *People v. Champion*, 16 Johns. (N.

Y.) 61; *Perrine v. Township Board*, 48 Mich. 641.

The case of *Uniontown v. Com.*, 34 Pa. St. 296, decides that mandamus will lie to compel the officers of a municipal corporation to keep its streets in repair. A provision in the charter of the city of Covington imposed upon the corporate officers the duty of repairing streets, and it was held that the court could compel the performance of the duty by mandamus. *Hammar v. Covington*, 3 Met. (Ky.) 494. Mandamus was held to be the appropriate remedy to compel a municipal corporation to repair its streets in the case of *People v. Bloomington*, 63 Ill. 207, where it was said: "The charter gives the city council full power to keep in repair the streets, and to provide for keeping them in repair, and to prohibit obstructions therein. This power is granted to be exercised for the public benefit, and its execution can be insisted on as a duty. *Bloomington v. Bay*, 42 Ill. 503; *Chicago v. Robbins*, 2 Black. (U. S.) 418."

2. *Com. v. People*, 99 Ill. 587; *State v. Wood County*, 72 Wis. 629.

3. *State v. Demaree*, 80 Ind. 519; *Shear. & Red. Neg.*, § 246; *Angell Highways*, § 38; *State v. Campton*, 2 N. H. 513; *Watson v. Proprietors etc.*, 14 Me. 201.

4. *Com. v. Justices of Hamden*, 2

the stipulations as to payment contained in the contract.¹ So where an officer is required by statute to enter into a contract for paving certain streets the performance of such act will be enforced by mandamus, though the municipality have made no appropriation for its part of the cost.²

4. Estimates.—Mandate lies against a city as a corporation at the suit of a contractor to compel the making of correct estimates of work done by him in the improvement of its streets, according to the terms of his contract, so far as the same may be chargeable to abutting real estate.³ Or at the instance of a citizen and tax payer to compel the council to pass upon estimates of expenses incurred by the employment of examiners under the civil service act by the mayor.⁴ But a bidder on proposals for estimates has no ground for a mandamus, as he has no cause of action and no clear legal right until a contract is made with him and approved by the common council.⁵

5. Discretion of Municipal Authorities.—Where municipal authorities are vested with discretionary powers and are required to exercise their own judgment in making local improvements, mandamus will not lie to control them in the manner of conducting the general duties of their office.⁶

6. Payment and Assessment of Damages.—Mandamus will lie on refusal of public officers to pay damages which have been assessed.⁷ It will lie to enforce the levy of taxes and the collection of damages,⁸ or to issue the bonds authorized for that purpose. *Pick. (Mass.)* 414; *People v. Common Council*, 45 Barb. (N. Y.) 473; *Manor v. McCall*, 5 Ga. 522.

1. *State v. Mayor etc. of New Orleans*, 29 La. An. 868.

If one whose bid for a public work has been accepted by a city has a clear right to the contract, mandamus will not lie to compel the commissioner to execute it; the proper remedy being by an action against the city for damages. If his right is not clear, the writ will also be denied. *People v. Campbell*, 72 N. Y. 496.

2. *Com. v. Dickinson*, 3 Brewst. (Pa.) 561.

In *Com. v. McFadden*, 14 Phila. (Pa.) 161, it was held that mandamus would not issue against the chief engineer of the water department to compel him to lay pipe on a certain street, when it is not alleged that there has been an appropriation by the city councils, which will enable the chief engineer to contract for and proceed with the work.

3. *Wren v. Indianapolis*, 96 Ill. 206. See *Indianapolis v. Patterson*, 33 Ind. 157.

4. *People v. Buffalo Common Council*, 16 Abb. (N. Y.) N. Cas. 96.

5. *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240.

6. *State v. Essex*, 3 Zab. (N. J.) 214; *Hill v. Worcester Co.*, 4 Gray (Mass.) 414; *State v. Police Jury of Jefferson*, 22 La. An. 611; *Mayor v. Roberts*, 34 Ind. 471; *County of St. Clair v. People*, 85 Ill. 396; *Haskins v. Supervisors*, 51 Miss. 406; *Hitchcock v. County Comrs.*, 131 Mass. 519; *Rice etc. Machine Co. v. Worcester*, 130 Mass. 575; *State v. Morris*, 43 Iowa 192; *State v. Henry Co.*, 31 Ohio St. 211; *Dickerson v. Peters*, 71 Pa. St. 53; *Com. v. Henry*, 49 Pa. St. 530; *Travis v. Skinner* (Mich.), 40 N. W. Rep. 234.

7. *Justices of Williamson Co. v. Jefferson*, 1 Coldw. (Tenn.) 419; *Treat v. Middleton*, 8 Conn. 243; *People v. Lowell*, 9 Mich. 144; *State v. Keokuk*, 9 Iowa 438; *Trustees of the Wabash & Erie Canal v. Johnson*, 2 Cart. (Ind.) 219; *People v. Supervisors of Westchester*, 4 Barb. (N. Y.) 64; *Minhinnah v. Haines*, 29 N. J. L. (5 Dutch.) 388; *Wilson v. Berkstresser*, 45 Mo. 283.

8. *Miller v. Bridgewater*, 24 N. J. L. 54; *Johnston v. Supervisors*, 19 Johns. (N. Y.) 272; *State v. Keokuk*, 9 Iowa

pose,¹ or to draw the proper vouchers² or warrants,³ or to audit the accounts and collect the damages,⁴ and to compel the county commissioners to estimate damages caused by injuries done by a railroad company to buildings near the line of their road.⁵

The supposed irregularities in the proceedings of the commissioners would not vitiate and avoid the assessment as against the city. Nor can the respondent be heard to allege, on return to a mandamus, that the charges were exorbitant or that the amount is incorrect, or take advantage of any irregularities in the proceedings,⁶ especially when possession has been taken.⁷

Mandamus lies to compel the court of sessions that improperly and without good cause rejects the verdict of a jury summoned and empanelled to estimate the damages occasioned to any person by the laying out of a highway to do right and accept the verdict.⁸ If it is shown that the road has never been opened or used and that there were irregularities in the laying out, the court will refuse a mandamus to compel the payment of damages.⁹

Where a board of supervisors refuse to act on a report and refuse to make the proposed road a highway, and to declare it open, etc., the mandate can proceed no further than to order them to take action on the report.¹⁰

XV. FORM OF THE WRIT—1. Alternative and Peremptory Writs Defined.—The alternative writ is issued upon the first application for relief commanding the defendant either to perform the act demanded or to show cause, why he does not, before the court at a time and place named. If defendant attends and shows sufficient cause, judgment passes in his favor and the writ is dismissed. If the cause shown is insufficient, or if he makes default, a peremptory writ is issued containing an absolute unqualified command that he shall do the act in question.¹¹

438; Brock v. Hishen, 40 Wis. 674; Higgins v. Chicago, 18 Ill. 276.

1. Duncan v. Louisville, 8 Bush (Ky.) 98.

2. Ryan v. Hoffman, 26 Ohio St. 109.

3. Rudisill v. State, 40 Ind. 485.

4. State v. Wilson, 17 Wis. 687.

5. Dodge v. Essex, 3 Met. (Mass.) 380; Carpenter v. Bristol, 21 Pick. (Mass.) 258.

6. Higgins v. Chicago, 18 Ill. 276; People v. Lowell, 9 Mich. 144.

Upon an application for a mandamus, directing the common council of a city to open a street laid out by them, the court will not notice a formal irregularity in the report of the commissioners appointed to assess damages to landowners, not affecting the right which the petition seeks to enforce, although it might, upon *certiorari*, invalidate the

proceedings of the commissioners. State v. Orange, 2 Vroom (N. J.) 131.

7. Higgins v. Chicago, 18 Ill. 276.

8. Com. v. Norfolk, 5 Mass. 435; Com. v. Middlesex, 9 Mass. 388.

9. People v. Scio, 3 Mich. 121.

10. People v. Cortelyou, 36 Barb. (N. Y.) 164; Regina v. Sheriff of Middlesex, 5 Q. B. 365; People v. Lake Co., 33 Cal. 487.

11. 2 Abb. L. Dict. 77. The alternative writ issues in the earlier stages of the cause in some cases upon a rule to show cause, in others upon a formal petition or application without such rule. In either event, its purpose is one and the same, namely, to apprise the respondent of the nature and grounds of the relator's claim for relief, and to afford him an opportunity of performing the act required, or of showing cause to

2. Alternative Writ.—An alternative writ of mandamus is in the nature of a declaration in an ordinary suit at law and is subject to the same rules of pleading.¹ The writ must contain averments of all such facts as are necessary to show that it is the defendant's duty to execute the command of the writ; that the relator is entitled to the relief he asks and cannot have redress by ordinary legal remedies, and that he has made all reasonable efforts to obtain the redress he seeks.² He must distinctly set forth all the material facts on which he relies, so that the same may be admitted or traversed.³ The defendant is called upon to perform the particular act sought to be enforced, or by a return deny the facts alleged in the writ, or state other matters sufficient to defeat relator's application.⁴

the contrary. It therefore concludes with a clause in the alternative, commanding the respondent to perform the duty in question or show cause to the court by a given day why he should not perform it, and it is from this clause that the alternative writ derives its name. It follows, necessarily, from the object as well as the structure of the alternative writ that it admits of an answer or return, in which the respondent may set forth the reasons why he should not yield obedience to the mandate of the court. The peremptory mandamus is the final mandate of the court granted after full hearing and satisfactory proof commanding the respondent forthwith to perform the duty in question. High Ex. L. Rem., § 529.

1. *People v. Supervisors of Westchester*, 15 Barb. (N. Y.) 607; *Canal Trustees v. People*, 12 Ill. 254; *State v. Union*, 43 N. J. L. 518; *McKenzie v. Ruth*, 22 Ohio St. 371; *State v. School District No. 9*, 8 Neb. 92; *State v. Sheridan*, 43 N. J. L. 82; *Com. v. Commrs. etc.*, 37 Pa. St. 277; *Commercial Bank v. Canal Commrs.*, 10 Wend. (N. Y.) 25; *People v. Judges of Washington*, 1 Cal. (N. Y.) 511; *Boone Commrs. v. State*, 61 Ind. 379; *County Commrs. v. State*, 61 Ind. 75.

2. *State v. Fletcher*, 39 Mo. 388; *Rex v. Bishop of Oxford*, 7 East 345; *Board etc. of Clark Co. v. State*, 61 Ind. 75; *Board etc. of Boone Co. v. State*, 61 Ind. 379; *Hambleton v. Dexter*, 89 Mo. 188. An allegation, in an alternative writ of mandamus, of a demand for certain prisoners "confined in the jail" of the county "under sentence to imprisonment," and giving their names, and the dates on and periods for which they were sentenced, is a sufficient allegation that they are, at the time of the appli-

cation for the writ, so confined. *Holland v. State*, 23 Fla. 123.

3. *Canal Trustees v. People*, 12 Ill. 254; *Peat's Case*, 6 Mod. 310; *Commercial Bank v. Canal Commrs.*, 10 Wend. (N. Y.) 25; *People v. Supervisors of Westchester*, 15 Barb. (N. Y.) 607; *People v. Columbia Common Pleas*, 3 How. (N. Y.) Pr. 30; *United States v. Cape Girardeau Co.*, 16 Fed. Rep. 836; *Lavalle v. Soucy*, 96 Ill. 467; *Houston etc. R. Co. v. Randolph*, 24 Tex. 317; *Hambleton v. Dexter*, 89 Mo. 188; *State v. Leon Supervisors*, 66 Wis. 199; *Commonwealth Bank v. Canal Commrs.*, 10 Wend. (N. Y.) 25.

A writ which omits a necessary fact cannot be cured by the return. *Reg. v. Southeastern R. Co.*, 17 Jur. 901; 4 H. L. Cas. 471. *S. P., London (Mayor etc.) v. Reg. (in error)*, 13 Q. B. 30; 13 Jur. 33; 17 L. J. Q. B. 330—Exch. Cham. And see *Reg. v. Hopkins*, 4 P. & D. 550; 1 Q. B. 160.

It is sufficient if in a petition for a writ of mandamus the statement of facts on which the right is made to depend are stated with a precision sufficient to express the right of one and the duty of the other, in such manner that the ordinary mind, disregarding technicality of pleading, may easily apprehend them. Certainty to a common intent is the rule, and that applies as well to the answer as to the petition, and it is sufficient that the former, without ambiguity or evasion, responds to and denies the assertions of the latter. *Cent. District & Printing Tel. Co. v. Commonwealth*, 114 Pa. St. 592.

4. *Hoxie v. County Commissioners*, 25 Me. 333; *State v. Jones*, 1 Ired. (N. Car.) 129; *Commercial Bank v. Canal Commrs.*, 10 Wend. (N. Y.) 26; *People v. Ransom*, 2 Comst. (N. Y.) 490;

The alternative writ should issue first to show cause why a mandamus should not be granted,¹ and is usually granted *ex parte*, and therefore its issuance is not conclusive on the sufficiency of the application, which may be objected to by the defendant by a motion to quash.² If the relator does not show a clear right to the writ it may be quashed. But he may have leave to amend if his right is left in doubt.³

Where officers are unqualifiedly and unconditionally required to do a specific act the writ should designate specifically the precise act to be performed. But where a discretion is to be exercised by an officer as to the manner in which an act may be done, or rather when the thing desired to be done depends upon the judgment of the officer, the writ should in general terms command the officer to act upon the matter in question without in any way directing him to act in any particular manner or to reach any given result.⁴

3. Refusal to Allow.—When a party prays for a writ of mandamus to enforce a claim substantially broader than the right which he succeeds in establishing, the court is justified in refusing him any writ.⁵ And the refusal to allow an alternative writ of mandamus is not reviewable on error.⁶

4. Peremptory Writ.—A peremptory writ of mandamus is an

Company of Proprietors, 6 Ad. & El. N. S. 898; *King v. Margate Pier Co.*, 3 Barn. & Ald. 220; *King v. Bishop of Oxford*, 7 East 345.

1. *State v. Delfield Supervisors*, 64 Wis. 218; *Re Devereux Street*, 13 Phila. (Pa.) 103.

2. *State v. Lean*, 9 Wis. 279.

3. *State v. Hastings*, 10 Wis. 518; *State v. Slavan*, 11 Wis. 153.

4. *Humboldt Co. v. Churchill Co.*, 6 Nev. 30; *People v. Supervisors of Dutchess*, 1 Hill (N. Y.) 50; *People v. Brennen*, 39 Barb. (N. Y.) 651. See *Cortleyon v. Ten Eyck*, 2 Zab. (N. J.) 45; *Lloyd v. Brinck*, 35 Tex. 1.

If the method of performing the duty is discretionary and optional, a mandamus to compel the defendant to do it in a particular manner is defective unless it shows on its face the impossibility of the defendant exercising the option. *State v. Union*, 43 N. J. L. 518.

Under the laws of Louisiana, the signing of judgment is a necessary and absolute duty on the part of the judge. *Held*, that mandamus is the proper remedy to compel the signing of the judgment, the act of affixing the signature being regarded as purely a ministerial duty. *Life etc. Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291.

Auditing Demands Against Municipal-

ities.—Where the writ issues to compel municipal authorities or boards to audit and pass upon demands against the municipality, it should be limited in form to merely setting the officers in motion and requiring them to act without directing them to act in any particular manner or interfering with their discretion. *People v. Delaware Co.*, 45 N. Y. 205; *Gas Co. v. San Francisco*, 11 Cal. 42; *Bright v. Chenango*, 18 Johns. (N. Y.) 242; *Furman v. Knapp*, 19 Johns. (N. Y.) 248; *People v. Supervisors of New York*, 32 N. Y. 473; *People v. Supervisors of Macomb Co.*, 3 Mich. 475.

A mandamus to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Toulumne Co. v. Stanislaus Co.*, 6 Cal. 440.

Mandamus will not lie to compel the Secretary of State to audit and allow a claim against the special trust fund known as "the trespass fund," where the petition does not aver that there are moneys in the State treasury belonging to that fund properly applicable to the payment of the claim. *State v. Warner*, 55 Wis. 271.

5. *Rosenfeld v. Einstein*, 46 N. J. L. 479.

6. *State v. Capeller*, 37 Ohio St. 121.

extraordinary remedy to coerce the performance of a pre-existing duty or clear and specific legal right, and hence should be granted only where the duty or right is clearly established and the facts upon which it is based are undisputed.¹ It only issues in the first instance where the moving papers preclude the possibility of any valid excuse being consistent with the facts therein contained.² So the courts, in exercising their jurisdiction in mandamus, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner.³

A peremptory writ of mandamus may be quashed or set aside if prematurely, improperly, or unnecessarily issued, or if bad in substance, or if it be impossible or illegal to obey it.⁴

5. Must Conform to the Alternative Writ.—A peremptory writ of mandamus must conform strictly to the alternative writ.⁵ The peremptory writ is in the nature of an execution and must

1. *State v. Mayor of Manitowoc*, 52 Wis. 423; *State v. Hastings*, 10 Wis. 518; *State v. Elwood*, 11 Wis. 17; *People v. Greene County*, 64 N. Y. 600; *State v. Common Council*, 9 Wis. 254.

2. *Harkins v. Supervisors*, 2 Minn. 342; *Harkins v. Sencerbox*, 2 Minn. 344.

In *Schend v. Aid Society*, 69 Wis. 237, it was held that, "in the circuit courts a rule to show cause why a peremptory mandamus should not issue should be allowed to supersede the alternative writ only in cases where, after a hearing upon the rule, no issue of fact appears to be involved." In giving the opinion of the court, LYON, J., said: "If the cause shown against the issuing of the writ presents an issue of fact on a material averment made in support of the order, we think the court should not try such issue of fact on affidavits, but should award an alternative mandamus, to the end that after return thereto the issue may be duly and regularly tried in the manner prescribed by statute and the rules of court. . . . If the respondent is heard in opposition to the application, and there is no dispute about the facts, the application being well founded in law, a peremptory mandamus may be granted in the first instance." See also *State v. Paterson*, 35 N. J. L. 196; *State v. Freeholders*, 35 N. J. L. 269; *Cleveland v. Board of Finance*, 38 N. J. L. 259; *Free Press Assoc. v. Nichols*, 45 Vt. 7; *People v. Chenango Co.*, 11 N. Y. 563; *Commonwealth v. Allegheny*,

37 Pa. St. 277; *People v. New York*, 25 Wend. (N. Y.) 680; *People v. Canal Board*, 13 Barb. (N. Y.) 432; *People v. Thompson*, 25 Barb. (N. Y.) 73; *Reese v. Walker*, 11 How. (N. Y.) 272; *People v. Oldtown*, 88 Ill. 202; 2 *Dillon Mun. Corp.*, § 830 (667).

3. *Gormley v. Day*, 114 Ill. 185; *State v. Inspectors of Election*, 17 Fla. 26; *Ray v. Goodwin*, 4 M. & P. 341; *People v. Chicago etc. R. Co.*, 55 Ill. 95; *People v. Cline*, 63 Ill. 394; *Cristman v. Peck*, 90 Ill. 150; *People v. Lieb*, 85 Ill. 484; *People v. Trustees of Schools*, 86 Ill. 613.

So where an ordinance of a village vacating a street was repealed before it went into effect, but after the filing of a petition for a mandamus to compel the village clerk to post copies of the same or give the relator copies thereof, the court will not award the writ, as to do so would subserve no beneficial purpose. *State v. Inspectors of Election*, 17 Fla. 26.

4. *Weber v. Zimmerman*, 23 Md. 45; In *State v. Conway*, 24 La. An. 132, it is held that the judgment of a court making a writ of mandamus peremptory is a final judgment which cannot be vacated or set aside by the judge on a rule taken by the defendant in mandamus.

5. *People v. Dutchess Co.*, 1 Hill (N. Y.) 50; *State v. Co. Judge*, 12 Iowa 237; *Queen v. East and West India Docks etc. R. Co.*, 2 El. and Bl. 466; *Chance v. Temple*, 1 Iowa 179; *State v. Cheraw etc. R. Co.*, 16 S. Car. 324; *Price v.*

follow the alternative; hence, if the relator is not entitled to require what he demands, the peremptory writ will be denied, although he may be entitled to a part of what he has demanded.¹

When a peremptory writ of mandamus cannot issue in the exact terms of the alternative writ, the latter may be amended so as to preserve the symmetry of the proceedings.²

It is not a sufficient reason for setting aside a peremptory mandamus that a previous alternative writ had not issued.³

6. When Granted.—When a return to an alternative mandamus is deemed insufficient the court will order a peremptory mandamus to issue.⁴ There is strictly no return to the peremptory writ. It is to be obeyed, and a certificate is made of what has been done.⁵ And if the person to whom the writ is directed fails in this perfect and implicit obedience, he is liable to proceedings in attachment for contempt of court.⁶

7. Legal Duty of Respondent.—The relator is bound to satisfy the court that there is a clear legal duty incumbent upon the respondent to comply with all the requirements contained in the alternative writ before the peremptory writ of mandamus will issue.⁷

Cases may arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief.⁸

Harned, 1 Iowa 473; *State v. Cheraw* etc. R. Co., 16 S. Car. 524; *State v. Kansas City* etc. R. Co., 77 Mo. 143; *overruling* *School District No. 1 v. Board of Education of Lamar*, 73 Mo. 627, and *Osage Valley* etc. R. Co. v. *Morgan Co. Ct.*, 53 Mo. 157.

The peremptory writ need not precisely follow the alternative writ in matters of detail. Upon the hearing the court may grant the relief in any form consistent with the case made by the complaint, presented and embraced within the issues. *State v. Weld*, 39 Minn. 426.

If the peremptory writ differs from the alternative only in immaterial details as to the mode of performing the duty required, the substance of both being the same and both requiring the performance of the same act, the variance will not be fatal. *People v. Dutchess* etc. R. Co., 58 N. Y. 152.

1. *State v. Union*, 43 N. J. L. 518; *State v. Gibbs*, 13 Fla. 55; *State v. Assessors of Taxes of Rahway* (N. J.), 17 Atl. Rep. 122.

2. *State v. Alderman*, 1 S. Car. 30.

3. *Knox Co. v. Aspinwall*, 24 How. (U. S.) 376; *People v. Contracting*

Board, 27 N. Y. 378; s. c., 46 Barb. (N. Y.) 254.

4. *Runkel v. Winemiller*, 4 Har. & M. (Md.) 429; *Com. v. Commrs. of Allegheny*, 32 Pa. St. 218; *Regina v. East and West India Docks* etc. Co., 22 Eng. L. & Eq. 113.

5. *Tapp. on Man.* 61, 389, 445 and 456; *State v. Jones*, 1 Ired. (N. Car.) 414; *Queen v. Ledgard*, 1 Ad. & E., N. S. 616; *State v. Board of Canvassers*, 17 Fla. 9; *State v. McLin*, 16 Fla. 17; *People v. Barnett*, 91 Ill. 422; *State v. Smith*, 9 Iowa 334; 3 Black. Com. 111.

6. *High on Ex. L. Rem.*, § 519; *State v. Board of Canvassers*, 17 Fla. 9.

7. *Queen v. Caledonian R. Co.*, 16 Ad. & E., N. S. 19; *People v. Common Council*, 3 Keyes (N. Y.) 81; s. c., 3 Abb. Dec. (N. Y.) 502; 45 Barb. (N. Y.) 473.

The court will not issue the writ of mandamus peremptorily if there be any reason sufficient in fact or in law against it. *Devereaux v. Brownsville*, 29 Fed. Rep. 742.

8. *State v. Kansas City* etc. R. Co., 77 Mo. 143. See *People v. Seymour*, 6 Cow. (N. Y.) 579; *Queen v. Baldwin*, 8 Ad. & E. 947.

8. **Ex parte Application.**—A peremptory writ of mandamus will not be issued upon the mere *ex parte* application of the relator. The defendant should be given an opportunity to show cause why it should not issue.¹ But where notice has been given and both parties are heard and there is no dispute about the facts, and the law is with the application, a peremptory mandamus will be granted in the first instance. In such a case the court will not put the party to the useless delay of going through with the forms of an alternative mandamus.²

9. **Refusal to Award Mandamus.**—At common law a writ of error would not lie to the judgment of an inferior court awarding or refusing an alternative mandamus upon an application for it or in awarding or refusing a peremptory mandamus upon the return to the alternative writ. But in this country the practice is otherwise. The granting or refusing of it is not a matter of mere discretion in the court, and whenever a suitor is entitled to a right which is withheld from him by the decision of the court, it can scarcely be said to be a matter of discretion which is understood to be the action of the court on such matters as are not demandable of right but are accorded to the parties to advance the justice of the case.³

10. **Certainty Required.**—The precise thing which is required should be set forth in the peremptory writ with great particularity, in order that the respondent may be definitely apprised of all that he is commanded to do.⁴ As to public officers, it is sufficient

1. *Swan v. Gray*, 44 Miss. 397; *Armijo v. Territory*, 1 New Mexico 580; *Adams v. Duffield*, 4 Brewst. (Pa.) 9.

Where a statute expressly authorizes the issue of the peremptory writ in the first instance, it is issued only upon a state of unquestionable facts, leaving no room for doubt as to the right to the performance of the act sought to be compelled, and when it is apparent and manifest that no valid excuse can be given for nonperformance. *Home Ins. Co. v. Scheffer*, 12 Minn. 382.

2. *Ex parte Rogers*, 7 Cow. (N. Y.) 526; *Knox Co. v. Aspinwall*, 24 How. (U. S.) 376. See *Ex parte Goodell*, 14 Johns. Rep. 325.

No peremptory mandamus can issue without notice in some form to the defendant, or a waiver of notice by an appearance. *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. Rep. 602.

3. *Hardee v. Gibbs*, 50 Miss. 805; *Ex parte Morris*, 11 Gratt. (Va.) 292; *Etheridge v. Hall*, 7 Port. (Ala.) 47; *State v. Lancaster Co.*, 13 Neb. 223; *State v. Lewis*, 76 Mo. 370; *Griffin v. Wakelee*, 42 Tex. 513. A writ of error lies upon refusal of the court to grant a peremp-

tory mandamus when judgment is pronounced after issue joined upon plea of demurrer interposed upon the coming in of the return of the alternative mandamus. *People v. Brooklyn*, 13 Wend. (N. Y.) 130; and see *People v. Throop*, 12 Wend. (N. Y.) 183.

In *New Jersey* the common law rule is preserved. *Layton v. State*, 4 Dutch. (N. J.) 575.

In *Michigan*, where the relator institutes proceedings in the district court by alternative mandamus, and that court dismisses the writ, not for any technical defect, but upon a ground which the district court hold shows the relator not entitled to relief, the decision is a bar to another proceeding by mandamus for the same cause. *State v. Hard*, 25 Minn. 460.

Evidence.—Petition for mandamus dismissed, because the plaintiff was allowed to file a petition in the place of one which was alleged to have been lost, when no proof that the original had ever become a part of the record was made. *Baker v. Mayor*, 2 Heisk. (Tenn.) 117.

4. *State v. Dubuque*, 11 Iowa 155.

to inform them in a general way what their duty is and to command its performance, unless they can justify or excuse the neglect.¹

Where there is any uncertainty in the terms of a mandamus the circuit court may refer to the decree of the supreme court in the case made at the time of issuing the mandamus.²

11. Peremptory Writ Cannot be Stayed by Injunction.—A peremptory writ of mandamus from any court of competent jurisdiction when once issued cannot be stayed by injunction like an ordinary execution upon a judgment at law.³

XVI. PARTIES—1. Relators.—Mandamus is now under existing statutes nearly everywhere in England and America considered as a civil action by and between the real parties thereto, the relator and respondent,⁴ who are denominated the plaintiff and the defendant, and the action is prosecuted in the name of the relator as plaintiff and not in the name of the State as formerly.⁵ Illinois,

Where in a proceeding by mandamus to compel the payment of certain orders by the treasurer of a school district, there was no description of the orders by number or amounts nor a recital of the use to which the money to be drawn thereon should be applied, in either the petition or the alternative or peremptory writs of mandamus, it was held that the proceedings were defective and the peremptory writ should not have been granted. *State v. District Township*, 9 Iowa 155.

1. *People v. Dutchess Co.*, 1 Hill (N. Y.) 50; *People v. Nostrand*, 46 N. Y. 375.

A mandatory clause commanding a town supervisor "to call an election of the legal voters of the said township under the laws of this State relating thereto," held, to be too uncertain, and the writ was refused on appeal. *People v. Brooks*, 57 Ill. 142.

2. *West v. Brashear*, 14 Pet. 51.

3. *Weber v. Zimmerman*, 23 Md. 45; *Cumberland etc. R. Co. v. Judge of Wash. Co. Court*, 10 Bush (Ky.) 568. See *Watson v. Avery*, 3 Bush (Ky.) 640.

4. *Brown v. Crego*, 29 Iowa 321; *Kendall v. Stokes*, 3 How. (U. S.) 87, 100; *Arberry v. Bearers*, 6 Tex. 457; *State v. Marston*, 6 Kan. 525; *Hagerty v. Arnold*, 13 Kan. 367; *State v. Faulkner*, 20 Kan. 541. See *Eden Dist. Twp. v. Templeton Independent Dist.*, 72 Iowa 687; *Brower v. O'Brien*, 2 Ind. 423; *People v. Lewis*, 3 Abb. (N. Y.) App. Dec. 537.

5. *State v. Cole*, 33 La. An. 1356.

Private persons may, without the intervention of the government law officer, move for a mandamus to enforce a public duty not due to the government as such. *Union Pacific R. Co. v. Hall*, 91 U. S. (1 Otto) 343; *Hall v. Union Pac. R. Co.*, 3 Dill. 515. See also *U. S. v. Union Pac. R. Co.*, 3 Dill. 524; *State v. County of Jefferson*, 11 Kan. 69; *Moore v. Cort*, 43 Iowa 503; *State v. County Judge*, 2 Iowa 280; *State v. Jennings*, 56 Wis. 113; *Stoddard v. Benton*, 6 Colo. 506; *Cannon v. Janvier*, 3 Houst. (Del.) 27. See *Morris v. Womble*, 30 La. An., pt. 2, 1312. Compare *Bishop v. Marks*, 15 La. An. 147; *State v. Commrs. of Perry County*, 5 Ohio St. 497.

A private citizen may be a party to a proceeding for mandamus to compel public officers to enforce certain city ordinances. *State v. Francis*, 95 Mo. 44.

The defendant corporation, organized under an act of the legislature approved March 31st, 1863, is a private stock corporation, and not an eleemosynary or public corporation; under the provisions of its charter no one can claim the right to receive instruction in the institution on any terms, and no provision is made for gratuitous instruction; the only restrictions upon it are that no religious tenets shall be required of any trustee or student, and "no sectarianism shall be taught or tolerated" in the institution, and that "persons of both sexes shall be admitted to all advantages; and no violation of these provisions is alleged; but the only object of

Michigan, New York, South Carolina, Wisconsin, and possibly a few other States, constitute an exception to the general practice of the present day.¹

(a) WHO PROPER RELATOR.—The only proper parties to mandamus are the relator or relators claiming to be interested in the performance of the duty and the party upon whom the duty is imposed by law; and it is inconsistent with the nature of the remedy to bring in as defendants parties only collaterally or incidentally interested in the subject of the controversy.²

(b) DEGREE OF INTEREST.—When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right, the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced.³

this proceeding is to determine who are entitled to vote at elections of trustees or at other corporate meetings of the stockholders. *Held*, that on general principles of public law, the attorney general cannot bring the action, but the remedy is by private action of the parties aggrieved. *Atty. Gen. v. Albion Academy*, 52 Wis. 469.

1. *State v. County of Jefferson*, 11 Kan. 69.

Consent of the State.—Where a holder of a certificate, on which a survey had been refused by the surveyor, sued out a writ of mandamus, to compel him to issue the certificate, *held*, that it was in fact a suit against the State, and that it could not be maintained until the State had given its consent to be sued. *League v. De Young*, 2 Tex. 497.

2. *State v. Smith*, 7 S. Car. 275; *Hyatt v. Allen*, 54 Cal. 353; *Boner v. Adams*, 65 N. Car. 639. See *State v. Haben*, 22 Wis. 660; *State v. Zanesville etc. T. Co.*, 16 Ohio St. 308; *Holland v. State (Fla.)*, 1 So. Rep. 521; *Waldrom v. Lee*, 5 Pick. (Mass.) 323; *State v. Burkhardt*, 59 Mo. 75; *People v. Lake Shore etc. R. Co.*, 18 N. Y. Supreme Ct. 1.

In an action by the trustee of a new township, created by the division of a civil township, for a writ of mandate against the county auditor to compel an equitable division and apportionment of the various funds belonging to the original township at the time of the di-

vision, it is not error to deny the application of the trustee of the latter to be made a party defendant to the proceeding, he showing no substantial interest in the controversy. *Fowle v. State*, 110 Ind. 120.

3. *State v. Madison Co. Commrs.*, 92 Ind. 133; *Stoddard v. Benton*, 6 Colo. 508; *Ottawa v. People*, 48 Ill. 233; *County of Pike v. People*, 11 Ill. 202; *School Trustees v. People*, 71 Ill. 559; *Pumphrey v. Mayor of Baltimore*, 47 Md. 145; *Glencoe v. People*, 78 Ill. 382; *State v. Gracey*, 11 Nev. 223; *McConihe v. State*, 17 Fla. 238; *Moses v. Kearney*, 31 Ark. 261; *State v. Board of County Commrs.*, 17 Fla. 707; *Harwood v. Case*, 37 Iowa 692; *Hightower v. Overhauser*, 65 Iowa 347; *State v. Shropshire*, 4 Neb. 411; *School Trustees v. Ball*, 71 Ill. 559; *Hamilton v. State*, 3 Ind. 452; *People v. Supervisors of Kent Co.*, 38 Mich. 421; *State v. Doyle*, 40 Wis. 175; *People v. Collins*, 19 Wend. (N. Y.) 56; *Hall v. People*, 57 Ill. 307; *People v. Halsey*, 37 N. Y. 344; *Linden v. Alameda Co.*, 45 Cal. 60; *State v. Henderson*, 38 Ohio St. 644; *Peck v. Booth*, 42 Conn. 271; *Lyon v. Rice*, 41 Conn. 245; *State v. County Judge of Marshall*, 7 Iowa 186; *People v. State Auditors*, 42 Mich. 422; *People v. Halsey*, 53 Barb. (N. Y.) 547; *Harrington v. Sawyer*, 36 Cal. 289; *United States, Pollock v. Hall (D. C.)*, 16 Wash. L. Rep. 782; *Thomas v. Carteret County*, 66 N. Car. 522; *City of Greenfield v. State (Ind.)*,

(c) **DISTINCT INTERESTS CANNOT BE JOINED.**—Two or more persons having separate interests seeking redress by mandamus cannot join in one and the same writ, but should have separate writs according to their several interests.¹ So one and the same writ cannot be directed to two or more respondents having separate interests.²

(d) **DEATH OF RELATOR.**—A petition for a writ of mandamus cannot be prosecuted after the death of the petitioner.³

2. Respondents.—A writ of mandamus runs only against the officer who is to do the particular official act commanded,⁴ and should be addressed to him in his official capacity.⁵ The writ should be directed to all the persons whose duty it is to perform

15 N. E. Rep. 241; Village of Glencoe v. People, 78 Ill. 382; State v. Doyle, 40 Wis. 175. Compare State v. Strong, 25 Me. 297; People v. Regents of University, 4 Mich. 98; Adkins v. Doolen, 23 Kan. 659; Reedy v. Eagle, 23 Kan. 254; Turner v. Commrs., 10 Kan. 16; Babbett v. State, 10 Kan. 9; Sanger v. Co. Commrs. of Kennebec, 25 Me. 291; Heffner v. Comm., 28 Pa. St. 108; People v. Inspectors of State Prison, 4 Mich. 187; State v. Sovereign, 17 Neb. 173.

In Mitchell v. Boardman, 79 Me. 469, it is held that a writ of mandamus will be granted to a private individual only in those cases where he has some private or particular interest to be subserved or some particular right to be protected independent of that which he holds in common with the public at large. It is for the public officers exclusively to apply for the writ when public rights are to be subserved. See Hyatt v. Allen, 54 Cal. 353.

A county has power to act as relator in an application for a writ of mandamus to compel the board of supervisors of another county to raise a tax which is to go into the treasury of the relator. People v. Alameda County, 26 Cal. 641.

Mandamus will not lie in the name of the people at the relation of a private person when the latter is the only real party in interest. People v. Pacheco, 29 Cal. 210.

1. King v. City of Chester, 5 Mod. Rep. 10; King v. Town of Andover, 12 Mod. Rep. 332; King v. Mayor of Kingston-upon-Hull, 8 Mod. Rep. 209. And see Hoxie v. Commrs. of Somerset, 25 Me. 333; Wright v. Gallatin County Commrs., 6 Mont. 29; Haskins v. Supervisors, 51 Miss. 406; State

v. Reno County Commrs., 38 Kan. 317.

Several persons whose bids for county printing have been rejected by the board of commissioners cannot join in a proceeding for a writ of mandate to compel the contract for such printing to be awarded to them. Wright v. Commrs., 6 Mont. 29.

If the respondent to a writ of mandamus which states the grievance of three towns whose several supervisors improperly unite in the writ, submits to answer, the case will be heard upon the merits, and will not be dismissed because of such improper joinder. People v. Ontario County Supervisors, 85 N. Y. 323.

2. State v. Chester, 10 N. J. L. (5 Hals.) 292. See State v. Minneapolis etc. R. Co., 39 Minn. 219; State v. Reno County (Kan.), 16 Pac. Rep. 337. See State v. Police Jury (La.), 3 So. Rep. 88.

3. Booze v. Humbird, 27 Md. 1.

4. Farrell v. King, 41 Conn. 448; People v. Common Council, 3 Keves (N. Y.) 81; Regina v. Mayor of Derby, 2 Salk. 436. See State v. Smith, 9 Iowa 334; Republica v. Commrs. of Phila. Co., 4 Yeates (Pa.) 181; Hollister v. Judges, 8 Ohio St. 201; People v. Hillard, 29 Ill. 419; People v. Matterson, 17 Ill. 167; Brower v. O'Brien, 2 Ind. 423; Rex v. Harris, 3 Burr. 1421.

Mandamus issued to compel a county board of chosen freeholders to pay a bill. Instead of ordering its payment the board sent it to the county auditor to be audited, whereupon a writ of mandamus against him was applied for. Held, that it should be refused, the remedy being under the writ already issued against the board. State v. Applegate, 49 N. J. L. 376.

5. Chance v. Temple, 1 Iowa 179.

the act required, though some of them may be applicants for the writ.¹ If the petition is against two persons, and it cannot be sustained as to one of them, it must necessarily be denied as to both.²

(a) SUCCESSORS IN OFFICE.—An action for mandamus is to be regarded as a proceeding against the officer and not against the individual; and when proper papers have been once served upon the officer any proceeding which they warrant may be taken against his successors without commencing *de novo*.³ But the successor of an officer who has been proceeded against by mandamus is not a proper party.⁴

(b) CORPORATIONS.—Mandamus to compel a municipal corporation to perform a duty may properly be directed to the mayor and city council in their official capacity instead of the corporate name of the municipality.⁵ The writ, when directed to a corpo-

1. *State v. Jones*, 1 Ired. (N. Car.) 129; *Cullem v. Latimer*, 4 Tex. 329; *Fisk v. Jefferson Police Jury*, 38 La. An. 508.

2. *People v. Yeates*, 40 Ill. 126.

Evidence.—Facts warranting the exclusion of a respondent in mandamus from office are not to be presumed when not supported by the evidence. *Gorman v. Board of Police*, 35 Barb. (N. Y.) 527; *Titus v. Same*, 35 Barb. (N. Y.) 535.

3. *State v. Madison*, 15 Wis. 37; *People v. Collins*, 19 Wend. (N. Y.) 56; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *People v. Barnett Supervisors*, 100 Ill. 332; *State v. Gates*, 22 Wis. 214; *Graham v. Maddox*, 6 Am. L. Reg. 626; *Lindsey v. Auditor of Kentucky*, 3 Bush (Ky.) 231; *Bassett v. Barbin*, 11 La. An. 672; *Pegram v. Cleaveland Co.*, 65 N. Car. 114; *Columbia Co. v. Bryson*, 13 Fla. 281; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *State v. Puckett*, 7 Lea (Tenn.) 709; *Hardee v. Gibbs*, 50 Miss. 802; *Clark v. McKenzie*, 7 Bush (Ky.) 523; *People v. Barnett Supervisors*, 100 Ill. 332. But see *People v. Squire* (N. Y.), 18 N. E. Rep. 362. Compare *U. S. v. Boutwell*, 17 Wall. (U. S.) 604; *People v. Sage*, 3 How. (N. Y.) Pr. 56.

Where a peremptory writ of mandamus has been awarded against the supervisor of a town commanding him to execute, in behalf of the town, certain bonds to the relator, and the officer has not obeyed the command of the writ, and his term of office has expired, an *alias* peremptory writ may properly be awarded against his successor in office to compel him to perform the acts

which the former had been by the first writ ordered to perform. This is but a repetition of the writ against the same party represented by another person. It is not making a new party or any amendment to the judgment or record, within any rule not allowing amendments. The duty upon the officer first commanded to execute it is a continuing duty upon him and his successors in office until it is performed. *People v. Barnett Supervisors*, 100 Ill. 332.

Proceedings against the clerk of a township to enforce its duty of levying the amount of such a judgment are against it, and do not abate by his resignation and the appointment of his successor. *Thompson v. U. S.*, 103 U. S. 480.

4. *Beachy v. Lamkin*, 1 Idaho 48.

5. *People v. Mayor of Bloomington*, 63 Ill. 207; *Mayor v. Lord*, 9 Wall. (U. S.) 409. See *People v. Common Council of New York*, 3 Keyes (N. Y.) 81; *Fisher v. Charleston*, 17 W. Va. 595, 628.

Mandamus for the purpose of requiring the officers of a city to perform a corporate act is to be regarded as a proceeding against the corporation, and an appeal from the decision of the court below is properly prosecuted in the name of the city. *City of Louisville v. Kean*, 18 B. Mon. (Ky.) 9.

Commissioners of highways being a *quasi* corporation, the naming of the individuals composing the body in a petition for mandamus may be regarded as surplusage. The proceeding is properly brought against them as "the commissioners of highways of the town

ration or ministerial officer, directs the manner in which they shall proceed.¹

3. Who May Intervene.—Any third person having an interest either in the success of the relator or respondent, or opposed to both, may intervene in the mandamus suit.²

XVII. PLEADING.—The general principles of pleading prevail in mandamus proceedings so far as the nature of the proceeding admits of their application.³ The alternative writ stands in the place of the declaration of which the return is an answer.⁴ The title of the relator to the relief asked must be clearly and distinctly stated in the alternative mandamus, so that the facts alleged may be admitted or traversed.⁵

In cases of mandamus the court will look into the whole record and determine whether it is the proper remedy as well as whether the allegations are sufficient to authorize the writ.⁶ Where the issue involves facts outside of the record it must be sent to some circuit court, or other court of appropriate jurisdiction, where the issue can be tried by a jury and the verdict certified back to the supreme court.⁷

of —," naming the town. *Sheaff v. People*, 87 Ill. 190.

Where a writ was directed to a board of canvassers, *held* that it was not necessarily erroneous, although one of the former members had become *functus officio*. *State v. Bailey*, 7 Iowa 390.

In England it has been held that mandamus not directed to the body politic by its corporate name but to the mayor and aldermen of the municipality it might be quashed. *Regina v. Mayor of Hereford*, 2 Salk. 701. See *King v. Taylor*, 3 Salk. 231. But see *Mayor of Abingdon, Ltd. Raym.* 559.

1. *People v. Steele*, 2 Barb. (N. Y.) 397.

2. *State v. Pilsbury*, 31 La. An. 1.

In a proceeding by mandamus to compel the state auditor to issue his warrant in favor of the applicant for a sum found due, the latter by a statutory arbitration between him and the state, a creditor of the applicant cannot intervene and ask the court to direct the auditor to issue to him a warrant for the amount of his debt. *Hewitt v. Craig*, 86 Ky. 23.

3. *Fisher v. Charleston*, 17 W. Va. 595; *Washington etc. Comms. v. Gibson*, 7 Ill. App. 231; *People v. Hach*, 33 Ill. 139; *Boody v. Watson* (N. H.), 4 N. Eng. Rep. 573; *People v. Mayor of Chicago*, 51 Ill. 28; *Silver v. People*, 45 Ill. 227; *People v. Hillard*, 29 Ill. 418; *People v. Salomon*, 46 Ill. 336; *State v. Sheriden*, 43 N. J. L. 82;

See *Board etc. of Clark Co. v. State* 61 Ind. 75; *Jessup v. Carey*, 61 Ind. 584; *Board etc. of Boone Co. v. State*, 61 Ind. 379; *Smith v. Johnston*, 69 Ind. 55; *Ex parte Candee*, 48 Ala. 386; *Savage v. Holmes*, 15 La. An. 334. Compare *Smith v. St. Francois Co. Court*, 19 Mo. 433.

The pleadings in mandamus have the same effect and are to be construed as in civil actions. *Ohio Rev. St.*, § 6751-2; *State v. Haws*, 43 Ohio St. 16.

4. *Silver v. People*, 45 Ill. 224; *People v. Ohio Grove*, 51 Ill. 191; *People v. Order American Star*, 53 N. Y. Super. Ct. 66; *Johnson v. Smith*, 64 Ind. 275.

5. *Commercial Bank v. Canal Comms.*, 10 Wend. (N. Y.) 25; *Amos v. Burros*, 11 Ill. App. 383; *State v. Fletcher*, 39 Mo. 388; *State v. Everitt*, 52 Mo. 89; *People v. Davis*, 93 Ill. 133; *Lavalle v. Soucy*, 96 Ill. 467; *People v. Glann*, 70 Ill. 232; *Hosier v. Board*, 45 Mich. 340; *Ex parte Fleming*, 2 Wall. 759; *Withers v. State*, 36 Ala. 252.

It is not enough to refer in the writ to the affidavits and other papers on file, on which the order for the mandamus was made; such reference is allowable to show the amount of a sum of money claimed, but not the right of the relator thereto. *Commercial Bank v. Comms.*, 10 Wend. (N. Y.) 25.

6. *Comms. of La Grange Co. v. Cutler*, 7 Ind. 6. See *Hartshorn v. Ellsworth*, 60 Me. 276.

7. *People v. Young*, 40 Ill. 87.

1. Requisites of Petition.—An application for a mandamus to enforce an alleged right of relator must show the facts constituting such right. A mere allegation that he is entitled to the right is not sufficient.¹ Thus where the *gravamen* of an action is the

1. *People v. German Church*, 3 Lans. (N. Y.) 434; *State v. Hammerstein v. Williams*, 95 Mo. 159. See *State v. Mobile etc. R. Co.*, 59 Ala. 321; *Pagborn v. Young*, 3 Vroom (N. J.) 29; *Schwartz v. Wilson*, 75 Cal. 502.

It is sufficient that the writ shows facts from which a duty legally results, without stating the statute by force of which the duty arises. *State v. County Judge*, 7 Clarke (Iowa) 186.

Allegation of Power to Levy Taxes.—In the action by mandamus against the mayor and aldermen of a municipal corporation, where the writ alleges the failure and refusal of the respondents, upon request, to provide for the assessment or collection of a tax, there is sufficient allegation of demand and refusal, and it is unnecessary for the relator to allege that the respondents had not exhausted their power to levy taxes. *State v. Mayor*, 22 Fla. 21. See *Kidder v. More*, 26 Vt. 74.

Place of Business.—A petition to the county court for commissioners to appraise the value of certain lands sought to be taken for the company, filed by persons claiming to be a corporation, was dismissed on the ground that the articles did not show sufficiently where the principal place of business of the company was located. The company applied to the supreme court for a writ of *certiorari*. The writ was refused, and the court held that the county judge had not exceeded his jurisdiction under Cal. act of 1858, and that the proper remedy was by mandamus from the district court. *Re Spring Valley etc. Works*, 17 Cal. 132.

Location of Railroad.—In an alternative writ of mandate to compel the auditor to place on the duplicate taxes levied in aid of a railroad, it is sufficient to aver as a fact that the railroad has been permanently located in the township, without alleging that the fact has been judicially determined. *Coffyn v. State*, 91 Ind. 324.

Issuing Warrant.—In a petition to the supreme judicial court for a writ of mandamus, commanding the judge to issue a warrant, if the proceedings in insolvency were commenced on application of a creditor, it is necessary to allege, and to prove, unless it is admit-

ted at the hearing, that the facts required to be set forth in such application appeared to such judge to be true. *Kimball v. Morris*, 2 Metc. (Mass.) 573.

Issuing of Bonds.—Under an agreement to issue county bonds, "said county to receive for each bond as issued a certificate for the same amount of stock in said company," held, that in a petition for mandamus to compel the issuing of the bonds, relator need aver only readiness to issue certificates on delivery of the bonds. *State v. Co. Judge*, 9 Iowa 288.

Payment of Warrants.—In an application for a mandamus to compel a county treasurer to pay two warrants, the averment that the auditor drew the warrants is sufficient, as the law will presume that he drew them properly; but the treasurer is at liberty to plead any illegality in them as a defence. *Connor v. Morris*, 23 Cal. 447.

Generally.—A petition for mandamus to compel a village to levy a tax to pay a judgment rendered in condemnation proceedings for opening a street is defective, if it fails to set forth the ordinance showing that compensation was to be made by the collection of a general tax. *Hyde Park v. Thatcher*, 13 Ill. App. 613.

A complaint in mandamus against a comptroller is fatally defective if it fails to allege that there are "moneys, not otherwise appropriated by law," out of which the compensation sought for is to be paid. *Redding v. Bell*, 4 Cal. 333. See *Huff v. Kimball*, 39 Ind. 411; *Miller v. State (Kan.)*, 22 Pac. Rep. 326.

A petition for a mandamus, alleging a contract between the petitioner and the justices of a county, by which he was to be paid a certain sum for building a court house, and a certain other sum for building a jail, "in monthly instalments for lumber and work," and praying for a writ of mandamus to compel the payment of what is due, without averring that any particular sum is due, is defective. *McCoy v. Harnett Co.*, 5 Jones (N. Car.) L. 265.

A petition for a mandamus to compel a county surveyor to survey certain lands for which the petitioner claims title by virtue of a file of head right certificate, should aver ownership of such

defendant's failure to perform a duty, the declaration must allege the facts from which the legal liability results, and the pleading is bad in substance if the duty does not in all cases result from the facts stated in it.¹

2. **Verification.**—A *jurat* is necessary to a petition for mandamus.² A verification on information and belief merely, especially where the defendants do not appear, is insufficient.³ The petition and affidavit, however, need not be embodied in two papers.⁴

3. **Abatement.**—Where a defendant in his return to a writ of mandamus sets forth matter in abatement, and also sets up facts in defence upon the merits and asks judgment upon the merits, he thereby waives the plea in abatement and elects to try the cause upon the merits.⁵ But an application for a peremptory writ of mandamus against a sole incumbent of a city office will abate upon such incumbent ceasing to hold or occupy such office, except in cases where such incumbent may resign such office for the purpose of evading such writ.⁶

4. **Statutes.**—Courts will take judicial notice of public statutes without their being stated in the pleadings, but when the statute gives the right and establishes a special method of enforcing it, not according to the course of the common law, the facts and circumstances the existence of which is necessary to entitle the party to the aid of the statute, must be specially set out.⁷ The constitutionality of a statute will be considered by the court in mandamus proceedings,⁸ and where the right to the writ depends upon the question whether a public statute appearing in the

certificate in the petitioner, and should give a description of the petitioner's entries and of the locality of the land sufficiently certain to apprise the surveyor what land he is required to survey. *Winder v. Williams*, 23 Tex. 601.

A petition for a mandamus to compel county commissioners to declare the petitioner register of deeds should aver affirmatively that a vacancy existed when the alleged election took place. *Rose v. Co. Commrs.*, 50 Me. 243.

A writ of mandamus issued on a relation of a town must show that the town directed the application therefor. *State v. Sauk Co. Supervisors*, 70 Wis. 485.

1. *School District v. Lauderbaugh*, 80 Mo. 190; *People v. Earle*, 47 How. (N. Y.) Pr. 370; *People v. Soucy*, 26 Ill. App. 504; *People v. Township Board*, 14 Mich. 28.

2. *Black v. Auditor*, 26 Ark. 237; *People v. Chicago*, 25 Ill. 483; *Potts v. State*, 75 Ind. 336. Compare *Brown v. Reese* (Tex.), 7 S. W. Rep. 489.

Under La. Code, art. 840, a petition for mandamus must be sworn to. The omission of the oath cannot be afterwards cured by supplemental petition. *State v. Jefferson Police Jury*, 33 La. An. 29.

Under the decisions and practice of the supreme court of the United States an application for "a rule to show cause why a mandamus in the nature of a writ of *procedendo* should not be issued" must be supported by affidavit, or its statements cannot be considered. *Ex parte Poultney*, 12 Pet. 472.

3. *State v. Clay Co. School District*, 8 Neb. 98.

4. *Golden Canal Co. v. Bright*, 8 Colo. 144.

5. *Silver v. People*, 45 Ill. 224.

6. *State v. Guthrie*, 17 Neb. 113.

7. *Thorpe v. Rankin*, 4 Harr. (N. J. L.) 36; *Van Riper v. Parsons*, 11 Vroom (N. J.) 1; *Com. v. Cox*, 1 Leg. Chron. (Pa.) 89.

8. *State v. Steen*, 43 N. J. L. 542.

statute book with all the prescribed forms of authentication is valid or not, the *onus* of proof is upon the applicants, with a strong presumption against the right asserted by them; and before that right can be recognized and judicially declared in the face of a public statute, having almost a conclusive presumption in its support, the applicants are bound to furnish the most conclusive evidence of the truth of the facts upon which they rely to invalidate the statute.¹

5. Amendment.—In mandamus proceedings the court can grant no relief except what is specified in the alternative writ, and if not warranted in granting that, must refuse any; but the writ is open to amendment.² But no amendment should be allowed to cure a fatal defect in an alternative mandamus after the return day.³ So motion for mandamus may be amended after argument.⁴ So matters arising *pendente lite* may be set up by answer or plea.⁵

6. Reply to the Answer.—No reply is necessary in mandamus; the answer, so far as inconsistent with the petition, is deemed denied without reply.⁶ So a plea to an answer in mandamus taking issue on immaterial matter is always bad.⁷

7. Demurrer.—When the facts stated in an application for mandamus do not entitle the plaintiff to the relief asked, a demurrer is the proper remedy.⁸ So where an alternative writ of mandamus fails to state facts sufficient to entitle the relator to the performance of the duty sought to be enforced, such defect may be taken advantage of by a demurrer, the same as in any other action, and the same right to answer, in case the demurrer is overruled, will exist in favor of a respondent as in any other proceeding.⁹

1. *Legg v. Mayor etc. of Annapolis*, 42 Md. 203.

2. *State v. Union*, 43 N. J. L. 518; *Queen v. Eastern Counties R. Co.*, 10 Ad. & E. 531; *Supervisors v. Durant*, 9 Wall. (U. S.) 736; *State v. Pierce County Supervisors*, 71 Wis. 321; *State v. Baggott* (Mo.), 8 S. W. Rep. 737; *Runion v. Latimer*, 6 Rich. (S. Car.) 126.

3. *People v. Metropolitan Police Commrs.*, 5 Abb. (N. Y.) Pr. 241.

4. *Houston v. Levy Court*, 5 Harr. (Del.) 15.

5. *People v. Baker*, 35 Barb. (N. Y.) 105; s. c., 14 Abb. (N. Y.) Pr. 19.

6. *Beckel v. Union Township*, 9 Ohio St. 569.

7. *State v. Eaton*, 11 Wis. 29.

8. *Meyer v. Dubuque Co.*, 43 Iowa 592; *State v. Chicago, St. Paul etc. R. Co.*, 19 Neb. 476; *State v. Gibbs*, 13 Fla. 55. Compare *Brown v. Reese* (Tex.), 7 S. W. Rep. 489.

Under the former practice an information for mandamus was not subject to demurrer. *State v. Board of Equalization*, 10 Iowa 157. The rule that a demurrer reaches back to the first fault in the pleadings of either party is as applicable to pleadings in mandamus cases as it is in ordinary suits at common law. *Doolittle v. Cabell Co.*, 28 W. Va. 158. The demurrer should be to the writ and not to the verified complaint. *Johnson v. Smith*, 64 Ind. 275.

9. *Long v. State*, 17 Neb. 60; *State v. Sheridan*, 43 N. J. L. 82; *Same v. Same*, 43 N. J. L. 518; *People v. Baker*, 35 Barb. (N. Y.) 105. Compare *People v. Harris*, 6 Abb. (N. Y.) Pr. 30.

Application for the writ and answer are the only pleadings allowed in applications for mandamus, and if the respondent file a demurrer and the same is overruled, the writ will issue, and no further pleadings be considered. *People v. Hamilton County*, 3 Neb. 244.

A demurrer to a complaint for a writ of mandate raises the question of the sufficiency of the facts averred in the complaint, or complaint and affidavit combined, but cannot be carried to the writ unless addressed to it in terms or by implication.¹

8. Joinder of Different Causes.—The remedy by mandamus cannot be joined with other actions under the rule as to the joinder of different causes of action.²

9. Right of Trial by Jury in Proceedings in Mandamus.—The right of trial by jury in proceedings in mandamus is generally determined by constitutional or statutory enactments in the different States.³

10. Jurisdiction.—The writ of mandamus must be applied for and issue in the county where it is intended to operate.⁴

1. Auditor *v.* State, 62 Ind. 266.

2. Barda *v.* Inhabitants of Carondelet, 16 Mo. 323.

Certiorari and mandamus cannot be joined in one writ. Fairbanks *v.* Amoskeag Nat. Bank, 30 Fed. Rep. 602.

Separate claims against a State officer cannot be joined in an application for a mandamus. Hickart *v.* Roberts, 9 Md. 41.

3. Castle *v.* Lawler, 47 Conn. 340; Chumaseo *v.* Potts, 2 Mont. 242; People *v.* Co. Commrs., 6 Colo. 202. See Dutton *v.* Hanover, 42 Ohio St. 215.

In *Connecticut* it is held that the constitutional provision for jury trials has no application to proceedings in mandamus, and that when issues of fact are raised by the pleadings, they are to be tried by the court without a jury. Castle *v.* Lawlor, 47 Conn. 340. And under the Civil Practice act of Montana it is held that a proceeding in mandamus not being an ordinary action at common law, the relator is not entitled as a matter of right to a trial by jury, and that it rests in the sound discretion of the court to award such trial. Chumaseo *v.* Potts, 2 Mont. 242.

In proceedings in mandamus to review the action of the exercise commissioners of New York city in refusing an hotel licence, the court may frame an issue of fact to be tried by a jury, under Code Civil Proc. N. Y., § 2083, which enacts "that an issue of fact, joined upon an alternative writ of mandamus, must be tried by jury," and it is not error to refuse to include in such issue conclusions or matters of inference, motive, or intent, or facts either conceded or a matter of record. People *v.* Woodman, 1 N. Y. Sup. 335. See People *v.* Order American Star, 53 N. Y. Super. Ct. 66.

A general verdict for one party upon issues under a petition for mandamus is a finding on all the issues in favor of that party, and is a verdict which the jury have a right to render under the practice of New York, in the absence of instructions to the contrary. Hanrahan *v.* Board of Police, 35 Barb. (N. Y.) 644; Peck *v.* Board of Police, 35 Barb. N. Y. 651.

In *Pennsylvania*, if the return raises a question of fact it must be decided by jury. Smith *v.* Com., 41 Pa. St. 335. See Treasurer of Jefferson *v.* Shannon, 51 Pa. St. 221; Childs *v.* Com., 3 Brewst. (Pa.) 104.

4. Wayne *v.* Greene. Wright (Ohio) 292; McMillon *v.* Richards, 9 Cal. 365; Whitmarsh Township *v.* Railroad Co., 8 Watts & S. (Pa.) 365; People *v.* Ouray, 4 Cal. 291; *Ex parte* Gephard, 1 Johns. Cas. (N. Y.) 10. See Field *v.* Judge etc., 30 Mich. 10.

Mandamus to compel a surveyor to make a survey and return the field notes to the general land office must be brought in the county of his residence, and not where the land is situated, though several claimants are properly made parties, it not being a suit to try title. Texas Mexican R. Co. *v.* Locke, 63 Tex. 623.

A petition for a mandamus by a receiver of an insolvent bank to compel payment to him, from the state bank fund, of a sum sufficient to discharge the excess of the bank's indebtedness beyond its assets, held, properly brought in the county where the receiver resides, although a decree of a court of chancery to pay over such sum had been obtained in another county, where the bank was situated. Receiver of Danby Bank *v.* State Treasurer, 39 Vt. 92.

11. **Appeal.**—An appeal lies from a judgment of the circuit court awarding or refusing a mandamus.¹ Where, on appeal from a judgment awarding a peremptory mandamus, it appears that the relator is now entitled to such writ, the judgment will be affirmed without regard to the question whether it was correct when rendered.²

12. **Variance.**—A variance in substance, between a writ of mandamus and the order of court directing it to issue, as to the act to be performed is fatal.³

13. **Another Action Pending.**—A writ of mandamus cannot be abated or barred by another action pending for the same cause and between the same parties.⁴ But mandamus will not lie to compel the court to enter judgment while a rule is pending in that court to show cause why the report should not be set aside.⁵

14. **Nonsuit.**—If, upon issues on a petition for a mandamus, the petitioner be nonsuited without any report of the facts on which the nonsuit is based, the case must be sent back for the purpose of ascertaining the facts of the case that the principal court may determine the law.⁶

XVIII. PRACTICE.—1. **Generally.**—At common law the writ was grounded on a suggestion by the oath of the party injured, and in order to satisfy the court that there was a probable cause for interposition a rule was made directing the party complained of to show cause why a writ of mandamus should not issue, and if he showed no sufficient cause, the writ itself issued at first in the alternative either to do thus or signify some reason to the contrary to which a return or answer was made at a certain day.⁷

The most usual practice in this country is to begin the proceedings by presenting to the court an application in the form of a petition setting forth in detail the grounds upon which the petitioner asks a writ of mandamus. This petition is usually *ex parte*, no notice that it will be filed being given to the defendants,

A nonresident debtor is entitled to a mandamus to compel trustees to appoint referees, under 1 Rev. Stat. 800, in order to contest the validity of debts claimed by attaching creditors. *Titus v. Kent*, 1 How. (N. Y.) Pr. 80.

Under the second proviso of Minn. Laws 1881, ch. 40, requiring the supreme court to transmit, on the motion of the respondent, the record of a proceeding in mandamus against a town, pending in such court, and in which issues of fact were not determined, "to the district court of the proper county," the county wherein the town is situated is meant. *State v. Lake*, 28 Minn. 362.

1. *Withers v. State*, 36 Ala. 252; see *State v. Judge of Sixth District Court*, 21 La. An. 741; *Justices of Spencer v.*

Harcourt, 4 B. Mon. (Ky.) 499; *People v. Church*, 20 N. Y. 529; *State v. Manitowoc County Clerk*, 48 Wis. 112.

No appeal lies from an order of the superior court granting a writ of alternative mandamus. An appeal from such an order is premature. *State v. Anson*, Busb. (N. Car.) L. 302.

2. *State v. Hoeflinger*, 31 Wis. 257.

3. *Hawkins v. Moore*, 3 Ark. 345; see *State v. Macdonald*, 29 Minn. 440.

4. *Calaveras County v. Brockway*, 30 Cal. 325.

5. *Berry v. Callet*, 6 N. J. L. (1 Hals.) 179.

6. *Martin v. Board of Police*, 35 Barb. (N. Y.) 550.

7. *Fisher v. Charleston*, 17 W. Va. 595, 611; 3 Black. Com. 111.

and it is always supported by affidavit when presented by a private person.¹ If a *prima facie* case is presented by the petition warranting the relief sought, the court frequently issues a rule which is served on the opposite party, requiring him to show cause why a mandamus should not issue.²

But in some of the States the issuing of this rule is frequently dispensed with, and the most usual practice is to issue the alternative writ immediately on the filing of a proper petition supported by affidavit.³ Where the court thinks proper to issue a rule, and it has been served, if the defendant fails to answer it or files an insufficient answer, the court either issues a peremptory writ of mandamus, enlarges the rule or compels an answer, as may be proper in the particular case. But if the answer denies the facts stated in the petition or shows sufficient cause why the rule should not issue, so that it appears that there is a dispute

1. *Fisher v. Charleston*, 17 W. Va. 595; *Haight v. Turner*, 2 Johns. (N. Y.) 371; *People v. Tioga Common Pleas*, 1 Wend. (N. Y.) 292; *Goshorn v. Ohio Co.*, 1 W. Va. 312; *Mason Co. v. Minturn*, 4 W. Va. 302; *Shields v. Bennett*, 8 W. Va. 76; *Barnett v. Meredith*, 10 Gratt. (Va.) 651; *Sights v. Yarnalls*, 12 Gratt. (Va.) 293.

An affidavit to support a rule to show cause why a mandamus should not issue to restore an attorney must show that he was improperly removed. *Ex parte Gephard*, 1 Johns. Cas. (N. Y.) 134.

2. *People v. Loomis*, 94 Ill. 587; *Ex parte Skaggs*, 19 Mo. 339; *Shrever v. Livingston Co.*, 9 Mo. 196; *Keasey v. Bricker*, 60 Pa. St. 9; *Swan v. Gray*, 44 Miss. 393; *People v. Thistlewood*, 103 Ill. 139; *Ex parte Candee*, 48 Ala. 386; *Speed v. Cocke*, 57 Ala. 209; *Cook v. Tanner*, 40 Conn. 378; *Re Devereux Street*, 13 Phila. (Pa.) 103; *Smith v. Dyer*, 1 Call (Va.) 563; *Dew v. Judges*, 3 Hen. & M. (Va.) 1; *Barnett v. Meredith*, 10 Gratt. (Va.) 652; *Harrison v. Emmerson*, 2 Leigh (Va.) 764; *Mason Co. v. Minturn*, 4 W. Va. 302; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va. 8; see *People v. Judges of Cayuga*, 2 Johns. Cas. (N. Y.) 68; *Turner's Cas.*, 5 Ohio 542; *Grimes v. Commrs.*, *Wright (Ohio)* 126; *Dinwiddie Justices v. Chesterfield Justices*, 5 Call. (Va.) 556.

On a rule to show cause why a peremptory mandamus should not issue, only one writ can be granted. *State v. Beloit*, 20 Wis. 79.

Whether mandamus is the proper remedy in a case is not determined by

an order to show cause why the writ should not issue. That point may be finally examined and determined at the hearing on the return of the writ, when both parties can be heard. *Olson v. Muskegon Circuit Judge*, 49 Mich. 85.

On the hearing of an application for a mandamus, the party showing cause is entitled to open and close the argument. *People v. Treasurer*, 8 Mich. 392.

Where the order to show cause contains the usual clause, "or for other relief" the relator may have a mandamus for any relief to which he shows himself entitled. *People v. Nostrand*, 46 N. Y. 375.

3. *Childs v. Com.*, 3 Brewst. (Pa.) 194; *Copland v. Lancaster Co. Bank*, 5 L. Bar. 14 Feb. 1874; see *State v. Todd*, 4 Ohio 351; *Houston v. Levy Court*, 5 Harr. (Del.) 15; *State v. Jefferson Police Jury*, 33 La. An. 29; *State v. Fairchild*, 22 Wis. 110; *People v. Cloud*, 3 Ill. (2 Scam.) 362; *Fisher v. Charleston*, 17 W. Va. 628; *Potts v. State*, 75 Ind. 336; *People v. Judges of Cayuga*, 2 Johns. Cas. (N. Y.) 68; *Schend v. St. George's German Society*, 49 Wis. 237; *State v. Board of Supervisors*, 64 Wis. 218; *Com. v. Tyn dall*, 2 Brewst. (Pa.) 425; *Com. v. Young Men's Hibernian Beneficial Society*, 2 Brewst. (Pa.) 441; *Com. v. Cuncannon*, 3 Brewst. (Pa.) 344; *Tillson v. Putnam Co.*, 19 Ohio 415; *People v. Throop*, 12 Wend. (N. Y.) 183; *Bridges v. Shallcross*, 6 W. Va. 662; *Shields & Preston v. Bennett*, 8 W. Va. 72; *Fisher v. Mayor of Charleston*, *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *Fitzhugh v. Custer*, 4 Tex. 391.

of fact between the parties, an alternative writ of mandamus is ordered to be issued in order that by the return to such alternative writ of mandamus a formal issue may be made up and tried.¹

This alternative writ of mandamus, whether issued immediately on the filing of the petition or after the return of such a rule, here as elsewhere stands in lieu of a declaration in an ordinary suit.²

The facts, however, alleged in this alternative writ may be alleged by way of recital; but it being in the nature of a declaration as well as of a writ, the sufficiency of these facts, to entitle the plaintiff to the redress he seeks; is called in question by a motion to quash the alternative writ or by a demurrer to it, and any defect in the recitals or allegations of this alternative writ cannot be aided by the petition or affidavit thereto, for though they be the foundation on which the writ was issued, they constitute no part of the pleadings in the case.³

If the petition does not state the necessary facts to justify the issuing of an alternative writ or a rule, neither ought to be issued, and if issued on the return day this fatal defect should be taken advantage of, not by demurrer but by a motion to quash the alternative writ or to discharge the rule as improvidently awarded. The petition and affidavit bear to the mandamus *nisi* a relation similar to that which an affidavit bears to an attachment.⁴

2. Notice.—The writ will never issue without reasonable notice of the application, except in a case of emergency, where the right is clear.⁵

In the case of *Bridges v. Shallcross*, 6 W. Va. 562, and *Shields & Preston v. Bennett*, auditor, 8 W. Va. 72, the court awarded alternative writs of mandamus without issuing any previous rule to show cause why a mandamus should not issue. The issuing of such previous rule is ordinarily useless and produces delay without any corresponding benefit.

Requisites of Affidavit.—Where defendants oppose a mandamus sought to enforce the result of an election as officially canvassed, on the allegation that fraudulent and unlawful votes were cast and counted, and ask a continuance to enable them to prepare their case, their affidavit should allege grounds for setting aside the election; and, particularly, should allege what objectionable votes were received, and that they were enough to affect the result. 1876, *State v. Thatch*, 5 Neb. 94.

1. *Dew v. Judges*, 3 Hen & M. (Va.) 1; *Douglass v. Loomis*, Judge, 5 W. Va. 544.

2. *People v. Supervisors of West-*

chester, 15 Barb. (N. Y.) 612; *Canal Trustees v. People*, 12 Ill. 254.

3. *Commercial Bank of Albany v. Canal Comms.*, 10 Wend. (N. Y.) 25; *Johnes v. State Auditor*, 4 Ohio St. 493; *People v. Baker*, 35 Barb. (N. Y.) 105.

4. *Fisher v. Charleston*, 17 W. Va. 612.

5. *Harkins v. Supervisors*, 2 Minn. 342; *Com. v. Brady*, 6 Phila. (Pa.) 121. Mandamus cannot issue without notice in some form to the defendant or a waiver of notice by appearance. *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. Rep. 602. After making a return to the alternative mandamus sued out against him by a judgment creditor of a township, the township supervisor cannot set up the non-service of any notice in the cause. *Edwards v. U. S.*, 103 U. S. 471.

But see *Com. v. Comms. of Allegheny*, 6 Pitts. L. J. (Pa.) 12.

After notice to the other party of an intention to apply for an alternative writ of mandamus, ten days' notice, by service of the writ, will be sufficient to compel him to answer. *People v. Rickey*, 19 Ill. 405.

3. **Service** of a writ of mandamus must be made on the respondent.¹ The proper mode of service is by delivering the writ, the officer retaining a copy to make his return upon.² And is usually made to the person or officer who is to perform the required act or whose duty it is to make return.³ The service of the writ

The omission of a date to the return of a peremptory mandamus directed to B G, and others, township committee, "to assign and appoint, in writing, to the overseers of the highway, or some of them, their several limits or divisions of the road for opening, clearing out, amendment, and repair," will not vitiate the notice. *State v. Griscon*, 8 N. J. L. (3 Hals.) 136.

1. *Wilson v. Hunt* (Cal.), 16 Pac. Rep. 305; *Schend v. St. George's German Aid Soc.*, 49 Wis. 237; *Jones v. Gibbs*, 51 Miss. 401; *Haskins v. Supervisors*, 51 Miss. 406.

The county commissioners having viewed certain land, whereas husband and wife were seised in fee in right of the wife, afterwards located the road over the same, and assessed damages for the land so taken, and ordered the damages to be paid to the husband, not knowing that he had deceased; and, upon application for a mandamus to the commissioners to show cause why an order should not issue to the county treasurer to pay over the damages to the widow, it was suggested that the location might have been made in the lifetime of the husband; whereupon the court directed that notice of such application should be given to the administrator on his estate to appear and show cause against the claim of the widow. *Kent v. Essex*, 10 Pick. (Mass.) 521.

2. *Hempstead v. Underhill*, 20 Ark. 337; *State v. Supervisors*, 69 Wis. 264; see *St. Louis Co. Court v. Sparks*, 10 Mo. 118; *Queen v. Birmingham etc. R. Co.*, 1 El. & Bl. 293; *People v. Pearson*, 3 Scam. (Ill.) 274; *People v. Judges of Westchester*, 4 Cow. (N. Y.) 73; s. c., 4 Cow. (N. Y.) 403; *Ladue v. Spalding*, 17 Mo. 159; *Haveyreyer v. Mineral Point Sup.*, 22 Wis. 396; *State v. Brady*, 6 Phila. (Pa.) 121.

The writ of mandamus in this case was placed in the hands of the sheriff for service, and he served the same upon the mayor and councilmen, who were the defendants, by delivering to each of them a certified copy thereof; and he then returned the original writ to the court, and neither the mayor

nor any one of the councilmen ever had the original writ in his possession, and never even saw the same. *Held*, that the service was void; that the service should have been made by delivering to the defendants the original writ, and not a mere copy thereof; and further *held*, that the defendants cannot, under such circumstances, be held to have committed a contempt by reason of any failure or refusal on their part to obey the mandates of the writ. *State v. King*, 29 Kan. 607.

Service of an alternative writ of mandamus may be made in the manner prescribed for the service of a summons. *State v. Lincoln Supervisors*, 67 Wis. 274.

3. *Ely v. Penn. District*, 1 Phila. (Pa.) 18; *Queen v. Chapman*, 6 Mod. Rep. 152; *King v. Mayor of Exeter*, 12 Mod. Rep. 251; *Village of Glencoe v. People*, 78 Ill. 382.

A peremptory mandamus commanding a town board of supervisors to levy a tax must be served by leaving the original writ with the chairman and a copy with each supervisor; said original to be returned by the board with their proceedings thereon. *State v. Town of Mineral Point*, 22 Wis. 396.

A writ of mandamus against a board of supervisors, whether alternative or peremptory, should be served upon the individual members; an acceptance by the clerk, although "by order of the board," is not sufficient. *Downs v. Rock Island Co.*, 4 Biss. (U. S.) 508.

A mandamus directed to a foreign corporation engaged in business in this State, commanding the performance of some duty growing out of that business, may be legally served upon any officer of the company in this State, upon whom lawful service could have been made, according to the ancient common law, if the corporation were domestic. *Freeholders of Mercer v. Penna. R. Co.*, 42 N. J. L. 490.

Where the thing enjoined by the writ was the building of a bridge, service upon a mere financial officer of the company was not sufficient. *Freehold-*

to which the seal of the court is not affixed is a nullity.¹ Where an alternative mandamus has been duly served, the court, on proof of such service, will grant a peremptory mandamus without compelling a return to the first writ.²

4. Return.—The function of the return is not simply to show what would amount to a *prima facie* right in the respondent in the absence of any allegation to the contrary, but it is to show a right to refuse obedience to the writ in view of the allegations it contains. And if it does not do this it is demurrable.³ The return should, for the purpose of making an issue, set up a positive denial of facts stated, or should state other facts sufficient to defeat relator's right.⁴

Allegations on a return should not be made on information and belief.⁵ If the respondent does not deny the material allegations, his failure is to be treated as an admission of the fact the

ers of *Mercer v. Penna. R. Co.*, 42 N. J. L. 490.

Time of Service.—The writ must be served at least eight days before the time specified for showing cause. *People v. Rensselaer Common Pleas*, 3 How. (N. Y.) Pr. 164.

Where the writ was served on the assessors of taxes, after the duties of the assessors were completed by statute for that year, the writ will not be quashed, but the time for return extended. *State v. Assessors of Taxes of Rahway* (N. J.), 17 Atl. Rep. 122.

An attachment will not be granted for disobedience to a peremptory mandamus unless it appear that it was served on the persons who ought to have obeyed it. *People v. Judges of Washington Col. & C. Cas.* (N. Y.) 362; s. c., 2 Cal. (N. Y.) 97.

Continuance—For Want of Service.—It is a sufficient ground for a continuance in a proceeding for mandamus in this court, where the action or conduct of several persons is sought to be affected or controlled by the writ, that some of the persons so to be affected have not been served with the summons. *People v. Thistlewood*, 103 Ill. 139.

1. *People v. Fisk*, 1 Hun (N. Y.) 464.

2. *People v. Judges of Ulster*, 1 Johns. (N. Y.) 64.

Motion for peremptory mandamus, made on filing the alternative, denied, without prejudice or costs, because the alternative writ was served in vacation. *People v. Essex Common Pleas*, 1 How. (N. Y.) Pr. 114.

3. *State v. Lean*, 9 Wis. 279.

4. *Canova v. State*, 18 Fla. 512; *Levy*

v. English, 4 Ark. 65. See *Springfield v. Commrs.*, 10 Pick. (Mass.) 59; *People v. Co. Commrs.*, 6 Colo. 202; *U. S. v. Bayard*, 5 Mackey (D. C.) 428; *Commercial Bank of Albany v. Canal Commrs.*, 10 Wend. (N. Y.) 25; *People v. Commrs. of Fort Edward*, 11 How. (N. Y.) Pr. 89; *People v. American Institute*, 2 N. Y. Leg. Obs. 170; *Society for Visitation of the Sick v. Com.*, 52 Pa. St. 125; *Shaw v. Howell*, 18 La. An. 195; *Goss v. Vermontville Common Council*, 44 Mich. 319.

The mandatory part of a writ of mandamus may be very general; but the return must be very minute in showing why the party did not do what he was commanded. [Per CROMPTON and BLACKBURN, JJ.] *Regina v. Southampton*, 1 Ellis, B. & S. 5.

In mandamus, where the defendants' affidavits merely state the affiant's ignorance of the facts positively alleged in the petition, the allegations of the petition are not put in issue. *People v. Board of Supervisors*, 6 N. Y. Supp. 591.

Discrepancy Between Return and Statement.—Where a discrepancy exists between the return of a judge and the statement of a relator, credence will be given in preference to the return. *State v. Burthe* (La.), 1 So. Rep. 652.

5. *People v. Morton*, 12 Abb. (N. Y.) Pr., N. S. 47; *State v. Sumter Co.*, 22 Fla. 1. See *People v. American Institute*, 2 N. Y. Leg. Obs. 170. Compare *People v. Alameda County*, 45 Cal. 395.

The return must be certain to a common intent in general; every allegation

same as if admitted in express terms.¹ So the respondent must also show that he has complied with the order of the writ to the extent of his ability.² And his return will be taken as true unless its falsity is shown by the petitioner.³

(a) SUFFICIENCY OF RETURN.—A return to an alternative mandamus is sufficient if it contains a full and certain answer to all the allegations expressly made in the petition for it and discloses a fair legal reason why the mandamus should not be obeyed.⁴ If the return be insufficient the proper mode of proceeding is to demurrer or move for a peremptory

must be direct and stated, without qualification, with plainness and certainty. *Com. v. Hancock*, 4 Leg. Gaz. (Pa.) 110; *Com. v. Commrs. of Allegheny*, 32 Pa. St. 218; *Com. v. Cox*, 1 Leg. Chron. (Pa.) 89; *Com. v. Commrs. of Allegheny*, 37 Pa. St. 237; *Com. v. German Society*, 15 Pa. St. 251; *Society for the Visitation of the Sick v. Com.*, 52 Pa. St. 125.

1. *State v. Haws*, 43 Ohio St. 16.

2. *Silverthorne v. Warren R. Co.*, 33 N. Y. L. (4 Vroom) 173.

3. *Tucker v. Iredell*, 1 Jones (N. Car.) 451; *People v. Ovenshire*, 41 How. (N. Y.) Pr. 164. See *Beard v. Supervisors*, 51 Miss. 542; *Merrill v. Gladwin County Treasurer*, 61 Mich. 95; *State v. Monroe*, 39 La. An. 664.

In some cases it is held that his return must be accepted as true; if it be false the party aggrieved is left to his action for a false return. *Beauman v. Leake County*, 42 Miss. 237; *Mead v. Treasurer of Ingham*, 36 Mich. 416. See *People v. St. Louis etc. R. Co.*, 47 Hun (N. Y.) 543; *People v. Pritchard*, 19 Mich. 470.

4. *Springfield v. County Commrs.*, 10 Pick. (Mass.) 59; *People v. Judges of Westchester, Col. & C. Cas.* (N. Y.) 135; *Sikes v. Ransom*, 6 Johns. (N. Y.) 279; *Benbow v. Iowa City*, 7 Wall. (U. S.) 313. See *Ex parte Trustees of Williamsburgh*, 1 Barb. (N. Y.) 34; *Snoddy v. Madison Co. Court*, Sneed (Tenn.) 74; *Bartlett v. Franklin Co. Court*, Sneed (Tenn.) 184; *Rex v. Faversham Fisherman's Co.*, 8 T. R. 352; *Rex v. Doncaster*, 2 Ld. Ken. 391; *Rex v. Taunton, Cowp.* 113; *Rex v. Old Hall*, 2 P. & D. 515; *Rex v. Round*, 5 N. & M. 427; *Reg. v. St. Andrew*, 10 A. & E. 736; *Reg. v. Burslem Board*, 5 Jur., N. S. 1394; *Com. v. Sheeham*, 32 Smith (Pa.) 132; *Meriden etc. Co. v. Whedon*, 31 Conn. 118; *Greene v. African M. E. Soc.*, 1 S. & R. (Pa.) 254; *Brosius v. Reuter*, 1 Har. & J. (Md.)

551; *People v. Collins*, 7 Johns. (N. Y.) 549; *State v. Board of Public Works*, 45 N. J. L. 465; *Reichenbach v. Ruddach* (Pa.), 15 Atl. Rep. 488; *Buffalo, New York etc. R. Co. v. Com.*, 120 Pa. St. 537; *In re Prospect Brewing Co.* (Pa.), 17 Atl. Rep. 1090; *State v. Jones*, 10 Iowa 65; *Society of Visitation of the Sick etc. v. Com.*, 52 Pa. St. 125; *State v. Pennsylvania R. Co.*, 45 N. J. L. 82; *Angle v. Runyon*, 38 N. J. L. 403.

Every intendment will be made against a return which fails to answer important facts. *People v. Ohio Grove*, 51 Ill. 191.

To an alternative writ of mandate directed to a county auditor, requiring him to show cause why he should not draw a warrant on the county treasury for the amount of an allowance made by the circuit court, it is a good return that the order of such court directed that such allowance should be paid by another person out of another fund, and that the claim had never been presented to and allowed by the board of county commissioners. *State v. Morrison*, 103 Ind. 161.

A return of the common council of the city of Madison to an alternative mandamus, directing them to levy a tax for the payment of a judgment against the city, setting forth that they have no "knowledge" of the judgment sufficient to form a belief is insufficient. The denial should be of any "knowledge or information," etc. *State v. Madison*, 15 Wis. 30.

Upon a writ of mandate to a county board, under 2 Ind. Rev. Stat., p. 297, § 740, on relation of a taxpayer, to compel removal of the records and furniture of the county offices and circuit court to the new county buildings, an answer that the board had set aside its order of removal for fraud in its procurement is insufficient; any defence against making the order comes then

writ.¹ If the return be sufficient, whether true or false, writ of peremptory mandamus cannot issue at once, but the return must be falsified by an action.² The issuance of a peremptory writ is not the necessary consequence of the respondent's answer being held insufficient if the insufficiency is in the pleading only and not in the answer. In case the answer is held insufficient the court will, in the first instance, direct the respondent to file a fuller and more perfect answer.³

(b) HOW SUFFICIENCY QUESTIONED.—A respondent in a proceeding for mandamus may question its sufficiency in law by demurrer or motion to quash, or in fact by plea or answer.⁴

(1) *Demurrer*.—The relator may traverse or demur to the return,⁵ too late. *Clarke Co. Commrs. v. State*, 61 Ind. 75.

The return of a register of deeds to an alternative writ of mandamus to compel him to hold his office at a place alleged to be the county seat, having been adjudged insufficient on demurrer, and the relator having moved for a peremptory writ, the clerk of the court of the same county presented affidavits alleging collusion between the relator and the register, and that similar suits had been commenced against other officers of the county, to test the same question, in which issues of fact had been joined. *Held*, that the proceedings against the register should be stayed until after a trial of the issues of fact. *State v. Avery*, 15 Wis. 18.

Facts Not Stated in the Writ.—The respondent will not be required to make a return as to facts not stated in the writ. *People v. Columbia Common Pleas*, 3 How. (N. Y.) Pr. 30.

1. *Com. v. Commrs. of Allegheny*, 32 Pa. St. 218; *People v. Byrne*, 9 Abb. (N. Y.) N. Cas. 127.

In *People v. Assessors of New York*, 52 How. (N. Y.) Pr. 140, it is *held* that upon an application for mandamus, if the substantial allegations in the moving affidavits are not fully met or avoided in the answering affidavits, a peremptory writ should be granted in the first instance. See *Rinkel v. Wine-miller*, 4 Har. & M. (Md.) 429; *People v. Throop*, 12 Wend. (N. Y.) 183; *People v. Brennan*, 39 Barb. (N. Y.) 522; *People v. Assessors of Barton*, 44 Barb. (N. Y.) 148.

Generally.—A motion for a writ of mandamus will not be entertained unless it is made in the manner prescribed by the practice act for moving for a new trial in the district court. *People v. Coon*, 25 Cal. 635.

A motion for a peremptory manda-

mus, on the coming in of a return to an alternative mandamus, is a non-enumerated motion, if the relator has not formally demurred. *People v. Commrs. of Hudson*, 6 Wend. (N. Y.) 559.

A motion by the applicant for a writ of mandamus, that the writ issue notwithstanding the matters alleged in the defendant's answer, amounts to a general demurrer to the answer. *Ward v. Flood*, 48 Cal. 36.

An order overruling a motion for a peremptory mandamus only has the effect to defer the question of issuance until the trial on the merits. *Booth v. Strippleman*, 61 Tex. 378.

2. *Dane v. Derby*, 54 Me. 95. See *Mullanphy v. St. Louis County Court*, 6 Mo. 563; *Cook v. Tanner*, 40 Conn. 378.

3. *State v. Jones*, 10 Iowa 65. See *State v. School Land Commrs.*, 9 Wis. 200.

Where to a writ of alternative mandamus the defendant exhibited a bill in equity alleging an equitable defence to the demands of the plaintiff, and praying for an injunction to restrain him from prosecuting the writ, and asked that that might be received as a return to the writ, *held*, not to be error in the court to refuse the injunction, and to order the defendant to make return. *Neuse River etc. Co. v. Commrs.*, 6 Jones (N. Car.) L. 204.

4. *State v. Williams*, 69 Ala. 311.

5. *People v. Champion*, 16 Johns. (N. Y.) 61; *Silverthorne v. Warren R. Co.*, 33 N. J. L. (4 Vroom) 173; *People v. Beebe*, 1 Barb. (N. Y.) 379; *State v. Suwannee Co. Commrs.*, 21 Fla. 1; *Barney v. State*, 42 Md. 480; *State v. Cole* (Neb.), 41 N. W. Rep. 245; *Hoskins v. Supervisors*, 51 Miss. 406; *State v. Lusitanian etc. Society*, 15 La. An. 73.

Where a return to an alternative

but he cannot do both.¹ He is not allowed to demur specially to the return if dissatisfied; he must obtain a supplementary return.² If the respondent files a demurrer to the petition instead of an answer to the writ and the relator agrees to accept the demurrer as a return to the writ, and thereupon demurs to it, the latter's agreement and subsequent action constitute a waiver of his objections to the technical correctness of the pleadings.³ So if the relator takes issue on the return instead of demurring he cannot afterwards question its legal sufficiency; there can be no judgment *non obstante*.⁴

After making a return to the alternative mandamus the respondent cannot set up the nonservice of any notice in the cause.⁵

(2) *Motion to Quash*.—In an action by mandamus it is proper practice for the respondent to move to quash the alternative writ for defects in the application therefor.⁶ Objections to a writ of mandamus, merely technical, must be taken *in limine* on a motion to quash, and cannot prevail after the return.⁷

Such a motion is in the nature of a demurrer, and on overruling the same the respondent should have leave to answer.⁸ A

writ of mandamus does not traverse any of the facts alleged in the writ, a demurrer to the return is superfluous. *People v. Salomon*, 46 Ill. 333; *People v. Miner*, Ill. 384.

It is not necessary to traverse the return to a mandamus before going to trial on the merits. *Borgstede v. Clark*, 5 La. An. 291.

1. *People v. Vail*, 1 Wend. (N. Y.) 38; *People v. Beebe*, 1 Barb. (N. Y.) 379.

2. *People v. Common Pleas*, 9 Wend. (N. Y.) 429. See *People v. Champion*, 16 Johns. (N. Y.) 61; *Vail v. People*, 1 Wend. (N. Y.) 38.

3. *Ensworth v. Albin*, 46 Mo. 450.

Where, upon motion for a peremptory writ of mandamus, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, this is equivalent to a demurrer, and he cannot complain if the court pass upon the motion instead of ordering an alternative writ. *People v. Fairman*, 91 N. Y. 385.

4. *People v. Board of Police*, 26 N. Y. 316; *reversing s.c.*, 35 Barb. (N. Y.) 644. And see *People v. Finger*, 24 Barb. (N. Y.) 341.

5. *Edwards v. U. S.*, 103 U. S. 471.

6. *State v. Ellwood*, 11 Wis. 17; *State v. Harvey*, 11 Wis. 33; *State v. Slavan*, 11 Wis. 153; *State v. Commrs.*, 19 Wis. 237; *Rex v. Cambridge (Mayor)*, 2 T. R. 456; *Rex v. York (Mayor)*, 5 T. R. 66. See *Kahn v. Bauer (Cal.)*, 12 Pac. Rep. 477; *Kahn v. City and County of San Francisco*, 12 Pac. Rep. 478.

A peremptory writ of mandamus will not be quashed on the motion of the defendant because no alternative writ has been tried, where he has had an opportunity to be heard upon the rule to show cause. *State v. Elkinton*, 30 N. J. L. 335.

On motion to quash a mandamus to permit an inspection of the books of the corporation, directed to the person shown to be in possession and control of them, the question whether the corporation should be made a party cannot be considered. *State v. Bergenthal*, 72 Wis. 314.

7. *Fuller v. Plainfield Academic School*, 6 Conn. 532. See *People v. Batchelor*, 53 N. Y. 128; *Easton v. Leigh Water Co.*, 97 Pa. St. 554.

8. *State v. Lean*, 9 Wis. 279; *People College of Physicians*, 7 How. (N. Y.) Pr. 290.

A motion to quash the answer, if such a motion is proper, is not equivalent to a motion to make the answer more specific and definite, or to strike

motion to quash an alternative writ may be made and heard before the return, and the party making the motion is not bound to present his objection in the form of a return to the writ.¹

If the answer to an application contains or sets up any sufficient reason for refusing the writ, though it is in other respects evasive and irresponsible, it should not be quashed as a whole.² But dubious and important legal questions ought not to be decided on a motion to quash a return.³ So where the relation for a mandamus leaves the right of the relator in doubt and the writ is quashed for that reason, leave will be given to amend the relation.⁴ Where a general motion to quash a writ of mandate has been overruled, no mere technical objections to the writ will be considered on appeal to the supreme court unless it be shown that such objections were distinctly raised in the court below.⁵

(c) DEFENCES BY RETURN.—The return may set up any number of facts constituting valid reasons for not doing the act enjoined.⁶ And where distinct defences are set up in a return to an alternative writ of mandamus one or more may be demurred to

out a part of it as redundant and superfluous, or to compel an election between different defences; but it is a challenge of the substance of the defence or defences presented, is equivalent to a demurrer, or a motion for judgment over the answer, and can only be sustained when in fact the answer contains no defence to the plaintiff's cause of action. *Crans v. Francis*, 24 Kan. 750.

1. *Harwood v. Marshall*, 10 Md. 451; *People v. Judges of Westchester*, 4 Cow. (N. Y.) 73.

Passing Upon Issues Generally.—In a mandamus proceeding to compel a public officer to receive warrants in payment of a debt, the issue of the genuineness of the warrants may be passed on. *State v. Pilsbury*, 29 La. An. 787.

Where an officer sets up in justification of his refusal to exercise the functions of his office an act of the legislature abolishing the same, the constitutionality of such act will be considered by the court and mandamus refused. If the officer had continued to exercise his office, the court would not by mandamus compel him to desist; the remedy would be by *quo warranto*. *State v. Steen*, 43 N. J. L. 542.

A mandamus in the alternative will lie, in *Indiana*, to compel the city council to issue precepts for the collection of an assessment for a street improvement; the question of the correctness of the engineer's estimates or of the contractor's demand may be tried on

the return under 2 Gav. & H., §§ 741-2. *Chapin v. Osborn*, 29 Ind. 99.

On a rule for the writ of mandamus to obtain an appeal from a final decree, whether it changes the parties' legal rights as fixed by a former judgment or is merely declaratory of the latter's legal effect is a question which cannot be determined; it can be determined only on the appeal. *Little v. Consolidated Association*, 2 La. An. 731.

2. *Legg v. Mayor etc. of Annapolis*, 42 Ind. 203.

3. *Silverthorne v. Warren R. Co.*, 33 N. J. L. (4 Vroom) 173.

Under Code Civil Proc. N. Y., § 2075, providing that an alternative writ of mandamus cannot be quashed or set aside on motion for any matter involving the merits, the questions whether mandamus is the proper remedy and whether the relator has another legal remedy cannot be raised on motion. *People v. Board of Supervisors*, 3 N. Y. Supp. 751.

4. *State v. Hastings*, 10 Wis. 518; *State v. Elwood*, 11 Wis. 17; *State v. Slavan*, 11 Wis. 153.

5. *Auditor v. State*, 72 Ind. 266.

6. *People v. Supervisors*, 32 Barb. (N. Y.) 473; *People v. Ulster Supervisors*, 32 Barb. (N. Y.) 473; *Wright v. Faucett*, 4 Burr. 2041; *Ex parte Candee*, 48 Ala. 386.

Under the *New Jersey* law as to mandamus, the respondents may set up in their return as many separate defences as they see fit, if consistent, fairly re-

sponsive, and tending to an issue that will procure a final decision of the rights of the parties; but if false, frivolous, or calculated to delay the remedy sought, the return will be quashed on motion. To an alternative writ, commanding the respondents to extend a sewer in a certain line, or show cause, a return showing substantial difficulties in its construction, adequate relief by another sewer, and want of funds or of authority to raise them, will not be quashed. *State v. Jersey City Board of Public Works*, 45 N. J. L. 465.

Conclusive Answers.—An alternative mandamus was issued to compel the comptroller to draw his warrant upon the treasurer for the payment of a claim upon the treasury. The answer that no appropriation has ever been made by law for the payment of the claim as required by art. 7, § 8, of the constitution, is conclusive. *People v. Burrows*, 27 Barb. (N. Y.) 89.

That there is no funds is a good answer to an alternative mandamus. *Dodd v. Miller*, 14 Ind. 433; *Miller v. State* (Kan.), 22 Pac. Rep. 326; *Treasurer of Jefferson County v. Shannon*, 51 Pa. St. 221; *People v. Frink*, 32 Mich. 96.

If the entire fund which can be raised by taxation within constitutional limits is required to meet the necessary expenses of an economical administration of the county government, a statement of such facts, supported by proof, will be a due return to a peremptory mandamus directing the county commissioners to levy and collect a sufficient tax to satisfy a judgment in favor of an individual creditor. *Cromartie v. Bladen County Comms.*, 85 N. Car. 211. See *Cope v. Collins*, 37 Ark. 649.

A county treasurer, in his return to an alternative writ of mandamus, showing cause for refusing to pay a warrant drawn on him as treasurer, alleged as a reason for so doing that it was issued through fraud and misrepresentation and without authority, and that at the time of the service of the writ upon him and since he had not had in his possession any funds with which to pay the warrant. *Held*, that this was not a sufficient answer when the petition for mandamus alleged frequent demands on the treasurer for payment before it was filed. *Hendricks v. Johnson*, 45 Miss. 644. So when money has been appropriated for a specific purpose it is not in all cases a sufficient an-

swer to an application for a mandamus to compel its payment for that purpose, to set up that the money has been wrongfully applied to other purposes. It may be regarded in contemplation of law as still in the treasury. *People v. N. Y. City Comptroller*, 77 N. Y. 45.

The secretary of state may set up in answer to a petition for mandamus to compel him to pay an award that a third person claims the money adversely to the petitioner, and that it is held by the secretary pending the settlement of the controversy between the conflicting claimants. *Bayard v. U. S.*, 127 U. S. 246.

An alternative mandamus was issued directing the defendant to open and improve a certain highway. The answer that the highway had been discontinued in the manner prescribed by law was held sufficient. *Clark v. Comms. of Highways*, 1 Thomp. & C. (N. Y.) 193.

On motion for mandamus to open and work a road previously laid out, an order of the highway commissioners, made after the motion and before its decision, discontinuing the road cannot be considered, the relator not having had notice of such order. *People v. Mills* (N. Y.), 15 N. E. Rep. 886.

Where, under the provisions of the Illinois township organization law, town officers had resigned in order to avoid auditing and paying a judgment against the town, *held*, that it was not a sufficient return to an alternative writ of mandamus that the respondents, the officers, had resigned. If it does not also appear that their successors have been elected or appointed and qualified, they will be ordered to audit the judgment. *U. S. v. Badger*, 6 Biss. 308.

To a rule against a county surveyor to show cause why a mandamus should not issue to compel him to make a survey of land upon the application of one claiming the privileges of the pre-emption laws, it is a sufficient answer that it appeared from the records of his office that the land had been previously surveyed and granted to another person. *Watkins v. Kirchain*, 10 Tex. 375.

A return showing that the person to whom the writ was directed has no legal authority to do the act commanded is good. *State v. Perrine*, 34 N. J. L. 254.

Where the city council of Wheeling passed an order to issue an innkeeper's licence on the first of May, and the inn-

and issue taken on the other.¹ But argumentative inferences in a return or sworn allegations which are merely constructive deductions, and which if false are not indictable as perjuries, cannot be treated as presenting distinct issues of fact.²

When the respondent elects to obey the writ, it is sufficient to set forth this fact by way of return, averring with sufficient certainty and clearness, his compliance with the mandate of the court, substantially "following the mandatory clause of the writ and stating his performance of the duty as by the writ commanded."³ So where the answer presents an issue of fact as to the true result of an election, this is a proper issue to be submitted to a jury.⁴

(d) OF THE MANNER AND TIME OF MAKING RETURN.—A mandamus to a board of officers to compel them to do a thing in a public capacity requires a return by them as a body.⁵

Writs of mandamus are not term writs returnable only at the next term after they are issued; they may be made returnable

keeper before that date sued out a *mandamus nisi* against the officer whose duty it would be to issue the licence, *held*, the officer might, in his return, allege a noncompliance, on the part of the innkeeper, with an order subsequently passed by the council taxing the licence. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

Where judgment has been duly obtained against a county upon coupons detached from its bonds, no defence which questions their validity can be pleaded to a mandamus commanding the county court to pay the judgment from moneys in the treasury or raise the means therefor by the levy of a special tax. *Ralls Co. Court v. United States*, 105 U. S. 733.

When the legality of a tax has been affirmed on *certiorari* in the court of last resort, the question of the legality of such tax cannot be raised on the return to an alternative writ of mandamus issued to enforce the collection of the tax. *Belvidere v. Warren R. Co.*, 34 N. J. L. 193. So to an alternative writ to show cause why he should not make a supplemental tax list, and extend thereon for collection certain taxes levied to pay a judgment on certain bonds of the county, the county clerk pleaded that the bonds had been adjudged invalid. *Held* no defence after a judgment on the bonds had been obtained. *Hill v. Scotland County Court*, 32 Fed. Rep. 716.

Where Causes Are Inconsistent.—When several causes returned are inconsistent, the whole is bad. *Rex v. Cambridge (Mayor)*, 2 T. R. 456; *Rex*

v. York (Mayor), 5 T. R. 66; *Ex parte Candee*, 48 Ala. 386.

1. *State v. Suwannee Co. Commrs.*, 21 Fla. 1.

2. *Com. v. Commrs. etc.*, 37 Pa. St. 237; *People v. Supervisors of New York*, 18 How. Pr. (N. Y.) 152; s. c., 21 How. Pr. (N. Y.) 288; 10 Abb. Pr. (N. Y.) 233.

3. *State v. Williams*, 69 Ala. 311; *State v. Sheridan*, 43 N. J. L. 82; *Johnston v. Cleveland*, 67 N. Car. 101; *State v. Bonnifield*, 10 Nev. 401. See *State v. Schofield*, 41 Mo. 38.

On a return of full compliance with a writ of mandamus issued to compel a court for the trial of contested elections organized under Comp. Laws, ch. 89, § 13, to sign a bill of exceptions to the decision, the supreme court declined to hear proof that the bill of exceptions was not true. *McDonald v. Sheldon*, 2 Kan. 322.

4. *People v. Grand County Commrs.*, 6 Colo. 202.

5. *McCoy v. Ins. of Harnett*, 4 Jones (N. Car.) L. 180. See *People v. Police Board*, 46 Hun (N. Y.) 296; *State v. Shea*, 70 Wis. 104.

The proper way for the justices of a county to make return to a mandamus is for them to convene, and, a majority being present, to fix upon the facts they mean to rely on by way of defence, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding. *Lander v. McMillan*, 8 Jones (N. Car.) L. 174.

The answer of supervisors, in their own names, cannot be regarded as an

during the same term, and the fixing of the time for their return is always within the sound discretion of the court.¹

(e) **NEGLECT TO MAKE RETURN.**—Upon the neglect of the respondent to make return to the alternative writ the relator is not entitled as of course to the peremptory writ; he should generally proceed to enforce a return.² The fine imposed by statute for not obeying a mandamus cannot be imposed for failure merely to make return to an order to show cause.³

(f) **EVASIVE RETURN.**—If the return be evasive, a peremptory mandamus will be awarded.⁴ If defendant denies only a part of the averments therein, the relator need prove only the averments denied.⁵

(g) **DAMAGES FOR FALSE RETURN.**—If a return is found to be false, the relator may recover damages equivalent to the injury sustained, together with a peremptory mandamus to the defendant to do his duty.⁶ Summary recovery of damages on the ground of false return is allowable only when relator traverses the return by plea and establishes its falsity first; not when he demurs and prevails on the ground it is insufficient in law.⁷

(h) **AMENDING OR WITHDRAWING RETURN.**—The court will allow a return to be amended when no loss of time or other in-

answer of the board, in a petition for mandamus against the latter. *People v. San Francisco*, 27 Cal. 655.

1. *Harwood v. Marshall*, 10 Md. 451. An alternative mandamus may be made returnable at a special term. *People v. New York Common Pleas*, 13 Wend. (N. Y.) 649.

Under N. C. Code, § 623, when the writ is applied for to enforce a money demand the summons must be returned in term time. *Rogers v. Jenkins*, 98 N. Car. 129.

2. *State v. Baird*, 11 Wis. 260. See *Hoffman v. Shea*, 70 Wis. 104.

Where an alternative mandamus is issued and no answer or return of cause is made, the court, instead of proceeding by attachment for contempt, may direct a peremptory mandamus to issue, simply regarding the alternative mandamus as in the nature of a rule to show cause why an absolute mandamus should not issue, and the court which issues such rule is the exclusive judge of the sufficiency of the service of it, and its judgment upon that matter cannot be revised upon appeal. *State v. Jones*, 1 Ired. (N. Car.) 129.

Where an alternative writ of mandamus was granted to a judge of the circuit court to compel him to sign a bill of exceptions and the writ was delivered to the judge but not returned by him, the supreme court of Illinois granted

peremptory writ requiring him to sign the bill of exceptions. *People v. Pearson*, 2 Scam. (Ill.) 189.

3. *People v. Kalamazoo Circuit Judge*, 39 Mich. 301.

4. *Ex Parte Trustees of Williamsburgh*, 1 Barb. (N. Y.) 34; *State v. City of Cincinnati*, 19 Ohio 178; *People v. Harris*, 9 Cal. 571; See *v. Small*, 47 Wis. 436.

To a mandamus requiring inspectors of election to return whether the relators did not receive the greatest number of votes, and whether they did not declare them duly elected, a return that they were not duly elected by the greatest number of votes is evasive, and should be quashed on motion. *People v. White*, 11 Abb. (N. Y.) Pr. 168.

5. *State v. Ferguson*, 2 Vroom (N. J.) 107.

6. *Tallapoosa v. Tarver*, 21 Ala. 661.

Evidence on the trial of an issue, in a mandamus to restore the member of a beneficial society who had been illegally expelled, the relator, being entitled to recover damages, as in an action for a false return to the writ, may give evidence that since his expulsion he had been in a condition which entitled him to the aid of the society, under its constitution and by laws. *Marion Beneficial Society v. Commonwealth*, 31 Pa. St. 82.

7. *State v. Ryan*, 2 Mo. App. 303.

jury is occasioned thereby.¹ After a return has been made to a writ any defect in substance may be taken advantage of at any time before the peremptory mandamus is awarded.² So a return to a mandamus may be adopted and made part of the return to a subsequent one, and thus constitute part of the pleadings and evidence in the case.³

(i) ANSWER TO RETURN.—On return to an alternative mandamus denying material allegations thereof, issue is raised without answer to the return.⁴ The papers on which the original motion was made must be presented and the points stated in writing in support of the application.⁵

Leave may be given to withdraw a return by consent.⁶

(j) MOTION FOR PEREMPTORY MANDAMUS.—The relator may move for a peremptory mandamus notwithstanding a rule to plead to the return.⁷ But the court will not on such motion look beyond the return.⁸ So a peremptory mandamus may be set aside on motion if unfairly issued.⁹ When the return presents traversable issues, the court ought not to grant a peremptory writ upon sustaining the relator's demurrer *ore tenus* to such return.¹⁰

(k) RETURN TO PEREMPTORY MANDAMUS.—A performance of the several specific acts commanded to be done by a peremptory writ of mandamus is the proper response to such a writ.¹¹

Although the general rule is that no return to a peremptory mandamus is sufficient except that it has been obeyed, yet if a statute has been enacted after such peremptory order forbidding obedience and making obedience impossible, such new matter will of necessity constitute a sufficient return provided the statute is constitutional.¹²

5. **Discharging Rule to Show Cause.**—On a motion to discharge a rule to show cause why a peremptory mandamus should not issue, the court cannot look at any facts outside of the record annexed to the application for such rule.¹³

6. **Judgment.**—The decree of a court granting a mandamus is a final judgment, but it does not become final on its rendition. The judge may, on his own motion, order a new trial any time

1. *Reg. v. Paynter*, 9 Jur. 926; *Rex v. Marriott*, 1 D. & R. 166; *State v. Keokuk*, 18 Iowa 388; *Reg. v. Conyers*, 8 Q. B. 981. A clerical mistake may be amended in the return after the return has been filed. *Rex v. Lyne Regis (Mayor)*, 1 Dougal 135; *Reg. v. Derbyshire etc. R. Co.*, 2 C. L. R. 1653.

2. *People v. Supervisors of Fulton*, 14 Barb. (N. Y.) 52. See *State v. Board of Equalization*, 10 Iowa 157; *State v. Weeks*, 93 Mo. 499.

3. *Rogers v. Mandeville*, 20 Ga. 627.

4. *State v. Pierce County (Wis.)*, 37 N. W. Rep. 231.

5. *People v. Delaware*, 2 Wend. (N. Y.) 255.

6. *Rex v. Barker*, 3 Burr. 1379.

7. *People v. Cayuga Common Pleas*, 10 Wend. (N. Y.) 632.

8. *People v. Commrs. of Hudson*, 7 Wend. (N. Y.) 474.

9. *Everett v. People*, Col. Cas. (N. Y.) 149; s. c., 1 Cai. (N. Y.) 8.

10. *State v. Delafield*, 69 Wis. 264.

11. *State v. Alachua County Canvassers*, 17 Fla. 9.

12. *Sedberry v. Choteau County*, 66 N. Car. 486.

13. *State v. Sheboygan County*, 20 Wis. 104.

before the lapse of the time prescribed.¹ So the judgment in a proceeding for a mandamus is subject to review on the same conditions as that in any other action.²

XIX. COSTS.—In petitions for mandamus costs follow the event of the suit.³ The granting of costs to one party or the other is exclusively in the discretion of the court, and they may be awarded or refused according as the equity and justice of each case may require.⁴ And when awarded they cannot be the subject of review or appeal.⁵ Where defendant is solvent plaintiff will not be required to make a deposit to secure the commissioner's costs.⁶

XX. VIOLATION.—The inferior court cannot refuse to obey the mandate to proceed sent from a superior court.⁷ So where a writ of mandamus is delivered to a judge or other person to whom

1. *State v. Sixth District Judge*, 32 La. An. 207.

2. *Hartman v. Greenhow*, 102 U. S. 672.

3. *Fox v. Whitney*, 32 N. H. 408; *People v. Colborne*, 20 How. (N. Y.) Pr. 378.

4. *People v. Densmore*, 1 Barb. (N. Y.) 557; *People v. Ulster County Supervisors*, 65 How. (N. Y.) Pr. 327; *Ballou v. Smith*, 31 N. H. (11 Frost) 413.

The supreme court have not the power by mandamus to review and control the adjudication of full costs of a court of common pleas, made on the ground that, on the trial of a cause in trover had before it, the title to land came in question. *Oneida Common Pleas v. People*, 18 Wend. (N. Y.) 79.

The costs to be allowed, and which are recoverable upon an appeal from an order granting a peremptory mandamus, when such order is affirmed, are regulated by N. Y. Code, § 3240, and, in the discretion of the court, are the same costs which are given on "appeal from a judgment." *People v. Ulster County Supervisors*, 65 How. (N. Y.) Pr. 327. Compare *People v. Ewen*, 8 Abb. (N. Y.) Pr. 359; *People v. Lewis*, 28 How. (N. Y.) Pr. 159.

Generally.—In suits and proceedings upon writs of mandamus, the court, on awarding a peremptory mandamus, does not grant costs against the judges of subordinate courts, or other public officers entrusted with the discharge of judicial duties. *Anon.*, 19 Wend. (N. Y.) 157.

Where the term of a town officer expires while proceedings in mandamus against him are pending, and an alternative mandamus is sued out against his

successor, *held*, that the latter is not liable upon judgment against him for costs incurred before the issue of such alternative mandamus. *Ferguson v. State*, 31 N. J. L. 289.

Where, on a petition for mandamus, an alternative mandamus issued, and before the return day thereof the petitioner complied with the order, but not within the period therein specified, whereby the petitioner was subjected to delay and expense in another court. *Held*, that although the failure to comply seasonably with the order was in contempt of the authority of the court, the costs of the delay in another tribunal could not be added to the costs of the proceedings on the petition for mandamus. *Fox v. Whitney*, 32 N. H. 408.

In *North Carolina*, under the act concerning writs of *quo warranto* and *mandamus* (1 Rev. Stat., ch. 97), the defendant, though judgment is given for him, cannot recover his costs against the relator, where the public only is interested. *State v. King*, 1 Ired. (N. Car.) L. 22.

In *Maine*, where process is withdrawn by petitioners the rule is to allow costs unless it is shown that respondent is in fault. *Anon.*, 31 Me. 591.

5. *People v. Albright*, 14 Abb. (N. Y.) Pr. 305; *State v. Judge of Kenosha County*, 3 Wis. 809.

Where, upon an issue in mandamus, the finding is against the defendant, but makes no mention of costs, the omission may be corrected by the *postea*. *Ferguson v. State*, 31 N. J. L. 283.

6. *United States v. St. Charles County*, 31 Fed. Rep. 442.

7. *Levin v. Hanley, Wright* (Ohio) 589. See *Sweeny v. Maynard*, 52 Cal. 468.

it is directed and he refuses to obey it, an attachment will issue for contempt.¹

An appeal from an order adjudging the appellant guilty of contempt in not obeying a peremptory writ of mandamus, the question as to the propriety of the order granting the writ is not presented and cannot be considered.²

1. Attachment for Contempt.—When a peremptory writ of mandamus is issued addressed to a county judge, a writ of attachment for contempt in not obeying the order of the court should run against the officer by his individual name and not by his official name alone. So when a writ of mandamus is issued directed to a board of canvassers consisting of a county judge and two justices of the peace, an attachment for contempt in disobeying the writ should run against the justices as well as the judge.³

MANDATE.

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I. Definition.—A mandate is a judicial command or precept issued by a court or magistrate directing the proper officer to enforce a judgment, sentence or decree.⁴

1. *People v. Pearson*, 3 Scam. (Ill.) 270; *Commonwealth v. Sheehan*, 81½ Pa. St. 132. See *United States v. Labette Co.*, 2 McCrary (U. S.) 25; *State v. Harvey*, 14 Wis. 152.

Where a petitioner ordered to be restored to his office and functions of pastor under the charter of a religious corporation is subsequently disqualified under said charter from holding said office, such qualification is good cause for discharging parties under attachment for disobeying the same. *Weber v. Zimmerman*, 23 Md. 45.

Sufficient Obedience.—When a mandamus issues to credit a certain sum of money, it is sufficient obedience to the writ to credit that sum without interest. *United States v. Kendall*, 5 Cranch C. Ct. 385.

Excuse for Not Obeying the Writ.—A willingness expressed to execute and deliver corporate bonds of a town in pursuance of a writ of mandamus upon receipt of a certificate of stock, and a refusal to give such certificate, it seems

will excuse the respondent from obeying the mandate of the writ until the corporation relator is ready and willing to give the town such certificate; but where no offer is made by the respondent to perform, or any willingness expressed to deliver the bonds, and it is evident he would have refused to deliver them if the stock had been tendered, the failure of the relator to tender the stock will furnish no excuse for not obeying the command of the writ. *People v. Barnett*, 91 Ill. 423.

2. *People v. Rochester etc. R. Co.*, 76 N. Y. 294.

3. *State v. Linnett*, 7 Iowa 334.

4. *Bouv. L. Dict.*; *Jones on Bailments* 52.

Mandate Under New York Code.—The word "mandate" in the provision of the New York Code of Civil Procedure authorizing the court to punish for criminal contempt a person guilty of wilful disobedience to its "lawful mandate," means only a written direction or order. *People v. Oyer and Termi-*

A mandate is a bailment of personal property in regard to which the bailee engages to do some act without reward.¹

II. Distinction Between Mandate and Deposit.—The great distinction, according to Sir WILLIAM JONES, between one sort of mandate and a deposit is that the former lies in feaseance and the latter simply in custody.² JUDGE STORY, criticising this statement, says that both in deposit and mandate there is custody and labor and service to be performed, the distinction between them being that in the case of deposit the principal object of the parties is the custody of the thing and the service and labor are merely accessorial; in the case of a mandate the labor and services are the principal objects of the parties and the custody is merely accessorial.³

III. The Consideration for the Contract.—It has been held that a mandate is no contract on account of lack of consideration. The delivery and acceptance of the goods constitute a sufficient consideration.⁴

IV. Form.—No particular form or manner of entering into the contract of mandate is prescribed, either by the common law or by the civil law.⁵

ner, 36 Hun (N. Y.) 281. According to the code itself (section 3343, sub. 2) "the word mandate includes a writ, process or other written direction issued pursuant to law out of a court, or made pursuant to law by a court, or a judge, or a person acting as a judicial officer and commanding a court, board or other body, or an officer or other person named or otherwise designated therein, to do or refrain from doing an act therein specified." And see McKelsey v. Lewis, 3 Abb. N. Cas. (N. Y.) 61.

1. Story on Bailments, § 137.

Mandate is when one undertakes without recompense to do some act for another in respect to the thing bailed. 2 Kent's Comm., Lect. 40, *p. 569. A mandate is a contract by which one commits a lawful business to the management of another, who undertakes to perform the service gratuitously. Richardson v. Futrell, 42 Miss. 525. See also Coggs v. Bernard, 2 Ld. Raym. 909, 913, 1 S. L. C., p. 369 (8th ed.); McCauley v. Davidson, 10 Minn. 421; Eddy v. Livingston, 35 Mo. 492; Bronnenburg v. Charman, 80 Ind. 477; Halifax, Analysis of the Civil Law 70; Wood, Civil Law, bk. 3, ch. 5, 242; Pothier, Traité de Mandat, art. Prelim., n. 1; Erskine, Inst., bk. 3, tit. 3, § 11.

Procuracion.—A mandate or procuracion is an act by which one gives to

another a power of doing something for the mandant and in his name. Code Civil of France, bk. 3, tit. 13, ch. 1, art. 1984.

2. Jones on Bailm. 53.

3. Story on Bailm., § 140, 2 Kent's Comm., *p. 569.

4. Pars. on Cont., vol. 2, *100. Riches v. Briggs, Yelv. 41, Cro. E. 883; Wheatley v. Low, Cro. J. 668; Whitehead v. Greetham, McClel. & Y. 205; Coggs v. Bernard, 2 Ld. Raym. 909; 1 S. L. C., p. 369 (8th ed.); Doorman v. Jenkins, 2 A. & E. 256; Shillibeer v. Glyn, 2 M. & W. 143; Bainbridge v. Firmstone, 8 A. & E. 743; Robinson v. Threadgill, 13 Ired. N. Car. L., 39; Rutgers v. Lucet, 2 Johns. Cas. (N. Y.) 92; Eddy v. Livingston, 35 Mo. 487; Delaware Bank v. Smith, 1 Edm. Sel. Cas. (N. Y.) 351; Hammond v. Hussey, 51 N. H. 40; Jenkins v. Bacon, 111 Mass. 373; McCauley v. Davidson, 10 Minn. 418.

The instruction by the judge that there was no consideration for the contract (mandate) which was the cause of the action, was held to be erroneous at common law. Ferguson v. Porter, 3 Fla. 27.

5. Story on Bailm., § 160. It may be verbal or in writing; it may be express or implied; it may be in a solemn form or in any other manner. Pothier, Pand., lib. 17, tit. 1, n. 19.

V. Requisites of Mandate.--In every contract of mandate there must be the following requisites:¹

1. At least two parties, the one employing called the mandator and the person employed called the mandatary.² All parties who are capable and willing to enter into contracts may become mandators and mandataries.³
2. Property to be acted upon. This is always personal property.⁴
3. Some act or business to be done by the mandatary to the subject matter for the benefit of the mandator.⁵
4. This act to be done gratuitously.⁶

1. Story on Bailm., § 144.

2. Story on Bailm., § 138. If the thing done concerns only the interest of the mandatary, no contract arises. This is mere advice or recommendation. Pothier, *Contrat de Mandat*, n. 15; Code of Louisiana of 1820, art. 2955.

3. **Married Women and Minors.**--The extent to which married women and minors can enter into mandates depends on the general rights and disabilities of married women and minors in respect to contracts generally. Story on Bailm., § 162. Story on Agency, § 485.

4. Story on Bailm., § 141. In civil law real property was also subject to mandate. 1 Pothier, *Pand.*, lib. 17, tit. 1, n. 3-5; Dig., lib. 17, tit. 1, n. 1-2; 1 Brown, *Civ. Law* 381.

5. Story on Bailm., § 144.

This requisite is pertinent only to an act to be done *in futuro* and not one already completed. The Roman law would class under this head a request from a third person to a creditor to give time to his debtor at the risk of the mandator. Pothier, *Contrat de Mandat*, n. 18, n. 6.

It must respect some certain thing. Vagueness prevents the law from acting. Thus where an agent's instructions are so ambiguous as to leave it doubtful whether he should pay a fund to one creditor or to another, and acting in good faith he pays it to the one not intended, the other has no action against him. *Dunbar v. Hughes*, 6 La. An. 466.

The act to be done must not be vain or absurd. Pothier, *Contrat de Mandat*, n. 12. If the act be possible, the contract may arise, though the mandatary may not have the proper skill to perform it well. Pothier, *Pand.*, lib. 17, tit. 1, n. 25-30.

The act to be done need not be for the benefit of the mandator, it may be

for the benefit of a third person. Pothier, *Contrat de Mandat*, n. 17; Halifax, *Anal. Civ. Law*, 70.

6. **Compensation.**--If there be compensation, express or implied, certain or uncertain in amount, the contract is a contract for hire. *Newhall v. Paige*, 10 Gray (Mass.) 366; *Haigh v. Brooks*, 10 Ad. & E. 320; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Hubbard v. Coolidge*, 1 Metc. (Mass.) 84, 92. A small compensation will not necessarily constitute the contract one for hire. *Comp v. Carlisle Deposit Bank*, 94 Pa. St. 409.

In *Louisiana*, mandate may be a form of agency and hence is not necessarily gratuitous. "Under our code, which has modified the principles of the Roman law, it is not of the essence of mandate that it be gratuitous. And, in our opinion, it is not necessary for an agent to establish an express agreement that he should have a pecuniary remuneration for his services. Courts may infer such an agreement from the nature of the employment and the relations of the parties. *Waterman v. Gibson*, 5 La. An. 672; 7 La. An. 207. See *Duranton*, lib. 3, tit. 13, n. 197. But where no agreement as to pecuniary remuneration can be inferred from the nature of the employment or the relation of the parties—it is a case of gratuitous procuration. *La Fourche Navigation Co. v. Collins*, 12 La. An. 119.

A mandatary, however, cannot recover on a *quantum meruit*. *Wilson v. Wilson*, 16 La. An. 155.

Gratuitous Agency at Civil Law.--Every case of gratuitous agency gave rise to the obligations of a mandate in the civil law. In our law we should treat it as a case of agency and not of bailment. The obligations in point of law may in many respects be the same, but the classification would be different.

5. The parties to intend voluntarily to enter into the contract.¹

VI. Duties and Obligations of the Parties.—The duties and obligations of the mandator and mandatary grow fairly out of the elements that make up the contract, to be ascertained by the express terms of the contract as explained by all the surrounding and attending facts and circumstances of the case.²

The general duties and obligations of the parties pertaining to almost all cases of mandate may be expressed as follows:

1. *Of the Mandator.*—To reimburse the mandatary for all necessary expenses and charges,³ and to indemnify the mandatary for incidental contracts.⁴

2. *Of the Mandatary.*—To do the act which is the object of the mandate after having once entered upon it. He is liable for misfeasance though not for nonfeasance.⁵

Story on Bailm., § 142; Story on Agency, § 4. According to the French law and the law of Louisiana a contract of mandate might intervene though there was no delivery of property in the mandator. Code Civil of France, art. 1884-1891; Code of Louisiana (1825), art. 2954-2964.

1. There must be no duress or constraint, substantial mistake, fraud or imposition, or misconception of the real intention on either side. Story on Bailm., § 155.

2. FREEMAN, J., in *Mariner v. Smith*, 5 Heisk. (Tenn.) 203.

3. *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; *Devalcourt v. Dillon*, 12 La. An. 672.

4. For the preservation and care of the property in his possession, and particularly as to live animals injured as in this case. *Harter v. Blanchard*, 64 Barb. (N. Y.) 617.

Where A deposits in B's hands merchandise to be sold and the proceeds to be applied to the extinguishment of A's debt to B, the transaction is a case of mandate, and B is entitled to all necessary expenses that have been incurred in fulfilling the object of the mandate. *Devalcourt v. Dillon*, 12 La. An. 672.

Contracts with Third Persons.—The mandator is liable for contracts made with third persons by the mandatary acting within the scope of his authority. And this is so even though the mandatary may also be liable in such a case upon a particular contract. 64 Barb. (N. Y.) 617.

5. Difference Between Liability for Nonfeasance in the Civil Law and in the Common Law.—In civil law the mandatary having accepted the con-

tract is bound to perform it according to his agreement and is liable for all damages sustained by the mandator by his non-performance, in like manner as if sustained by a misfeasance. Digest, lib. 17, tit. 1, 1-5, § 1; 1-27, § 2. SIR WILLIAM JONES contends that the doctrine pertains to the common law as well. This theory is criticised satisfactorily in *Thorne v. Deas*, 4 Johns. (N. Y.) 84. This was a case where one of the owners of a vessel voluntarily offered to get her insured, but neglected to do so. The vessel being lost and action being brought, it was held that no action would lie against the mandatary for his nonfeasance. CH. J. KENT, referring to SIR W. JONES's Essay on the Law of Bailments, says: "This treatise stands high with the profession as a learned and classical performance, and I regret that on this point I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some dicta (and those equivocal) from the Year Books, in support of his opinion, and were it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. A short review of the leading cases will show that by the common law a mandatary is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss." The learned judge then discusses and applies to the question in hand *Watson v. Brinth* (Year Book, 2 Hen. IV, 3b), 11 Hen. IV, 33a; 3 Hen. VI, 36b; 14 Hen. VI, 18b, pl. 58; 19 Hen. VI, 49a, pl. 5; 20 Hen. VI, 34a, pl. 4; 2 Hen. VII, 11,

To use slight care. He can only be held responsible for bad faith or gross negligence.¹ As to what constitutes slight care and gross negligence, no general rule can be laid down, for much depends upon the circumstances of each particular case, and the character and value of the thing bailed, and its liability to loss or injury.² The question is not whether he omitted that care which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence; but whether there be a want of that care which men of common sense, however inattentive, usually take or are presumed to take, of their own property, for that is gross negligence.³

To dispose of the property according to the directions which he has received.⁴ If he should deliver the property to a person not authorized to receive it, he would make himself responsible

pl. 9; 21 Hen. VII, 41a, pl. 66. See also *Elsee v. Gatward*, 5 T. R. 143, S. P.; *Wilkinson v. Coverdale*, 1 Esp. Rep. 75; *Smith v. Lascelles*, 2 Term Rep. 188; *Webster v. De Tastet*, 87 Term Rep. 157; *Balfé v. West*, 13 C. B. 466, 22 Eng. L. & Eq. 506, 17 C. B., N. S. 194; *McGee v. Bast*, 6 J. J. Marsh. (Ky.) 455; *Samuels v. McDonald*, 11 Abb. Pr., N. S. (N. J.) 344; *Fellowes v. Gordon*, 8 B. Mon. (Ky.) 415.

1. *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 S. L. C., p. 369 (8th ed.); *French v. Reed*, 6 Binn. (Pa.) 308; *Steamboat New World v. King*, 16 How. (U. S.) 469; *First National Bk. v. Graham*, 79 Pa. St. 106; *Whitney v. Lee*, 8 Metc. (Mass.) 92; *Foster v. Essex Bank*, 17 Mass. 479; *Giblin v. McMullen*, 21 L. T., N. S. 214; *Shiells v. Blackburne*, 1 H. Bl. 158.

2. *BAY, J.*, in *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122.

3. *STORY, J.*, in *Tracy v. Wood*, 3 Mason (U. S.) 135.

When the person who is appointed attorney in fact has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, we are of opinion that on the occurrence of difficulties in the exercise of it, which offer only a choice of measures, the adoption of a course from which loss ensues cannot make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to us to suppose the possession and require the exercise of perfect wisdom in fallible

beings. No man would undertake to render a service to another on such severe conditions. The reason given for the rule, namely, that if the mandatary had not accepted, the office, a person capable of discharging the duty correctly would have been found is quite unsatisfactory. The person who would have accepted, no matter who he might be, must have shared in common with him who did, the imperfections of our nature, and consequently must be presumed just as liable to have mistaken the correct course. The test of responsibility, therefore, should be not the certainty of wisdom in others, but the possession of ordinary knowledge, and by showing that the error of the agent is of so gross a kind that a man of common sense, and ordinary attention, would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous. *PORTER, J.*, in *Percy v. Millandon*, 8 Mart. (La.), N. S. 32; 20 Mart. (La.), O. S. 68.

4. *Fellowes v. Gordon*, 8 B. Mon. (Ky.) 415; *Ferguson v. Porter*, 3 Fla. 27; *Graves v. Ticknor*, 6 N. H. 537; *Colyar v. Taylor*, 1 Coldw. (Tenn.) 372.

Where in good faith he follows mandatary's directions, he cannot be held liable for what seems to the bailor a deviation from instructions. *Eldridge v. Hill*, 97 U. S. 92. See also *Camoy's v. Scurr*, 9 C. & P. 383.

for its value without regard to the question of due care or the degree of negligence.¹

1. Hall v. Boston etc. R. Co., 14 Allen (Mass.) 439; Lichtenheim v. Boston etc. R. Co., 11 Cush. (Mass.) 70; Cass v. Boston etc. R. Co., 14 Allen (Mass.) 448, 453; Jenkins v. Bacon, 111 Mass. 373; Stewart v. Frazier, 5 Ala. 114. This rule holds good even though the unauthorized person be the mandator's wife. Knowing v. Manly, 49 N. Y. 192.

As the problem whether the degree of negligence displayed in any particular case constitutes gross negligence depends on the circumstances of each particular case, a review of the principal cases of mandate, which have been decided on this question under their proper heads will be inserted at this point.

Annuities.—Howard offered to invest a sum of money for Dartnell in the purchase of an annuity. He laid out the money in securities wholly insufficient, and of no value whatever. *Held*, that it does not necessarily follow from these circumstances that Howard was guilty of gross or corrupt negligence. Dartnell v. Howard, 4 Barn. & C. 345.

Banks.—The plaintiff deposited with the defendant \$6,666.75 to be paid to L. Z. Rogers, provided he shall deposit with said bank a good and sufficient warranty deed conveying to plaintiff association the Waterville mill property. Rogers presented the deed and the bank, acting in good faith, paid over the money. It turned out that Rogers was not legally seised of the lands. *Held*, bank not liable. Cannon River Manufacturers' Assoc. v. First Nat. Bank of Faribault, 37 Minn. 394.

Under very similar circumstances a bank paid \$800 on a deed to one purporting to be J. L. Lord. The bank did not know J. L. Lord, and took no steps toward the identification of the stranger who represented himself to be J. L. Lord. The payee turned out not to be J. L. Lord and the deed proved to be a forgery. *Held*, bank not liable. "This is a different case and different principles rule than in the case of the payment of a check to the wrong person by a bank in the course of business." Metzger v. Franklin Bank, 119 Ind. 359.

Where a bank engages to charge previous endorsers of a note and fails to do so, it is guilty of misfeasance. Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372; Bank of Utica v. Smedes,

3 Cow. (N. Y.) 662; Bank of Utica v. McKinster, 11 Wend. (N. Y.) 473.

Defaults of Notaries.—For liability of banks for the defaults of their notaries and agents see BANKS AND BANKING, vol. 2, 113. See also Bank of Orleans v. Smith, 3 Hill 560, criticised in 7 N. Y. 461, 462, disapproved in 11 N. Y. 212.

Defaults of Correspondents.—For defaults of correspondents see BANKS AND BANKING, vol. 2, 112.

Demand of Payment.—For demand of payment and bank's liability for money collected see BANKS AND BANKING, vol. 2, 112.

A banker has a lien on a note paid into his house and a right to retain it for his general balance. Jourdain v. Lefevre, 1 Esp. Rep. 66, 5 Term Rep. 488, 3 C. B. 531; Australia Bank v. White, 4 App. Cas. 413. But where one bank transmits to another bills for collection, a banking custom of passing the avails to the credit of the transmitting bank and to the debit of the receiving bank cannot affect the claim of a third person. Lawrence v. Stonington Bank, 6 Conn. 521. Somewhat similar is Cent. Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54.

Bank Cashiers.—A bank is bound by the certification of a check by its cashier though there be no funds to meet it. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604; Cooke v. State Nat. Bank 52 N. Y. 96. But if an assistant cashier without authority accept a post-dated check, the bank is not liable even to a holder for value. Pope v. Bank of Albion, 57 N. Y. 126.

As to the ability of a cashier or other bank officer to bind his bank, see Case v. Citizens' Bank, 100 U. S. 456; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557; Morse v. Massachusetts Bank, 1 Holmes (U. S. C. C.) 209; Cochico Bank v. Haskell, 51 N. H. 116; Lloyd v. West Branch Bank, 15 Pa. St. 172; Dorsey v. Abrams, 85 Pa. St. 209; Ziegler v. First Nat. Bank, 93 Pa. St. 393, 397; State v. Commercial Bank, 6 Smed. & M. 218; Goodloe v. Godley, 13 Smed. & M. (Miss.) 233.

Bank Directors.—The directors of banks must exercise ordinary care and attention. It is not contemplated by any of the charters which have come under our observation, that they should

devote their whole time and attention to the institution to which they are appointed and guard it from injury by constant superintendence. Other officers on whom compensation is bestowed for the employment of their time in the affairs of the bank have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible. *PORTER, J.*, in *Percy v. Millamdon*, 8 Mart. (La.), N. S. 32; 20 Mart. (La.), O. S. 68.

All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. *The Bank of the U. S. v. Dunn*, 6 Pet. (U. S.) 51, 60.

Bank Officers.—The recognized and known functionaries of a bank, especially its officers, are held out to the world as having authority to act according to the general usage, practice, and course of business of such institutions. *Lloyd v. West Branch Bank*, 15 Pa. St. 172.

Bills and Notes.—A gave B a bill of exchange, which the latter promised to return to A on demand. The bill was given as a matter of courtesy, and was entirely for the benefit of A; yet as B did not return the bill on demand he was *held* liable to A for the amount. *Rutgers v. Lucet*, 2 Johns. Cas. (N. Y.) 92.

As to what are post notes, and the rules applicable to them, see *Mechanics' Bank v. Merchants' Bank*, 6 Metc. (Mass.) 13. Where an action is brought on account of the failure to collect a note, whether the agreement to collect was or was not gratuitous, is a matter of proof. *Kincheloe v. Priest*, 89 Mo. 240.

Where the defendant received certain notes to collect or return, the delivery of the notes constituted a consideration for the defendant's agree-

ment, and he was *held* liable for want of ordinary diligence in collecting them. *Robinson v. Threadgill*, 13 Ired. (N. Car.) L. 39.

Carrier Without Hire.—Where a passenger, carried gratuitously, is injured by an explosion, the result of gross negligence, the steamboat company is liable. *Steamboat New World v. King*, 16 How. (U. S.) 469.

If a package containing money be handed to the captain of a steamboat, which is in the habit of charging freight for carrying remittances of money, without informing him of its contents, and the package is lost, there being no charge for freight, the owners of the vessel are not liable. *Mechanics and Traders' Bank v. Gordon*, 5 La. An. 604.

Where a person was to take abroad bonds gratuitously and deposit them for sale for another person, he was *held* liable only for gross negligence. 32 Gratt. (Va.) 670.

Where one carried gold dust as a favor from California to New Orleans, to be delivered to a third person, and the mandator gave the mandatory the privilege of converting the gold dust into coin, such a conferring of power did not change the relationship of bailor and bailee into that of debtor and creditor. *Goodenow v. Snyder*, 3 Greene (Ia.) 599.

If a mandatory enter upon the execution of the business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; if he do not, and damage ensue, he is liable to the mandator for his misfeasance. *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

Where the defendant was to carry gold dust from California to Iowa gratuitously, there dispose of it and turn the proceeds over to plaintiff's wife, he was *held* liable only for gross negligence. *Jourdan v. Reed*, 1 Iowa 135.

Where a vessel has a right to compensation for carrying freight, and nothing has been said about the amount of freight to be paid, the common law liability of a common carrier is not created, though there may be the responsibility of a mandatory incurred. *Knox v. Rives*, 14 Ala. 249.

The U. S. statutes (4 Stat. at L. 104, § 6; 5 Stat. at L. 736, § 13) concerning the liability of steamboats engaged in carrying the mail do not impose upon the

owners of steamboats the responsibilities of common carriers in favor of a third person who has contracted for no more than the diligence of a mandatary in the carrying of bank bills. *Haynie v. Waring*, 29 Ala. 263.

A railroad corporation may lawfully agree with a passenger, who is carried gratuitously in its cars, that it will not be responsible for injuries resulting from the negligence of its servants. *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 282; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, *reversing* 29 Barb. (N. Y.) 602.

A carrier without hire is liable on his express promise to deliver safely. *Delaware Bank v. Smith*, Edm. Sel. C. (N. Y.) 351.

Collection of Money.—A clerk of the defendants' collected in Salt Lake City for the plaintiffs the sum of fifteen hundred dollars, and being unable to procure a bill of exchange deposited the money with the defendants for safe keeping. The undertaking was a mere act of kindness. The defendants bought a draft, according to the custom, from one Heyward, a marshal of the United States. At the time of purchase Heyward was in good credit; at the time of presentation at the treasury payment was refused. Plaintiffs sued the defendants for the amount. Defendants were held to be not liable. *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122.

Expert.—Where the profession of the bailee implies skill, a want of skill is imputable as gross neglect. *Stanton v. Bell*, 2 Hawks (N. Car.) 145; 11 Am. Dec. 744.

Where a farrier, without reward, offers to cure a horse of a swelling on the hock joint, and he makes the puncture so unskilfully that the horse becomes worthless, this act is equivalent to gross negligence. *Conner v. Winton*, 8 Ind. 315; 65 Am. Dec. 761.

"If a person holds himself out to the public as a physician, he must be held to ordinary care and skill (*i. e.*, the ordinary care and skill of physicians of the same general neighborhood) in every case of which he assumes charge, whether in the particular case he has received fees or not. *McNevin v. Lowe*, 40 Ill. 209; *Howard v. Grover*, 28 Me. 97; 48 Am. Dec. 479 (see especially note).

One who, without any benefit to himself, rides a horse at the owner's request for the purpose of exhibiting him

for sale, is bound to use such skill as he possesses; and if proved to be skilled in horses, is equally liable with a borrower for an injury done to the horse. *Wilson v. Brett*, 11 M. & W. 113; 12 L. J. Exch. 264.

Insurance.—Where a person, without pecuniary compensation, offers to execute an order of insurance and the execution turns out to be defective, he is liable for the loss. *French v. Reed*, 6 Binn. (Pa.) 308. See also *Moore v. Mourgue*, Cowp. 479.

Justice of the Peace.—Where money is paid by a judgment debtor to the judge, and the latter places it in his desk with his own money, and then notifies the judgment creditor that the money is ready for him, and the latter neglects for two days to call for it, during which time the money is stolen, it was held that the judge was not guilty of gross negligence, and hence was not liable. *Monteith v. Bissell's Administrator*, Wright (Ohio) 411.

Letters.—Where a hotel clerk received and signed a return receipt for a registered letter, delivered to him by a letter carrier for a guest of the hotel, and the letter was lost through his negligence, he was held liable. *Joslyn v. King*, 42 N. W. Rep. 756.

Where one gratuitously undertakes to carry a letter containing money from one city to another, he is liable for non-delivery. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Graves v. Ticknor*, 6 N. H. 537.

Lost and Stolen Goods.—Where one for the accommodation of the owner receives and undertakes to sell a bale of cotton, he is liable if it is lost by his gross negligence. *Patterson v. McIves*, 90 N. Car. 493; *Galledge v. Howard*, 23 Neb. 61.

Where an article has been lost, it is not necessary, in order to charge a mandatary, to prove that the delivery had been made to him individually or to one expressly authorized to receive for him. *Lloyd v. Barden*, 3 Strobb. (S. Car.) 343.

A ring deposited with defendant to be illegally raffled for was lost by his gross carelessness. *Held*, that he was liable. *Woolf v. Bernero*, 14 Mo. App. 518.

Where a stage coachman without reward undertakes to carry a parcel and loses it through gross carelessness, he is responsible. *Beauchamp v. Powley*, 1 M. & Rob. 38.

A carrier of money without reward

VII. Who May Maintain Suit.—Possession is a sufficient title to enable possessor to maintain a suit against a mere wrongdoer for any wrong or injury done to the thing.¹ But a recovery by the bailee against a trespasser is a bar to an action by the bailor for the same injury.²

VIII. Dissolution of Mandate.—The contract of mandate may be dissolved in one of the following ways:

By the death of the mandator or mandatary.

By the renunciation of the mandatary at any time before he has entered upon the execution of the contract.³

By revocation of the authority, either by operation of law or by the act of the mandator.⁴

By the bankruptcy of the mandator.⁵

By a change of the status of the parties.⁶

IX. The Measure of Damages for Refusal to Return.—The rule of damages in an action of trover is the value of the property at the time of the conversion with interest.⁷

is excused, in case of robbery, if he took the same care of it he took of his own. *Anderson v. Foresman*, Wright (Ohio) 598. To the same point see *Brownenberg v. Charman*, 80 Ind. 475; *Dart v. Lowe*, 5 Ind. 131.

But where he lost money belonging to a mandator, while he preserved his own money, he is liable for the loss. *Bland v. Womack*, 2 Murph. (N. Car.) 373.

Where money entrusted to a mandatary to carry to a certain person in a certain place is lost or stolen through his gross negligence, he is liable. *Kemp v. Farlow*, 5 Ind. 462. See also *Storer v. Gowen*, 18 Me. 174.

If a person entrusted with money by his superior to give to a third person gives it to a boy whom he has seen but a few times, and who has but recently entered the employ of said third person, and the boy absconds, the mandatary is guilty of gross negligence and is liable to his superior for damages. *Skelley v. Kahn*, 17 Ill. 169.

1. On this point the rule in the case of a mandate is the same as the rule in the case of a deposit. See **DEPOSITS**, vol. 2, p. 576; *Jones v. McNeil*, 2 Bai. (S. Car.) 466; *Hare v. Fuller*, 7 Ala. 717; *Cox v. Easley*, 11 Ala. 362. But see *Miles v. Cattle*, 1 Lloyd & W. 353; 6 Bing. 743.

In this case Miles was entrusted by one Garbut with the carriage of a £50 bank note to the defendant's office, who was a common carrier, to be forwarded by him to London. Instead of

obeying instructions plaintiff put the note in his bag intending to convey it himself to London. The bag was lost. It was held that Miles could not recover the £50 from Cattle because he had violated his trust toward Garbut by depriving him of any remedy he might have had against Cattle in case the parcel had been lost while in his custody, and he was a wrongdoer towards the stage company because he had deprived it of the fee it would have earned for carrying the parcel. On this latter point see also *Batson v. Donovan*, 4 B. & N. 21.

2. *Chesley v. St. Clair*, 1 N. H. 189; *Bissell v. Huntington*, 2 N. H. 143.

3. *Story on Bailm.*, p. 192.

4. *Story on Bailm.*, p. 195. Where a person deposits money with another to be appropriated in a certain way he may countermand his instructions and demand back the money at any time before the appropriation has been made. *Winkley v. Foye*, 33 N. H. 171. The revocation need not be express, but may be implied. *Copeland v. Mercantile Ins. Co.*, 6 Pick (Mass.) 198.

5. *Story on Bailm.*, 197; *Minett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East 382.

6. The general rules applicable to the law of contracts as to change of status of parties apply also to mandates. See *Story on Agency*, § 481.

7. *Vaughan v. Webster*, 5 Harr. (Del.) 256. See also **DEPOSIT**, vol. 5, 579. A wrongful refusal to deliver up property on reasonable demand will

MANDATE—MANDATORY—MANHOOD.

X. Evidence and Pleading.—The burden of proof of negligence is generally on the plaintiff.¹

What is gross negligence is generally a question of fact for the jury.²

In pleading, it is only necessary to aver negligence generally, not the specific facts constituting negligence.³

The concomitant acts of a mandatary immediately before and after the loss of the property bailed are admissible in evidence to disprove his negligence.⁴

The testimony of the defendant is inadmissible in regard to the loss of property entrusted to him as a mandatary.⁵

In an action brought against the bailee by the bailor for conversion, the former cannot set up the title of a third person except by the authorization of that person.⁶

MANDATORY.—In the construction of statutes this word is applied to such as require to be obeyed under penalty of having proceedings under them declared void.⁷

MANHOOD.—See note 8.

support an action of trover. 5 Harr. (Del.) 256.

1. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Lampley v. Scott*, 24 Miss. 528; *Graves v. Ticknor*, 6 N. H. 537; *Stewart v. Frazier*, 5 Ala. 114; *Clark v. Spence*, 10 Watts (Pa.) 335; *Newstadt v. Adams*, 5 Duer (N. Y.) 43; *Williams v. East India Co.*, 3 East 192. But see *Platt v. Hibbard*, 7 Cow. (N. Y.) 550; *Cumins v. Wood*, 44 Ill. 416; *Doorman v. Jenkins*, 1 Ad. & E. 256; *Smith v. First Nat. Bank*, 99 Mass. 605. See *DEPOSIT*, vol. 2, p. 573.

2. *Lancaster Co. Bank v. Smith*, 62 Pa. St. 47; *Griffith v. Tipperwick*, 20 Ohio St. 388. The court sometimes settles the question in its charge to the jury. *Smith v. First Nat. Bank*, 99 Mass. 60. See also *TAUNTON, J.*, in *Doorman v. Jenkins*: "A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. Such a question will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact and others where it is matter of fact more than of law."

3. *McCauley v. Davidson*, 10 Minn. 418.

4. *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Lampley v. Scott*, 24 Miss. 528.

5. *McNabb v. Lockhart*, 18 Ga. 495.

But where there would be a failure of justice and in the ordinary course of

human transactions no other testimony could necessarily be expected, a mandatary could give evidence in his own favor in regard to the loss of the property entrusted to him. *Lampley v. Scott*, 24 Miss. 528. This necessity must occur not from the natural failure of evidence in a particular case, but in the natural and usual course of human events, as, *e. g.*, where a person is robbed, his testimony is admitted because there is no other evidence. *Lampley v. Scott*, 24 Miss. 528.

6. *Bates v. Stanton*, 1 Duer 79; *Dodge v. Meyers*, 61 Cal. 405.

7. *Bouv. L. Dict.*

"Where the provision of a statute is the essence of the thing required to be done, it is mandatory; otherwise when it relates to form and manner;—and where an act is incident, or after jurisdiction acquired, it is directory merely." *Davis v. Smith*, 58 N. H. 17. And see *Endlich on Interp. of Statutes*, § 431, etc.

8. Where a testator bequeathed as follows: "I lend unto my grandson O. R. a tract of land, three negroes, etc. Now, if, in case the said O. R. should live to arrive at manhood and beget heirs lawfully, the above property to him and his heirs forever; if not, I give and bequeath the above-mentioned property unto my son J. R., to him and his heirs forever;" *held*, that "manhood" could not be construed to mean "21 years of age," that "and" could not be read "or,"

MANIA—(See also INSANITY).—*Mania* is that form of insanity where the mental derangement is accompanied with more or less of excitement.¹

MANIFEST—(See also BILL OF LADING).—In commercial navigation, a document signed by the master containing the names of the places where the goods have been laden, and the places for which they are destined, the name and tonnage of the vessel, the name of the master, and the place to which the vessel belongs; a particular description of the packages on board; marks, numbers, etc.; the goods contained in them; and the names of the shippers and consignees, as far as known. The manifest must be made out, dated and signed by the captain at places where the goods, or any part, are taken on board.²

Clearly visible to the eye; obvious to the understanding; not obscure or difficult to be seen or understood; plain; open; apparent; palpable.³

and that the grandson, although attaining 21 years, having died without having been married, the ulterior limitation took effect. *Felton v. Billups*, 1 Dev. & B. Eq. (N. Car.) 584.

1. *Hall v. Unger*, 2 Abb. (U. S.) 510. "Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred; and of things which do not exist, and acts more or less in conformity with his belief in these particulars. The mania may be general, and affect all or most of the operations of the mind; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed monomania."

"The phrases 'fit of mania' and 'insane delusion' are terms of ambiguous import, just as the generic term *insanity*, as used in the law books, itself is. . . . What we do say is, that there is a species of insanity, or mental unsoundness, manifested by a temporary depression or aberration of the mind, which sometimes accompanies or follows intoxication, and is often accompanied by delusions, hallucinations, and illusions. This state of transient departure from mental soundness is sometimes called a fit of mania, just as anger itself is often said to be a short madness, and these delusions are said to be insane delusions. But they are not such insanity as confers legal irresponsibility for crime." *Gunter v. State*, 83 Ala. 108.

2. Wharton's Law Lex.

3. Webs. Dict.

"**Manifestly Designed.**"—A recital in an indictment for making and publishing an obscene composition that certain words were "manifestly designed to corrupt the morals of youth," does not mean that the composition of itself and upon its face must manifestly be of a kind to produce that effect. "We construe these words to refer to the intention—the purpose—of defendants in making and publishing the composition. It must have been manifestly designed, that is intended and purposed by them, to corrupt the morals of youth by making and publishing such composition." *Smith v. State (Tex.)*, 5 S.W. Rep. 510.

"**Manifest Errors.**"—In construing this expression in an act giving power to a board of supervisors to correct "manifest errors" in any assessments or returns, the court said: "The errors which may be corrected are 'manifest' errors; not errors which may be shown to have been committed by extrinsic evidence, or may be proved to the satisfaction of the court. No provision is made for any enquiry, the production of proofs, or any trial. . . . But 'manifest,' as used here, means something which is apparent by an examination of the assessment-roll or return, needing no evidence to make it more clear. That which is open, palpable, and, I might add, incontrovertible. It is synonymous with evident, visible, plain, obvious to the understanding from an examination of the roll or document; or, at the most, only requiring a mathematical calculation to demonstrate it." *Matter of Hermance*, 71 N. Y. 485-6.

MANNER—(See also **LIKE**).—Lexicographers give to the word "*manner*" a broader meaning than that of "*method*." The derivation of the word "*manner*" is from the Latin, *manus*, the hand. "*Manner*" is literally the handling of a thing, and has a wider sense, embracing both *method* and *mode*.¹ It sometimes includes "time" as well.²

"Manifest Impediment."—Where an act provides that "no person shall be liable to be tried and punished by a general court martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period," the reference is to "such impediments only as operate to prevent the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or his being imprisoned under sentence of a civil court for crime, and the like." *In re Davison*, 4 Fed. Rep. 507.

"Manifest Reasons," such as are required to be shown by affidavit, under a rule of court, to authorize a circuit court commissioner to grant an injunction are "necessarily reasons based on facts shown by persons testifying on knowledge, and punishable for perjury if they swear falsely." *Tol. A. A. & N. Mich. R. Co. v. Det. L. & N. R. Co.*, 61 Mich. 11.

Where a provision that trusts should be "created and manifested" by a writing, was altered by a subsequent statute so as to read "created and declared," this was *held* to work a change of the law, it being henceforth sufficient that the trust be afterwards declared by a writing. *McClellan v. McClellan*, 65 Me. 500.

1. *Pitcher v. Bd. of Trade of Chicago*, 20 Ill. App. 326, quoting *Webs. Dict.* In this case, in construing the clause in an act "Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof," the court said: "Counsel for appellant seem to suppose that the words 'in manner' have reference to the mere method of doing it, through a majority of all the members of the corporation, but are not broad enough to authorize a delegation of the power to a board of directors. . . . It seems to us, from a consideration of all the provisions of the act, that its

framers intended to leave the whole subject matter of the expulsion of members to be regulated, both as to method and tribunal, by rules and by-laws of the body, not inconsistent with the principles of natural justice or the laws of the land. . . . We are of opinion . . . that the trial, conviction and expulsion of appellant were by a tribunal, not only authorized by appellee's charter, but by reason of appellant agreeing to be bound by said by-laws."

Whereas, in *Brown v. O'Connell*, 36 Conn. 432, in construing the provision in the constitution that the judges "shall be appointed by the general assembly in such manner as shall by law be prescribed," the court said: "The term 'manner' is a comprehensive one, but it is evident that it has reference in that connection to the mode of doing the act prescribed—to the proceedings of the two houses of the general assembly in making the appointment—whether by ballot or by resolution, and whether by joint or concurrent action of the two houses—and could not have been intended to authorize a delegation of the power to appoint any and all the judges to any officer or tribunal to whom they might think proper to delegate it."

The Pa. act of 1868, p. 547, providing for the extension of Fairmount Park, and assessment of damages "in like manner" as prescribed by the act of 1867, has reference merely to the general method. The quarter sessions may appoint six, instead of twelve, viewers. Thirty-fourth Street, Philadelphia, 81 Pa. St. 27.

The word "manner" is one of large signification, but it cannot exceed the subject it belongs to; the incident cannot be extended beyond its principal. *Wells v. Bain*, 75 Pa. St. 39, 54.

2. *Harris v. Doherty*, 119 Mass. 142, where it was said: "By ch. 142, § 5, trustee processes must be 'served on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment.' As no time is otherwise prescribed for the service of trustee processes, 'the manner' evidently in-

For its meaning in various phrases, see note I.

cludes the time, as well as the form, of service."

In *U. S. v. Morris*, 1 Curtis (U. S.) 26, the court say: "The time when such order is to be entered may or may not be considered as part of the 'manner' of remitting. Generally, the time of doing an act and the manner of doing it are distinct things. The phrase 'at such times and in such manner' is one of very frequent occurrence in legal language, and is strictly correct. Still, it may be that, though not naturally included, congress intended to embrace the time of entering the order in the words 'in like manner'; and therefore it is necessary to look carefully at the different parts of this statute, and see if such was the intention of congress. . . . It would seem, therefore, that the words 'in like manner' were not intended to embrace the time when the order is to be entered; for in one case it is to be when the indictment is presented, in the other while it is pending."

And so, in construing the section of a mining tax law, providing that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly, it was *held* that the word "manner" as there used did not mean "time." *State of Nev. v. Eureka Co.*, 14 Morr. Min. Rep. 165; s. c., 8 Nev. 15.

1. In discussing the requisites of a certificate and affidavit for the renewal of a limited partnership, in *Fifth Ave. Bank v. Colgate*, 54 N. Y. Super. Ct. 196, the court said: "The phrase 'in the manner herein required for its original formation' is the controlling indication of what the statute requires to be the contents of the papers that have been named. . . . What does 'manner' mean? If it means 'form' only, it must be said as to a certificate, as distinguished from the act of signing it, that the form in the original requirement was not particularized, but was a form of any shape that would contain the assertion of the existence of certain facts and intentions. . . . But the word 'manner' has a larger meaning than 'form' has. It includes 'mode, method, or way,' and therefore includes the idea that the documents shall have the same function that was intended for an original formation."

An act regulating the "manner of voting" in a county in questions of railroad taxation applies to votes where the question submitted is "whether or not stocks shall be subscribed," and not merely to votes where the question of levying the tax is submitted. *Ky. Union R. Co. v. Bourbon County*, 85 Ky. 98; s. c., 8 Ky. L. Repr. 887. "The phrase 'manner of voting,' literally interpreted, applies simply to the act of voting, which is provided for in the constitution, but, by itself, signifies nothing. It is therefore plain that a more comprehensive meaning was intended and should be given to it. And if so, why may it not fairly be applied to the counting of the votes and ascertaining the result of the voting? It seems to us there is a natural connection between 'regulating the manner of voting' and prescribing rules or tests by which to determine and declare the result, which was the object of the clause in question."

In the title of an act "providing for the manner of adopting children," "the word 'manner' is clearly demonstrative that the purpose of the law was to provide for the form to be used for the adoption of minors." *Succession of Vollmer*, 4 South. Rep. (La.) 256.

The "manner" of appealing *held* not to include the form of recognizance. *Morris v. Horrell*, 35 Mo. 470.

"**In Any Manner.**"—A power to appoint by deed or other writing not being a will, is not a power to appoint "in any manner," so as to be exercisable by a will under section 27th of the Wills act. "In any manner" obliges the court to distinguish between writings, deeds and testamentary documents. *Phillips v. Cayley*, 61 L. T., N. S. 195, 197, affirmed in 62 L. T., N. S. 86.

"**In the Same Manner.**"—In an act providing that damages for the removal of dams on certain streams should be assessed "in the same manner" as in the laying out of highways; the phrase "in the same manner" means "by similar proceedings, so far as such proceedings are applicable to the subject matter." *Phillips v. County Commrs.*, 122 Mass. 258, 260.

An assessor appointed by a common council had power by statute to assess upon the persons and property of the residents, etc., 'in the same manner' as the assessors of townships. This was

held to authorize the assessment "not only in the same manner as to form, but also as to the objects to be taxed. . . . This twelfth section directs an assessment upon persons as well as upon property, thus showing that something more was meant by the word 'manner' than the mere form of proceeding." *State v. Perkins*, 4 Zab. (N. J.) 411.

"**In Such Manner.**"—An act required a constitutional convention to submit amendments to the voters at such time "and in such manner as the convention shall prescribe," and that the election to decide upon the amendments should "be conducted as the general elections now are." By the election laws the election was to be conducted by inspectors. The convention, by an ordinance, appointed persons to have direction of the election, to fill vacancies, appoint judges and inspectors, make report of their action to the president of the convention, etc. *Held*, that the ordinance was void as contrary to the act. *Wells v. Bain*, 75 Pa. St. 39. The court said: "The word 'manner' is one of large signification, but one thing is clear—it cannot exceed the subject it qualifies or belongs to. The incident cannot be extended beyond its principal. What then does the word 'manner' qualify or pertain to in this section? Clearly it is the submission—'shall submit the amendments in such manner as the convention shall prescribe, subject to'—subject to what?—the limitation as to the separate submission of amendments. Can language be clearer to express the mode of submitting or placing the amendments before the people for their adoption or rejection? . . . No implication can be drawn from the word 'manner' to contradict the plain and positive enactment that the election shall be conducted according to the laws governing general elections. It would violate the plainest rules for the interpretation of statutes to make the merest inference stand higher than an intent expressed in distinct language."

The constitution of *Nevada* provides that the legislature shall submit proposed amendments to the people "in such manner and at such time as the legislature may prescribe." A statute provides for the publication of such amendments in a daily newspaper for ninety days preceding the election, and the distribution of copies of such paper. *Held*, that this act was not unconstitutional. *State v. Davis*, 19 Pac. Rep. (Nev.) 894, the court saying: "The con-

stitution having unconditionally referred to the legislature the subject matter of the manner of submitting proposed amendments, by declaring that they shall be submitted 'in such manner and at such time as the legislature shall prescribe,' such reasonable requirements may be imposed by the legislature as its discretion may suggest." *HAWLEY*, J., dissented, saying: "What did the framers of the constitution mean when they declared that 'it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe?' . . . As to the manner, they meant that the legislature should prescribe the method as to how the votes thereon should be cast, whether upon separate ballots or upon the ballots containing the names of officers to be voted for at such election, and prescribing the manner in which the electors should express their votes. The word 'manner,' as used in the constitution, does not necessarily require anything more and was not intended to embrace anything else." Quoting from the above case of *Wells v. Bain*, 75 Pa. St. 39, 54.

Where a statute provided that in the case of a verdict found or judgment given for a person suing a writ of mandamus "he shall recover his damages and costs in such manner as he might have done in a civil action for a false return," it was contended that the words "in such manner" referred only to the forms or modes of procedure whereby the damages were to be recovered, and did not, in the least degree, qualify or limit the absolute right of recovery. But the court held this view not tenable, saying: "It should also appear that the statutory expression 'in such manner,' etc., means nothing more nor less than under the like conditions and limitations as would apply to a civil action for a false return upon the alternative writ, if there were no statute in the case. It follows that the relator, in this instance, is entitled to the assessment of damages demanded, if he could have recovered them in such an action, and not otherwise." *State v. Ryan*, 2 Mo. App. 303, 310.

A constitutional provision that certain officers "shall be appointed or elected in such manner as the general assembly may direct," gives to the latter no appointing power. *State v. Kenyon*, 7 Ohio St. 546. "To make good this claim, it must be made to appear

MANOR.—*In English Law.*—A tract of land originally granted by the king to a person of rank, part of which was given by the

that the power to direct the 'manner,' the mode, the way in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical or equivalent to each other, is too clear for argument, and almost too clear to admit of illustration. To prescribe the *manner* of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function."

A power given to a trustee to distribute "in such manner and proportion as he shall think proper" gives him full discretion to make unequal appointments. *Cowles v. Brown*, 4 Call (Va.) 477.

"In manner above mentioned," in a statute, construed. *Reg. v. Humphery*, 10 Ad. & Ell. 335, 372.

"In manner aforesaid," in a will. *Woodall v. Woodall*, 3 C. B. 350. The court said with reference to the constructions contended for: "The defendant's construction treats the words 'in manner aforesaid' as something inoperative and without any effect, in the meaning of the will, which, on this construction, is the same as if they were left out; whereas, the construction of the plaintiff gives them the appropriate effect of saving a long repetition of the detailed limitations to which they refer."

An agricultural lease contained a covenant on the part of the lessor, his heirs, etc., that he and they would 'drain with proper drain tiles, one rod apart, ten acres of the lands now in rye-grass, at his and their costs, except the carriage of the said drain pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, *in manner aforesaid*, upon being paid a further yearly rent of £5 for every £100 so expended." *Held*, that the words "in manner aforesaid" referred only to the mode of performing the work, viz.: placing the drain tiles one rod apart; and therefore the tenant was not chargeable with the expense of carriage of the drain pipes beyond the first ten acres. *Beer v. Santer*, 10 C. B., N. S. 435.

"In manner following," in the covenants in a lease, "must, according to the general rules of construction, extend to all the subsequent covenants on

the part of the lessees throughout the deed, unless there be something in the nature of the subject to restrain them to the former part of the lease." *Duke of Northumberland v. Errington*, 5 T. R. 522, 525.

"In Manner and Form"—*In Pleading.*—The words "in manner and form," etc., which are regularly used in tendering an issue, either general or special, are sometimes of the *substance* of the issue, and sometimes merely words of *form*. When they are of the *substance* of the issue, they put in issue the *circumstances*, alleged as concomitants of the principal matter denied by the pleader (such as time, place, manner, etc.). When *not* of the substance of the issue, they do *not* put in issue such circumstances. They may always be safely used, in tendering an issue, because, in their legal effect, they always put in issue all *material* circumstances, and *no other*. *Gould Pl.* (5th ed.) 292.

In an indictment the words "in manner and form following, that is to say," do not bind the party to recite the instrument, etc., *verbatim*, nor render mere formal omissions or mistakes fatal. *Rex v. May*, 1 Doug. 193.

In a Verdict.—Upon an indictment for concealing the death of a bastard child, the jury found the prisoner 'guilty of the concealment in manner and form as she stands indicted.' The verdict was held bad, in consequence of the omission to find the bastardy of the child. *Boyles v. Com.*, 2 S. & R. (Pa.) 40.

In articles of settlement of the wife's estate, power was given to the husband to appoint her estate to the children of the marriage for such estates and in such parts and in such manner and form as he should by deed or will appoint. *Held* that the words "in such manner and form" authorized him to give equitable interests to the children. *Trollope v. Linton*, 1 Sim. & S. 477.

In a statute where by a certain act a warrant of attorney to confess judgment not filed "in manner and form" provided by an earlier act, is deemed void, the words "in manner and form" "refer only to the mode in which the thing is to be done, and do not introduce anything from the act referred to, as to the thing which is to be done or the time for doing it." *Acraman v. Herniman*, 16 Q. B. 998, 1003.

grantee or lord of the manor to his followers, the rest retained by him under the name of his demesnes.¹

In American Law.—A manor is a tract held of a proprietor by a fee-farm rent in money or in kind, and descending to the oldest son of the proprietor, who, in New York, is called a patroon.²

MANSION—(See also ARSON; BURGLARY; DWELLING HOUSE).—"Mansion" and "dwelling-house" are practically synonymous,³ and include not only the principal house, but appurtenant buildings.⁴

MANUAL—See note 5.

1. Bouv. L. Dict. See Elphinstone on Interpretation of Deeds 592.

In *Delacherois v. Delacherois*, 11 H. L. Cas. 83, it is said: "Without attempting to define a manor in the abstract, it is enough to say that the seisin of a defined district, with the power of subinfeudation therein, and the existence of freeholders holding of the manor, and the right to a court baron, in which the feudatories are judges, does of itself constitute a seignior or manor within the considerations applicable to the present case."

2. Bouv. L. Dict. See *People v. Van Rensselaer*, 5 Seld. (N. Y.) 291.

3. Bish. Stat. Crime, § 277—"but 'house' is not quite the same. . . . The latter is of meaning somewhat larger than the others, though the difference is not quite definable." See also 1 Chit. Gen. Pr. 167.

In an indictment for burglary, a house was held sufficiently described as a *dwelling* house by the word *mansion*. *Com. v. Pennock*, 3 S. & R. (Pa.) 199.

A mansion house held upon the same trusts as lands at a distance was held a "principal mansion house," within the meaning of the Settled Land Act, 1882. *In re Thompson's Will*, 21 L. R. Ir. 109.

4. *Fletcher v. State*, 10 Lea (Tenn.) 338; 1 Hale P. C. 558. Bacon's Abr. II. 135, 136. In 4 Com. Dig. 618, it is said: "A church is a mansion house. . . . So, a shop. . . . So, a chamber within the inns of court, if it be inhabited. . . . By the stat. 5 Edw. VI, 2, a booth or tent in a fair or market in which any there remains; an house from which all are occasionally absent. . . . So, if a man inhabits sometimes in one house, sometimes in another, both are mansion houses. . . . If a woman hires an house, and lives separate from her husband, and the

lease being in the husband's name he refuses to have it, yet it shall be the mansion house of the husband. . . . A barn or stable disjoined are not mansion houses at this day. . . . Nor a shop let to another, who works there by day, but does not abide there by night; for it is severed by lease from the mansion house to which it is annexed."

5. **Manual Labor**.—A tram car driver is not a person "engaged in manual labor" to whom the Employers and Workmen act, 1875, applies. *Cook v. N. Metropolitan Tramway Co.*, 18 Co. Ct., 100; s. c., 56 L. T., N. S. 449; 35 W. R. 577 (another report is to be found in 18 Q. B. D. 683; 57 L. T., N. S. 476; 2 Ry. & Corp. L. J. 631). SMITH, J. said: "It is said that manual labor includes any work done with the hands. But writing for instance, is clearly not manual labor within the meaning of the act, but yet it would come under the definition contended for if it were a good one. Again, can it be said that a telegraph clerk is a manual laborer, or a hair cutter? Clearly not. Is, then, a driver to be taken to come within the meaning of the clause merely because he works with his hands? I can see no distinction between his case and those I have taken as examples—namely, a telegraph clerk, a writer, or a hair cutter. All have manual work to do, but that does not necessarily make them come under the term 'laborers,' and I cannot see that a driver is a man 'engaged in manual labor,' to whom the act is intended to apply. . . . Mr. Crispe tells us, however, that the driver of a tram car has not only to drive, but that he has to do other things in the course of his employment, such as putting the brake on, changing the horses, etc. But there is no evidence that he has any other special or substantial duty imposed upon him than that

MANUFACTORY.—A building, the main or principal design or use of which is to be a place for producing articles as products of labor. It is something more than a place where things are made.¹ A building or collection of buildings appropriated to the manufacture of goods. It includes not only the building but the machinery necessary to produce the particular goods manu-

of driving. . . . The real substantial business of the plaintiff must be considered, and not other subsidiary duties he may happen to have." GRANTHAM, J., said: "It is very difficult to draw a clear and definite line as to how much and what classes of work are included in the words 'manual labor'; but I think that these words were inserted in the section with a view to being applied to those whose labor is laborious without being intellectual. The ordinary definition of labor is continuous work without any necessity for very much thought. . . . Unless, therefore, driving can be said to be labor of such continuous kind requiring little thought, it does not come within the meaning of the act. Driving, in my judgment, is clearly not mere labor of a continuous kind without any need of intelligent thought. On the contrary, it requires the exercise of skill and mental power in directing the horses." See *contra*, *Wilson v. Glasgow Tramways Co.*, 5 Ct. Sess. Cas. (S. C.), 4th series, 982. An omnibus conductor is not a person so 'engaged in manual labor.' *Morgan v. London Gen. Omnibus Co.*, 13 Q. B. D. 832, where BRETT, M. R., said: "He is not 'engaged in manual labor,' he does not lift the passengers into and out of the omnibus; it is true that he may help to change the horses, but his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares." And BOWEN, L. J. said: "It seems to me that 'manual labor' can only mean labor performed by hand; and it is very plain that the plaintiff is not engaged in work of that kind."

"Manual labor," in cutting, banking or driving logs or timber, "includes the use and earnings of all implements, instrumentalities, or agencies, such as axe, cant hook, team, or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger." *Martin v. Wakefield*, 43 N. W. Rep. (Minn.) 967.

1. *Franklin Fire Ins. Co. v. Brock*, 57 Pa. St. 82, where it was held that a

building, the tenant of which kept hay, straw, produce, etc., and, giving this up, kept broom corn and made brooms by hand,—did not come within the prohibition in a policy of insurance against "mills and manufactories." *STRONG, J.*, in his charge to the jury said: "The fact that articles are made or manufactured in a dwelling house or a store does not, of course, make it a *manufactory* within the meaning of this policy. Had clothes been made in the store, and had a sewing machine been introduced, and worked there, a jury would hardly find that it had become a manufactory, and therefore no longer insured." He then gave the definition in the text, which was quoted and approved by the supreme court.

In *People v. Bradt, Rensselaer (N. Y.) Sessions*, it was held that a flax mill is not a "manufactory" within the statute of arson, it being only a place where the flax is separated from the husk. *Browne's Judicial Interp.* 242.

The business of cutting saw logs and driving them to the place of manufacture is not included within the words "works, mines, manufactory, or other business" in a statute giving a labor lien. *Pardee's Appeal*, 100 Pa. St. 408.

Where one of the upper stories of a building was rented to persons who carried on therein the business of putting together the frames of chairs which had been elsewhere made, it was held ["but apparently without much consideration." *Thompson*] that the judge ought to have submitted the question to the jury whether this was a manufactory or not, within the meaning of the policy. *Appleby v. Firemen's Fund Ins. Co.*, 45 Barb. (N. Y.) 454; *Thompson on Trials*, § 1303.

A whole block of buildings was held to constitute one "manufactory," in *Richards v. Swansea Imp. Co.*, 9 Ch. D. 425.

And as to the amount of property adjoining the principal building that a railway company is obliged to take as part of the "manufactory," see *Furness v. Midland R. Co.*, 6 Eq. Cas. 473; *Reg. v. London & Greenwich R. Co.*, 3 Q. B.

factured and the engines or other power requisite to propel such machinery.¹

MANUFACTURE—(See also MANUFACTURER; MANUFACTURING CORPORATIONS.—The process of making anything by art, or of reducing materials into form fit for use by hand or by machinery; as “an establishment for the manufacture of cloth.” Anything made or manufactured by hand or manual dexterity, or by machinery. To form by manufacture or workmanship by the hand or by machinery; to make by art and labor.²

166; *Richards v. Swansea Imp. Co.*, 9 Ch. D. 425.

1. *Schott v. Harvey*, 105 Pa. St. 227, 228.

The insurance of a “starch manufactory” includes machinery and fixtures. *Peoria Ins. Co. v. Lewis*, 18 Ill. 553. But machinery alone does not constitute a “manufactory” or “mill.” *Halpin v. Ins. Co. of N. America*, 23 N. E. Rep. 989 (N. Y.), where it was held that where a fire insurance policy on mill machinery and apparatus, apart from the building in which it was contained, provided that where a building, “if a mill or manufactory,” should stand idle, without notice and consent, all liability thereunder should cease, the standing idle of the machinery did not create a forfeiture. “A manufactory is ‘a house or place where anything is manufactured’ [Webs. Dict.]” and this definition was regarded as not applicable to the machinery in question.

2. *Atty. Gen. v. Lorman*, 59 Mich. 163-4, quoting *Worcester's Dict.*

In *Evg. Journ. Assn. v. State Bd. of Assessors*, 47 N. J. L. 38, after quoting *Worcester's* definition, it is said: “Mr. Brande defines ‘manufacture’ as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles in the view of rendering them capable of satisfying some want or desire of man; and manufacturing industry to consist in the application of art, science or labor, to bring about certain changes or modifications of already existing materials. He includes under the term ‘manufacture’ all branches of industry, with the exceptions of fishing, hunting, mining, and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied to those departments of industry in which

the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products. Brande's *Encyclo.*, tit. *Manufacture*.”

In *Carlin v. West. Assur. Co. of Toronto*, 57 Md. 526, it is said: “Whilst, from its derivation, the primary meaning of the word ‘manufacture’ is making with the hand, this definition is too narrow for its present use. Its meaning has expanded as workmanship and art have advanced; so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, which, after all, is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages, are now commonly designated as ‘manufactured.’ Burrill defines ‘to manufacture’ ‘the process of making a thing by art,’ and cites *BUTLER, J.*, in 2 H. Bl. 463, 471. Abbott gives its meaning as ‘whatever is made by human labor, either directly or through the instrumentality of machinery.’ The definition in Webster is ‘To make or fabricate from raw materials by the hand, by art or machinery, and work into forms convenient for use.’ Worcester has, in substance, the same definition.”

“Such a process . . . is making an article by the hand, which was once the literal meaning of the word manufacture, or *manufactum*, and in the

more modern idea attached to the word it is making an article, either by hand or machinery, into a new form capable "of being used, and designed to be used, in ordinary life." *Lawrence v. Allen*, 7 How. (U. S.) 794.

In *Rex v. Wheeler*, 2 B. & Ald. 349, it is said: "The word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking frame or a steam engine for raising water from mines. Or it may, perhaps, extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill is requisite to satisfy this word."

And in *Murphy v. Arnson*, 96 U. S. 134, it is said: "In the present case, the original elements are fluids, and the manipulation and the materials blending with each form a union which is as much a manufacture within the meaning of the statute as where the materials are mechanically joined together. Bouvier thus defines the word 'manufacture': 'The word is used in the English and American patent laws. It includes machinery which is to be used and is not the object of sale, and substances (such, for example, as medicines) formed by chemical processes when the vendible substance is the thing produced, and that which operates preserves no permanent form.' It includes any new combination of old materials constituting a new result or production in the form of a vendible article, not being machinery. The contriver of a new commodity which is not properly a machine or a composition of matter can obtain a patent therefor as for a new manufacture. And, although it might properly be regarded as a machine or a composition of matter, yet if the claim to novelty rests on

neither of these grounds, and if it constitutes an essentially new merchantable commodity, it may be patented as a new manufacture."

"The various nostrums vended all over the land, with or without the certificate of the patent office, are manufactures. Beer may well be said to be manufactured from malt and other ingredients, whisky from corn, or cider from apples. The fact that the identity of the original article or articles is lost, and that a new form or a new character is assumed, is not material in determining whether, within the popular idea, as embodied in the Customs act, the article in question is a manufacture from its original elements. We have no doubt that nitro benzole is a manufacture from benzole and nitric acid, falling within the twentieth section of the act of 1842, and that the duty was rightly fixed by the court below." And see *Crane v. Price*, 4 Man. & G. 580, where it was held that a combination of an old invention with the new one did not prevent the result being a "new manufacture." See also *Boulton & Watt v. Bull*, 2 Hea. Black. 463; *Fess. Pat.* 67.

In *Fess. Pat.* 367, it is said: "The word 'manufacture' is of extensive signification, and applies not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice. Under things made we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word. Secondly, all mechanical inventions, whether made to produce old or new effects. Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public. . . . New methods of manufacturing articles in common use, where the whole merit and effect produced are the saving of time and expense, and thereby lowering the price of the article, may be said to be new manufactures according to the spirit and meaning of the act." See also title Patent Law, *infra*.

In *Norris Bros. v. Com.*, 27 Pa. St. 496, it is said: "What is manufacturing? It is making. To *make*, in the mechanical sense, does not signify to create out of nothing; for that surpasses all human power. It does not often mean

the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities or new combinations to matter which has already gone through some other artificial process. A cunning worker of metals is the maker of the wares he fashions, though he did not dig the ore from the earth, or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather. A bureau is made by the cabinet maker, though it consists in part of locks, knobs and screws, bought ready made from a dealer in hardware." It was, therefore, held that locomotives were the exclusive manufactures of a firm, within the meaning of an act, notwithstanding a portion of the materials used in their construction were purchased by the manufacturers.

And so in *City of N. O. v. Le Blanc*, 34 La. An. 597, it is said: "A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer because he does not also tan the leather; the tanner is none the less a manufacturer of leather because he does not breed and raise the bullocks from which the raw hides are taken. The tanner makes leather to sell, but does not buy hides to sell again. He produces the article of the leather and depends for his profit upon the labor which he bestows upon the raw material."

Mining is not *manufacturing*. *Appeal of Com. (Pa.)*, 25 Am. & Eng. Corp. Cas. 320; *Byers v. Franklin Coal Co.*, 106 Mass. 131. Nor is the business of an aqueduct company. "Nothing is put into the article which it supplies to change its natural condition, and the whole operation of the water works is designed merely to keep foreign substances from mingling with it." *Dudley v. Jamaica etc. Corp.*, 100 Mass. 183.

A list of special substances follows, in connection with which the word "manufacture" has been used and judicially treated.

Bone.—Animal charcoal produced by the process of burning bone, and bone dust, produced by pulverizing it, are

"manufacture of bone." *Schriefer v. Wood*, 5 Blatchf. (U. S.) 216, where it is said: "We do not ordinarily apply the term 'manufacturer' to one whose operations are as limited as those of a wood sawer; but when great quantities of salable articles are produced, even by a single operation of a very simple machine, we frequently, if not ordinarily, speak of the operation as a manufacture. When large quantities of kindling wood are made by splitting blocks of wood by machinery adapted to that special purpose, we do not hesitate to speak of it as a manufacture of kindling wood; and an establishment where very large quantities of bone dust are produced by grinding by machinery would by many, in ordinary conversation, be termed a manufactory of bone dust. We speak of the manufacture of salt, when it is produced by the simple operation of boiling, or by solar evaporation; and when any article of manufacture, having a distinct name in the trade and commerce of the country, is produced by machinery, or by a chemical process, from any material or materials having a different commercial name from the article produced, we may generally speak of the operation by which it is produced as a manufacture."

Copper.—Copper plates turned up at the edge are not "manufactured copper." *U. S. v. Potts*, 5 Cranch (U. S.) 284.

Coral, in the form of a cameo, is "coral, cut or manufactured." *Bailey v. Schell*, 5 Blatchf. (U. S.) 195.

Cotton.—The weaving of cotton thread into a covering for strips of steel to be used for making crinoline skirts is a "manufacture of cotton." *Whymper v. Harney*, 18 C. B., N. S. 243. See *Morlot v. Lawrence*, 1 Blatchf. (U. S.) 608; *Arthur v. Herman*, 96 U. S. 141; *Arthur v. Rheims*, 96 U. S. 143; *Kohlsaat v. Murphy*, 96 U. S. 153; *Fisk v. Arthur*, 103 U. S. 431.

Ebony.—Fancy boxes made of common wood and veneered with ebony are "manufactures of ebony." *Sill v. Lawrence*, 1 Blatchf. (U. S.) 605.

Firewood is not a "manufactured article." *Correio v. Lynch*, 65 Cal. 273.

Gas.—Producing and supplying illuminating gas is a "manufacture." *Nassau Gas Light Co. v. Brooklyn*, 89 N. Y. 409.

Glass.—Spectacles are "manufactures of glass, or of which glass shall be a component material." *Arthur v. Suss-*

field, 96 U. S. 128. See also *Roosevelt v. Maxwell*, 3 Blatchf. (U. S.) 391.

Hair.—See *Arthur's Exrs. v. Butterfield*, 8 Sup. Ct. Rep. 714; *Thorp v. Lawrence*, 1 Blatchf. (U. S.) 351.

Hay is not a "manufactured article." *Frazee v. Moffitt*, 20 Blatchf. (U. S.) 267, where the court said: "Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine and then bagged. Yet it is raw wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat and air, and the manipulation they receive, produce or allow, be it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grain are the same articles they were when on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried, to be sure; but the drying and any conversion of starch into sugar are the mere incidents of the necessary cutting to enable it to be stored for food in latitudes where grass cannot be found all the year round. Where it can be so found no hay is stored. Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture within the meaning of § 2516."

Hemp.—*Semble*, that the term "a manufacture of hemp," used in a tariff act, cannot properly include an article generally known in commerce as "hemp carpeting," but in the manufacture of which no hemp is actually used. *Baxter v. Maxwell*, 4 Blatchf. (U. S.) 32.

Ice.—"The cutting of ice produced by the agencies of nature on the surface of a pond into pieces of a size convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture. The material is in no way changed or adapted to any new or different use; it still remains ice to be used simply as ice; it is no more a

manufacture than putting of the water from the pond into casks for transportation and use would be a manufacture, or the mining of coal, which has been decided not to be a manufacture. *Byers v. Franklin Coal Co.*, 106 Mass. 131. It is like the harvesting of hay or grain, or other agricultural crops, and the analogy is so strong and obvious that 'the ice crop,' 'the ice harvest' and 'harvesting ice' are terms in common use." *Hittinger v. Westford*, 135 Mass. 262.

See to the same effect *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, where it was said: "No doubt ice may be manufactured and frigorific effects produced by artificial means. Corporations exist for that purpose and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. Its tools and implements are for convenience in handling and marketing a product, and not at all for making it."

But see *contra Atty. Gen. v. Lorman*, 59 Mich. 157; s. c., 60 Am. Rep. 287, where ice cutting was held to be "manufacturing." The court said: "Its natural condition is not changed. The article itself is a natural product, as described in the replication. It is ice when it is taken from the river, and it is ice when delivered to consumers. The form alone is changed. It is reduced in size and delivered in quantities to suit the convenience of the patrons of the company. But it is not necessary, to constitute the commodity a manufactured article, that a chemical change should be wrought in the thing manufactured. Iron manufactured from iron ore remains iron. Cotton gathered from the boll and by means of complicated machinery manufactured, becomes the cotton of commerce. Lumber is manufactured from logs or timber simply by changing its form. And it has been held that grinding bones to produce the bone dust of commerce was manufacturing within the meaning of the revenue laws of the United States. *Schriefer v. Wood*, 5 Blatchf. 215. So it was held by the Supreme Court of the United States that timber split into staves or into long pieces designed for shovel handles, was "manufactured," and not covered by the reciprocity treaty of 1854. *U. S. v. Hathaway*, 4 Wall. (U. S.) 404, 408."

Iron.—Iron show cards are "manufactures of iron." *Forbes Lith. Co. v.*

Worthington, 132 U. S. 655. So are hair pins. *Robertson v. Rosenthal*, 132 U. S. 460.

It is no breach of a covenant prohibiting the erection of a forge or furnace for the "manufacturing of iron" to erect a forge for the purpose of *heating* iron, and *moulding* and *working* it into different articles. *Rogers v. Danforth*, 9 N. J. Eq. 289. "What is the definition of a *forge or furnace for the manufacture of iron*? For, if there is a definition comprehended and understood alike by scientific men and by mechanics acquainted with the business referred to, such definition ought to control the court in its construction of this covenant. What is such a forge or furnace? An establishment or mechanical contrivance by which iron is made or manufactured from the ore.

From what is iron manufactured? It is manufactured from the ore. By a blacksmith's forge iron is not manufactured, but by it from iron itself machines or instruments of use are manufactured. It is not the intention of the defendants to erect any forge or furnace for the manufacture of iron. Their object and intention is not to make iron, but to use iron when made, to be worked up into different materials."

A person employed in an establishment where castings, farming implements and machinery are made from melted pig and old iron is not exempt from jury service as a person in actual employment of "an iron manufacturing company." *People v. Holdridge*, 4 Lans. (N. Y.) 511. The court said: "Manufacturing, according to Webster and other lexicographers, is making goods and wares from raw materials. It does not include tailors and blacksmiths, or other persons engaged in making clothing or other articles for use or sale from cloth after it has been manufactured from cotton, flax or wool, or implements and wares from iron after it has been manufactured from ore." See also the opinion in *Lawrence v. Allen*, 7 How. (U. S.) 785 (quoted at length *infra*), and U. S. v. Sarchet, Gilp. (U. S.) 273.

Marble.—In *U. S. v. Wilson*, 1 Hunt's Merchants' Magazine, 167 (cited in *Harranft v. Wiegmann*, 121 U. S. 615), it was held that marble which had been cut into blocks for the convenience of transportation was not "manufactured marble." The court charged the jury "that the only question for their consideration was, as to whether

this marble was or was not manufactured. A thing may be considered manufactured if any labor has been put upon it, changing it from the raw material, as with bar iron. When the term 'manufactured' is applied to a commodity, the question then arises, has it been removed from its character of raw material? Another question is, in what sense or acceptation is the term 'manufactured' used among dealers in marble? From the evidence of the defendant's witnesses, it does not appear that this is a manufactured article. If this was a manufactured article, it is your duty to render a verdict for the United States. If unmanufactured, then for the defendants." The jury, without leaving their seats, found for the defendants.

Metals.—In *Meyer v. Arthur*, 91 U. S. 570, in construing the words "manufactures of metals" in a tariff act, the court said: "When the act speaks of 'manufactures of metals,' it obviously refers to manufactured articles in which metals form a component part. When we speak of manufactures of wood, of leather, or of iron, we refer to articles that have those substances respectively for their component parts, and not to articles in which they have lost their form entirely, and have become the chemical ingredients of new forms." It was accordingly held that white lead, nitrate of lead, oxide of zinc, and dry and orange mineral, were not "manufactures of metals," within the meaning of the act.

And this case was approved in *Murphy v. Arnson*, 96 U. S. 131, cited *supra*.

"Tin plates" were not held to be included in "manufactures of metals," in *May v. Simmons*, 4 Fed. Rep. 499, the reason given being that they were ordinarily specifically designated in similar acts.

Newspapers.—See MANUFACTURER.

Reeds.—A round reed, from which the outer covering, which made it a rattan, is stripped, is not "manufactured." Otherwise of square reeds, which have been obtained by the further process of cutting the round reeds. *Foppes v. Magone*, 40 Fed. Rep. 570.

Rocks.—Where two operations are necessary to fit stones, to be placed in a wall, one of reducing them by blows of hammers to a suitable size and degree of smoothness, and the other of dressing them by masons, and the parties to

Definition.**MANUFACTURE.****Definition.**

an agreement for blasting and excavating rocks agreed that the rocks so blasted should be "manufactured," it was held that the terms of such agreement were sufficiently complied with by the stones being broken into proper sizes and shapes, and made sufficiently smooth to be submitted to masons for dressing by them, so as to be fit to go into the wall. *Tone v. Doelger*, 6 Robt. (N. Y.) 251. See also MANUFACTURING PROCESS, *infra*.

Shells—Shells cleaned by acid and then ground on an emery wheel and some of them afterwards etched by acid, and all intended to be sold for ornament as shells, are not dutiable as "manufactures of shells." *Hartranft v. Wiegmann*, 121 U. S. 609.

The court said: "They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton."

Silk—Chinese shoes, consisting of an upper part of silk or cotton and a sole of felt, and leather, are "manufactures of silk, or cotton," respectively. "A definition adopted and acted upon for a long time should not be regarded as changed by a subsequent act of congress, unless the intention to change is clearly manifest." *Swayne v. Hager*, 37 Fed. Rep. 780. See also *Adams v. Bancroft*, 3 Sumn. (U. S.) 384; *Bernstein v. Baxendale*, 6 C. B., N. S. 251.

Textile Fabrics—One engaged in cutting and making coats and trousers out of jeans cloth, which has been already manufactured by another, is not engaged in the "manufacture of textile fabrics." *Cohn v. Parker*, 6 South Rep. (La.) 718. "To say that the making of coats and pants out of a textile fabric already manufactured is 'the manufacture of textile fabrics,' in the sense of the constitution, would be to confound the terms completely; for the making of the coats and pants presupposes the previous existence of the fabric out of which they are cut and made, and the manufacture of the fabric presupposes the subsequent cutting and making of

the coats and pants. Hence, it is quite clear that one cannot be taken for the other, and that the cutting and making of jeans coats and pants out of a previously manufactured article is, in the sense of the law, 'the manufacture of textile fabrics.' We do not regard *City v. Arthurs*, 36 La. An. 98, as applicable to the question presented here. In that case the payment of the tax demanded by the city was resisted by the defendant on the ground that the property assessed was a 'manufactory of fish-lines, ropes, packing, and other hempen articles,' and therefore exempt as being 'employed in the manufacture of textile fabrics.' The alleged exemption was maintained by this court, and the defendant relieved from the payment of the tax. Such articles as fish-lines and ropes can only be made by being woven from raw material, and are themselves 'textile fabrics;' but net and hammocks made out of lines and ropes would not be textile fabrics."

Wood—Saw mills are not "property employed in the manufacture of wood." *Jones v. Raines*, 35 La. An. 996.

Wool—Worsted shawls with cotton borders are not "manufactures of wool, or of which wool is a component part." "If, because worsted is made of wool, all manufactures of worsted become wollen manufactures, there would be no propriety in enumerating worsted goods as a distinct class." *Elliott v. Swartwout*, 10 Pet. (U. S.) 151. See also *Lening v. Maxwell*, 3 Blatchf. (U. S.) 125.

"Manufactured Articles, Goods."—Where a railway company were entitled to charge a certain rate for "manufactured goods," this term "must be understood in a popular sense, and must mean not merely goods produced from the raw state by manual skill and labor, but such as are ordinarily produced in manufactories; and we should therefore exclude stationery and include shoes, ironmongery, glass and trapezy. It should be observed, however, that having given what we conceive to be the meaning of the term, the application of that meaning to particular articles is a question of fact, not of law; and what we have suggested in this respect is not to be taken as conclusive." *Parker v. G. W. R. Co.*, 6 El. & Bl. 77, 109.

"Manufactured goods" means "goods the manufacture of which is completed, so that the goods are in a condition to be sold, and so that all that needs to be done, if a purchaser asks for them, is to

deliver them." *U. S. v. A Quantity of Tobacco*, 5 Ben. (U. S.) 129.

So it was held in *Rex v. Woodhead*, 1 Moody R. 549, that goods remain in "a style, process, or progress of manufacture," within the meaning of a statute, though the texture be complete, if they are not yet brought into a condition fit for sale.

Pattern pieces of paperhanging were held to be "articles of manufacture," within the meaning of stat. 5 & 6 Vict., ch. 100. "It is equally an article of manufacture, and equally an article of trade, whether it be manufactured and sold as a pattern or for actual use; and, if it contains no marks of registration, is just as likely to mislead a purchaser as a larger piece." *Heywood v. Potter*, 1 El. & Bl. 439, 448. COLERIDGE, J., dissented, saying, "There is a broad distinction, as it seems to me, between the pattern of an article and the article itself, between what is the ordinary subject of trade and what is put forth, as it were, to induce such trade."

India rubber shoes, made by dipping a mould into the gum while in a liquid state, are dutiable as "manufactured articles." *Lawrence v. Allen*, 7 How. (U. S.) 785. The court said: "What constitutes a manufactured article? In some instances, and for some purposes, it may be one kind of process performed on what is found in a natural state, and in some, another kind. Thus the juice of the maple or of the cane is in some views manufactured when it is made into molasses or syrup, and in others when again made into sugar or spirit from molasses. And so the juice of the grape is one sense manufactured when converted into wine, and in another when made into brandy. And so is lye from ashes, when boiled down to potash or pearlash, manufactured into them. Here, the juice or sap of the india rubber tree, while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance, and in its natural form; and, in one sense, and to a certain extent, its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into, is a manufacture. It is so as much as butter or cheese is a manufacture from animal milk, or tar from turpentine, and resin from tar. Yet from the words of the law, as well as its design, it is manifest that the india rubber is not meant to be taxed as a

manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful and convenient form for other manufactures here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is 'unmanufactured,' or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy and purpose, it is 'manufactured,' as it is made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures. After these, what requisite is wanting to bring it within the spirit, no less than the letter, of the provision improving a duty? It has been changed, by fire and labor, in its color, consistency and form, from its natural state as the milk of the india-rubber tree. It has been fashioned into an article of clothing, suitable and customary to be worn in its then shape. It is a rival to other shoes made here. These elements would, on principles of common sense, seem to amount to a manufacture, and one, when imported from abroad, likely to be taxed. . . . This occasional use of the shoes for other purposes than wearing as water-proof shoes would not alter their original character as a manufacture for the latter purpose, nor the importation and present character of them as a manufacture for the same purpose. Thus, the importation of cast iron in kettles or hand irons in a state to be so used, and frequently so used, would not be altered as a manufacture of that kind, and as subject to pay the duty imposed on it in the tariff; because some of it, after imported, might occasionally be melted down and recast, and used for other or similar purposes. Nor is the juice of the cane—converted into a different consistence and color abroad, and shipped here as molasses, ready to be used, and often used as such—any the less a 'manufactured article,' and any less subject to the duty on molasses because some of it, after arriving in this country, may again be manufactured into sugar or spirit. A further illustration as to the distinction between the same article,

MANUFACTURER—(See also MANUFACTURE; MANUFACTURING CORPORATIONS).—One who is engaged in the business of

put into a shape to be sold for use as it is, and into one not for use as it is, is that of melted iron. In that state it may be run in moulds, either for pots or for pigs, and, in the former case, fitted and sold to be used in that shape, and hence a manufacture; while, in the latter, sold to be made up afterwards into new and different forms, and hence, for some purposes, is then not regarded as a manufacture till so made up. So lead may be melted into the shape of pigs or bars, for exportation and for foreign manufacture, or be run into weights, for use as weights, and then be regarded as already a manufacture for that purpose."

An article designated in a contract as "slops from their distillery" does not constitute a manufactured article, within the meaning of the rule which implies a warranty of merchantable quality. *Holden v. Clancy*, 58 Barb. (N.Y.) 590. The court there said: "A manufacture is defined as 'the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery,' and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of manufactories is more or less valuable for certain purposes, and may be, and often is, the subject of sale, but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate, and disregarded when attention to it would interfere with the most profitable mode or material to be used in the process which is the main object of the manufacturer." And see *Lening v. Maxwell*, 3 Blatchf. (U.S.) 125. See also the cases in the above list under the headings Firewood, Hay, Ice, Marble and Shells.

Manufacturing Establishment.—A flour mill driven by steam and furnished with a middlings purifier, bran duster, belting and other machinery was held to be a "manufacturing establishment," in *Carlin v. West. Assur. Co. of Toronto*, 57 Md. 515; s. c., 40 Am. Rep. 440, 446, n. See the opinion in this case quoted *supra*. See also *Establish.*

Manufacturing Process.—The building of a ship does not come within the stat-

utory definition of a "manufacturing process," viz. "Any manual labor incidental to the making of any article or part of an article." *Palmer's Ship-building Co. v. Chaytor*, L. R., 4 Q. B. 209.

Quere whether splitting rock into slates and shaping them for sale is such a "manufacturing process." *Kent v. Astley*, L. R., 5 Q. B. 19.

Manufacturing Purposes.—The language in a deed poll that a piece of ground is to be used for "milling or manufacturing purposes only," is not a covenant, expressed or implied, that the grantee will erect a mill of any kind upon the property. *Madore's App.*, 129 Pa. St. 15. The court said incidentally: "A covenant to use property for manufacturing purposes would imply the right to use it for all purposes incident to such object. There must be a house or houses for those who operate the establishment to live in, and we cannot say that a store to supply their wants is not germane."

Manufacture and Keep.—A penalty for "manufacturing and keeping" ammunition containing gun powder held to apply only to the keeping by *manufacturers* themselves, not by those who sell goods manufactured by others. *Webley v. Woolley*, L. R., 7 Q. B. 61.

Manufacture and Sell.—A grant by a patentee of "the sole and exclusive right to manufacture and sell" machines of the patented invention in a specified city, gives by implication to a purchaser from such manufacturer the right to use the machine until it is worn out, wherever he pleases. *May v. Chaffee*, 2 Dill. (U. S.) 385.

Manufactured and Used.—In an action brought to recover a royalty for an article "manufactured and used" by the government without a licence this term, in the case of a hoop attachment for stacking arms, was construed to mean the *completion of the combination*, so that the firearm with the patented device attached to it was ready for sale or military service. *Butler v. U. S.*, 23 Ct. Cl. 335.

Place of Manufacture.—The "place of manufacture" at which liquors might, under a statute, be sold without licence or tax, was held to be confined to the distillery or to places so near as to be used in the business of distilling. *State v. Whissenhunt*, 98 N. C. 682.

working raw materials into wares suitable for use.¹

1. *People v. N. Y. Floating Dry Dock Co.*, 63 How. Pr. (N. Y.) 453, quoting *Webb's Dict.* In that case it was held that the constructor of docks for building and repairing ships was not a "manufacturer." The court said: "Undoubtedly using the words manufacture, manufacturer in their broadest sense, the builder and repairer of a vessel, or a house even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the words, and it is such general and ordinary meaning which words are to receive in the construction of statutes. (*Potter's Dwaris on Statutes* 193.) The builder and repairer of vessels is a ship carpenter or ship builder; his business is ship carpentry, and he and his business are so styled in common speech, and he is no more a manufacturer, and his business no more manufacturing, than is a house carpenter or manufacturer, or his business manufacturing."

The case was affirmed in 92 N. Y. 478.

One who makes barrels, hogsheads, etc., is a manufacturer. *City of N. O. v. Le Blanc*, 34 La. An. 506. See opinion in this case quoted under *Manufacture, supra*.

A member of a firm engaged in the manufacture of friction matches is a "manufacturer" of friction matches, with whom the government may deal as such. *U. S. v. Weedon*, 3 Fed. Rep. 623.

Under Bankrupt Law.—One who prepares lumber, the growth of his own land, for market and sells it, is a manufacturer within the meaning of the Bankrupt act. *Re Chandler*, 1 Lowell (U. S.) 478. "It is not like the case put in argument of a farmer making cider or cheese, for two reasons: these products, when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a manufacturer, as the word is now commonly used, and the making is one merely incidental to the cultivation of his land, like curing his hay, etc. But in the case of the lumber business, the land may be almost said to be incident to the lumber, which usually forms its chief value, and

the manufacture itself is the main source of profit, independently of any cultivation or other use of the land."

And see *Burge v. Comer*, 5 Pa. Co. Ct. Rep. 5; 2 Am. & Eng. Encyc. of Law 85.

The publisher of a newspaper was held to be a "manufacturer" within the meaning of the Bankrupt act in *In re Kenyon v. Fenton*, 1 Utah T. 47; s. c., 6 Bankr. Reg. 238. The court said: "The term *manufacturer*, under the Bankrupt act, has a legal meaning, and this legal meaning must be governed by legal rules. It is true that everyone who manufactures is not to be embraced within the legal phrase. A farmer is not to be considered a manufacturer in the commercial sense, when he confines his business to the manufacture of the milk of his cows into butter and cheese, nor when he converts the products of his farm into beef and pork. But it does not follow that when he makes it a part of his business to buy milk and manufacture the same into butter and cheese, or to purchase the products of other farms and other stock than those of his own and manufactures the same into beef and pork, that he is not a manufacturer within the meaning of the act. When the manufacturing becomes the principal part of even, a farmer's business, which requires him to buy articles or products and to manufacture them for sale, he thereby becomes a manufacturer and trader within the meaning of the act. A buyer of leather who makes it his business, or a part of his business, to manufacture the same into boots and shoes or harness, and sells the same, though he be a nurseryman or a gardener or a farmer, is a manufacturer and a trader within the meaning of the act. If other construction than this should be given to the act, the spirit and the letter of the same could be destroyed by assumptions the most frivolous as well as those the most false. If it should be admitted that the publishers of a weekly or daily paper were not manufacturers within the meaning of the act, yet if they should buy paper, ink and other material and make the same into cards or bill heads or blanks and blank books, and conduct a business of this kind, as in this case it is averred the bankrupts have done, they are manufacturers and traders within

the meaning of the act; for these articles so manufactured are not necessary parts of the business of publishing a newspaper. . . . Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have expressed the opinion it would be, and I am inclined to the same conviction. A newspaper publication is as much the result of manufacture as that of books or cards or bill heads. To make a distinction between them, when, in fact, there is no distinction, would seem to be an utter disregard of the objects as well as the legal intentment of the law; for they buy, manufacture and sell."

But a contrary opinion was reached in *In re The Capital Publishing Co.*, 3 McArthur (D. C.) 405; s. c., 18 Bankr. Reg. 319. The opinion of the court on this point we quote at length: "The first question raised upon the demurrer is whether the company is a manufacturer within the meaning of the Bankrupt act. Words in a statute are to be taken in their ordinary and familiar signification, and regard is to be had to their general and popular use. The court will presume that they were used to express their meaning in common usage. Keeping in mind this rule of interpretation, we can determine the judicial construction to be placed upon the word 'manufacturer' when it is used in the Bankrupt law. There can be no doubt but the word 'manufacturer' was used in the statute in the limited sense in which it is commonly understood. The agriculturist is engaged in the most extensive industry of this or any other country, and he brings to the market many commodities which are produced without the direct aid of the soil, or of the vegetative powers of nature, but he is never spoken of in common parlance as a manufacturer. The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton and silk goods, etc. This limitation of the term manufacturer is to be adopted as the true meaning of the Bankrupt law. Perhaps there is no substantial difference between the various branches of industry in any respect, except only in regard to the different processes

which they employ. To manufacture is to change and modify natural substances so that they become articles of value and use. Chantrey was in the habit of receiving three thousand dollars for a single bust; Bierstadt, twenty-five thousand dollars for a single picture; and the representation of Lincoln's cabinet was purchased at a cost of twenty thousand dollars and presented by a noble hearted American lady to the congress of the United States. These are called works of art, but in a legitimate sense they may be comprised among the productions of manufacturing industry. The artists use material and natural substances. They oftentimes employ a variety of subordinates. They work with their hands and perfect an article of great pecuniary value. It symbolizes their art and genius. In a word, the artist accomplishes all that is implied by, but he is never included in, the term manufacturer. The definitions and rules which obtain in the patent office are not applicable here. A newspaper is not regarded as a manufacture any more than a painting, and an editor a manufacturer as little as an artist. We have been referred to the case *In re Kenyon v. Fenton*, decided by the supreme court of Utah. It was a case where the bankrupts carried on the business of printing blank books, cards, bill heads, in addition to which they published a paper, and the petition alleged that they published a newspaper, and are 'manufacturers of books, cards, bill heads,' etc. And the court say: 'Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have expressed the opinion that it would be, and I am inclined to the same conviction.' It will be observed that the decision is placed upon the ground of the bankrupts' being manufacturers of books, bill heads, etc., and in this respect they were undoubtedly within the meaning of the act. Having come to this conclusion, the court further say that it is not necessary to decide that the publishing of a newspaper is manufacturing within the strict sense of the law, but express the opinion 'that it would be.' No more weight can be given to this voluntary case than to any other conditional *obiter dictum*. It might be respectfully suggested that the substantial difference between the strict sense of the term

'manufacturer' in the abstract, and the strict sense it is to receive in the law has been overlooked in this decision. We have already stated the proposition that every branch of industry which converts any material or substance into useful commodities, strictly speaking, comes under the term manufacturers, and in that sense a newspaper or a painting would be included. But we are of opinion that this is not the strict sense of the statute, which only includes those industries which commonly pass under that designation. This is an important distinction; for while all employments rest upon the same faculty in men to labor, to contrive and to mould the refractory elements of matter, common usage and the convenience of society have given a limited signification to the word. The rule already adverted to for the interpretation of statute law limits its import to the sense in which it is usually received. Now no definition of the word manufacturer has ever included the publisher of a weekly newspaper, and the common understanding of mankind excludes it. You may reason by analogy, or reason from the nature of things, that it is; and so you may do the same thing with anybody who himself labors or employs others. But surely a bankrupt law is not to be expanded to cover every employment. It was by express terms limited to certain classes who are designated by names well known in the business world. The husbandman prepares the soil, the inventor his models, the orator his address, for which he receives two hundred dollars a night; the lawyer makes his brief, for which he scarcely ever gets enough; the physician formulates his prescription, and so on through all the divisions of labor and industry. By these means man acquires a certain mastery and is furnished with inestimable results. So of the newspaper. It has grown within a century into the most popular vehicle for the spread of information. Its vigor and influence are felt in every household. Indeed, it may be called the people's storehouse of intelligence. It claims to be an institution, and even our statesmen, with great complacency, have denominated it the fourth estate. It does not come within the popular meaning of the term *manufacture*, unless, indeed, when its contents are slenderly endowed with the truth, or when its articles appear to be made out of whole cloth. It gives employment

to printing presses and types and editors; and yet in the whole history of newspapers from the close of the seventeenth century this word *manufacturer* has never been applied to them, or appropriated by them, in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or by any authority, except by way of opinion in the solitary case from Utah."

This case was approved of and followed in *Evening Journ. Assn. v. State Bd. of Assessors*, 47 N. J. L. 36. The court said: "We agree with the reasoning and with the conclusion of the court in *In re Capital Publishing Co.* that the publisher of a newspaper is not, in a legal sense, a manufacturer. It is true that, in the production of his papers which he sells, he employs manual labor and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter, who executes his painting with his palette and his brush; so does the lawyer, who prepares his brief, or the author, who writes a book. But neither the sculptor nor the painter is classed as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer, though they employed a printer—the former to print his brief and the latter his book. In the ordinary and general use of the word 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term."

See an extract from the opinion in this case quoted *supra* under MANUFACTURE. See also the opinion in *N. O. v. Le Blanc*, 34 La. An. 597, quoted under MANUFACTURE.

A book binder and blank book maker is a "manufacturer." See *Seeley v. Gwillim*, 40 Conn. 106.

The printer of calicoes is not the "maker or manufacturer of them," so as to render them liable when in his hands to seizure under an extent for bygone duties. *Rex v. Tregoning*, 2 Younge & J. 132. "It is contended that, for the purposes of this act, the printer is the maker and manufacturer of these goods, likening this, as I conceive, to the familiar case of the maker of a picture who is, of course, he who spreads the colors upon the canvas, which produce the impression upon the mind, and not the man upon whose canvas the picture is painted. There is, however, no resemblance whatever be-

tween the two cases. The maker and manufacturer of these goods, according to the plain sense and common understanding of those words, is he who manufactures the articles upon which the print is impressed. . . . He who merely puts the stamp upon the goods is not the maker or manufacturer within the common meaning of these words, upon the plain construction of which I can entertain no doubt."

A **trade mark** representing that certain persons were "manufacturers" of plated spoons and forks was held to contain no substantial misrepresentation, it appearing that those persons superintended the manufactory, directed as to the style and quality of the goods, and had the general supervision of the manufacturing and sale thereof. "Such representation . . . was in an important sense true. All that the public or the trade cared to know was that the goods were the production of their skill and experience." *Meriden Britannia Co. v. Parker*, 39 Conn. 450.

Taxation.—One who slaughters hogs and converts the flesh into bacon, lard, etc., is taxable as a manufacturer. *Engle v. Sohn*, 41 Ohio St. 691. The court said: "The occupation of the defendants in error was, we think, essentially that of manufacturers. By the use of tools, implements and mechanical devices; by subjecting the slaughtered animals to divers processes, running, some of them, through several months; by a combination with various materials and ingredients requiring skill, care and attention, products were obtained in the form of pork, lard and cured meats, to which may appropriately be applied the term 'manufactured articles.' The original substance, though not destroyed, was so transformed through art and labor that without previous knowledge it could not have been recognized in the new shape it assumed, or in the new uses to which it was applied. One who produces such results may as correctly be designated a manufacturer as he who buys lumber and planes, tongues, grooves, or otherwise dresses the same; or as he who by a simple process makes sheets of batting from cotton; or as he who buys fruit and preserves the same by canning—all of whom have been held to be manufacturers and taxed as such, under the Internal Revenue laws of the United States. 9 Int. Rev. Rec.

193; 5 Id. 180; Int. Rev. Dec. 117, No. 171. And as to the article of ice, to which reference has been made in argument, he is not inappropriately termed a manufacturer who produces artificial ice by the method of vaporization and expansion. The dressed lumber, cotton batting, canned fruits and artificial ice, though but slightly changed from the original material, could not, we think, be properly classed as manufactured goods. Indeed, the term *manufacture* has been extended to include every object upon which art or skill can be exercised, so as to afford products fabricated by the hand of man, or by the labor which he directs. *Curtis on Pat.*, § 74. . . . These views, it may be urged, are in conflict with the decision of the court in *Jackson v. State*, 15 Ohio 652. The facts in that case appear to be meagerly reported. The appellant was a citizen of the State of Pennsylvania, 'engaged in the business of purchasing, slaughtering and packing pork for transportation and sale, at Columbus, Ohio. *HITCHCOCK, J.*, was 'not prepared to say' that a person so engaged was a manufacturer within the meaning of the statute. We are, however, satisfied that if the facts had been the same as in the case at bar, if there had been in the year 1846 the same perfection in the art of packing and curing meats which has since been reached and now exists, Jackson would have been held to be a manufacturer and not a merchant."

An ice cream confectioner is not a *manufacturer* so as to be exempted from taxation. *City of New Orleans v. Manessier*, 32 La. An. 1075. "We cannot assent to the proposition that a person making and selling ice cream is a manufacturer in the sense of the law, or in any other sense of the word. The attempt to magnify a confectionery, which is defendant's business, into a manufacture, must fail. We are told that anyone seeing the steam engine, complicated apparatus, and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said that anyone visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employes, and their colossal apparatus, would at once magnify the cooks and pantrymen into manufacturers."

MANUFACTURING CORPORATIONS.

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I. DEFINITION.—Literally speaking, a manufacturing corporation is a corporation engaged in the production of some article, thing or object, by skill or labor, out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural condition.¹ The meaning of the words are not always thus confined, however. Several of the States have enacted laws for the incorporation of manufacturing companies; and it is concerning corporations organized under these acts that this article will treat.

1. See *People v. Knickerbocker Ice Co.*, 99 N. Y. 181; 9 Am. & Eng. Corp. Cas. 418.

Dock Company.—A corporation created by chapter 170 N. Y. Laws of 1843, "for the purpose of constructing, using and providing one or more dry docks or wet docks or other convenient structure for building, raising and repairing and coppering vessels and steamers of every description," is not a manufacturing company. *People v. New York Floating Dry Dock Co.*, 63 How. (N.

Y.) 451; 92 N. Y. 487; 1 Am. & Eng. Corp. Cas. 455.

A mining corporation is not a manufacturing corporation within Mass. St. 1862, ch. 218, defining and regulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations. *Byers v. Franklin Coal Co.*, 106 Mass. 131.

A corporation organized under the laws of Utah for the purposes of conducting a general mining business in all its branches, mining ore and manufacturing it into bullion, which was first

II. ORGANIZATION—1. What Companies May be Formed Under Manufacturing Acts.—The manufacture of lumber, flour and meal, is within the meaning of an act authorizing the formation of corporations for manufacturing, agricultural, mining or mechanical purposes.¹ And the gathering, storing and vending of ice is a manufacturing business within the meaning of such a statute.²

shipped to Chicago and smelted and refined, and then to the city of New York, where it was assayed, for which the company paid two per cent., and the receipts issued for the silver by the assay office were sold, and so much as were not used were transmitted to Utah and Chicago, is not engaged in "manufacturing within this State," so as to exempt it from taxation under the N. Y. act of 1881, ch. 361; *People v. Horn Silver Mining Co.*, 105 N. Y. 76; 19 Am. & Eng. Corp. Cas. 210.

A gas company, organized under chapter 37 N. Y. Laws of 1848, is a manufacturing company within the meaning of the exemption contained in section 3, chapter 542, Laws of 1880. *Nassau Gaslight Co. v. City of Brooklyn*, 25 Hun (N. Y.) 567; 89 N. Y. 409.

Oil Company.—A corporation organized under Mass. Gen. Stat., ch. 61, for the purpose specified in the articles of association, of "refining and preparing for use oil, coal and other minerals," is a manufacturing corporation within the meaning of Stat. 1862, ch. 218 (which makes members of such corporations liable for corporate debts) without regard to what other purposes are also specified. *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

Printing and Publishing Company.—A company incorporated for the purpose of carrying on the business of printing and publishing a daily newspaper and general jobbing, printing and publishing, whose capital is wholly employed in publishing a newspaper for circulation, is not a manufacturing company within the meaning of the exemption in the fourth section of the New Jersey act of 1884. But a company incorporated to "conduct and prosecute the business of book printing and job printing, engraving, electrotyping and lithographing," whose capital is invested in the prosecution of that business, and which manufactures on orders only, is a manufacturing company within the meaning of that section. *State v. State Board of Assessors*, 47 N. J. L. 36; 13 Am. & Eng. Corp. Cas. 403.

An aqueduct company is not a manufacturing corporation. *Dudley v. Jamaica Pond Aqueduct Co.*, 100 Mass. 183.

See also *supra*, II 1, WHAT CORPORATIONS MAY BE ORGANIZED UNDER MANUFACTURING ACTS.

1. *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54.

But in *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; 41 N. W. Rep. 1074; 27 Am. & Eng. Corp. Cas. 303, it was held that where the principal business of a corporation is the storing, buying and selling grain, building and operating grain warehouses, and as incidental, dealing in coal, lime and cement, and the manufacture of flour and feed which the corporation also engaged in formed but an extremely small part of the company's business, the corporation is not one which may be incorporated under the Minnesota statutes relative to the incorporation of companies for manufacturing or mechanical purposes.

2. Under a statute requiring the articles of association of a corporation to state distinctly and definitely the purpose for which the same is formed, articles setting forth that respondents and others are incorporated "for the purpose of putting up, packing and manufacturing for market Detroit river and lake ice, and distributing and selling the same," set forth a purpose such as the statute authorizes the formation of corporations to carry on; and it is not necessary to state the means or methods of manufacture. *Atty. Gen. v. Lorman*, 59 Mich. 157; 60 Am. Rep. 287. Compare *People v. Knickerbocker Ice Co.*, 99 N. Y. 181; 9 Am. & Eng. Corp. Cas. 418.

Ice companies, gas companies and water companies intended to supply a city, respectively, with ice, gas and water, are within the meaning of Cal. act of 1853, providing for the formation of corporations for manufacturing etc. purposes, "or for the purpose of engaging in any species of trade or commerce, foreign or domestic." *Heyneman v. Blake*, 19 Cal. 579.

Mercantile Corporations.—Pub. Acts

But in *Minnesota*, no corporation can be organized under such an act except for an exclusively manufacturing or mechanical business.¹

Stockholders in corporations cannot exempt themselves from the rule of personal liability properly applicable to them by organizing under a manufacturing act when it is evident from the character of the business transacted that but a trifling part of it is manufacturing, and that the primary object of the organization is the carrying on of business foreign to manufacturing.²

2. Compliance with Incorporation Law.—When the requirements prescribed by a general incorporation law as necessary to the incorporation of a manufacturing company have been complied with, and a certificate is recorded, the persons signing the same become a body corporate as effectually as if the franchise had been granted directly by the State.³

3. Capital Stock.—Capital stock is usually essential to the existence of a manufacturing corporation.⁴ The integral parts of such a corporation are at least three stockholders.⁵ In *New York*, the certificate as to the payment of the capital stock must be sworn to; a mere acknowledgment thereof is not sufficient.⁶ It is frequently allowed that stock may be issued for the pur-

Mich. 1881, No. 274, amending Public Acts 1875, No. 187, so as to include corporations for mercantile business, the title of the amended act being "An act for the incorporation of manufacturing companies," and being unchanged, is void as being in violation of const. Mich., art. 4, § 20, providing that no law shall embrace more than one object, which shall be set forth in its title. *Eaton v. Walker* (Mich.), 43 N. W. Rep. 638; 27 Am. & Eng. Corp. Cas. 310.

1. If the purpose for which a corporation is formed, as stated in its articles of association, is to carry on a manufacturing or mechanical business, and also some other and distinct kind of business not properly incidental to or connected with the former, it will belong to the class of corporations authorized to be formed under title 2, ch. 34, Minn. Gen. Stat. (§§ 109-119), although the articles recite that it is formed under the manufacturing act of 1873. *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; 27 Am. & Eng. Corp. Cas. 286.

2. *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; 27 Am. & Eng. Corp. Cas. 303.

3. *Hager v. Cleveland*, 36 Md. 476.

4. But in *Massachusetts* it has been held not necessary in order to main-

tain an action on a demand against a company acting as a manufacturing corporation, that the plaintiff should prove that the corporation was organized and divided its stock, etc., conformably to the directions of Mass. Rev. Stat., ch. 38, §§ 4, 9, and ch. 44, § 3. It is, in general, sufficient to give in evidence the act of incorporation, and the actual use of the powers and privileges of an incorporated company, under the name designated in the act. *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282.

The subscribers for, and holders of, stock in a manufacturing corporation, which has been defectively organized, and transacted business under such defective organization, do not thereby become partners, general or special, in such business; and the records of such supposed corporation are not admissible against the members, as evidence of any agreement or understanding among them, as to their own rights and liabilities as members of a partnership, or of the extent of authority given to their general agent, as agent of a partnership. *Fay v. Noble*, 7 Cush. (Mass.) 188.

5. *Stone v. Flagg*, 72 Ill. 397.

6. *Brown v. Smith*, 13 Hun (N. Y.) 408.

chase of property, but this does not dispense with the necessity of filing a certificate of the payment of the whole of the capital stock;¹ nor does it authorize the issue of stock in addition to the capital stock stated in the certificate of organization.² But if the act contemplates payment of subscriptions in money, subscribers are not allowed to pay their subscriptions in property.³ Assessments on the stock can only be made in accordance with the provisions of the charter.⁴

III. POWERS—1. Mortgages.—Manufacturing corporations generally possess the same power to mortgage their property as is given to other corporations.⁵ The particular property which

1. *Brown v. Torrey*, 10 J. & S. (N. Y.) 1.

A and his associates, having been incorporated by act of the legislature, as a manufacturing corporation, met and agreed to accept the act, and fixed the proportions in which the shares should be distributed, and also agreed that the corporation should purchase certain lands of A, with the buildings and machinery thereon, then unfinished, but to be completed by A. The corporation was afterwards organized, and A conveyed the lands to them; but before he had finished the buildings and machinery, or had paid all the instalments on his shares, and before any certificate had been issued to him, he became insolvent, and proceedings in insolvency were instituted. *Held*, that the corporation had no lien on the shares of A, for sums expended by them, before or after he became insolvent, in finishing said buildings and machinery. *Massachusetts Iron Co. v. Hooper*, 7 Cush. (Mass.) 183.

2. The provisions of section 2, of the New York act of 1853 (ch. 333 of the Laws of 1853), amending the act of 1848 (ch. 40 of the Laws of 1848), authorizing the formation of corporations for manufacturing and other purposes, does not authorize the issue of stock, in addition to the capital stock stated in the certificate of organization, and any increase thereof made pursuant to the act of 1848. It simply authorizes the payment for such stock in property necessary for the business of the company instead of in cash; and under its provisions the whole capital stock can be paid for in property, and when so paid for, the owner thereof is not liable to the creditors of the company under section 10 of the act of 1848. *Schenck v. Andrews*, 46 N. Y. 589.

3 The Pennsylvania act of July 18th,

1863, contemplates a payment of subscriptions in money; an arrangement whereby two of the original promoters put in certain real estate at a large advance on its cost, and are credited with the difference on account of stock, is invalid as against other stockholders. *Bailey v. Pittsburgh etc. Co.*, 69 Pa. St. 334.

4. A clause in the charter of a manufacturing corporation, "that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount as aforesaid has been paid in, except in equal proportions, and by the consent of the stockholders owning at least three fourths of the shares of the capital stock of the corporation," authorizes a further assessment of paid stock, only upon the basis that the capital stock, fixed in amount by the charter, has been subscribed for and actually paid in. *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Compelling Agent to Enforce Contribution.—Where the proper agents of a manufacturing corporation, in *New York*, neglect to call in debts due by the stockholders, so as to enable it to pay its debts, a creditor of the corporation is entitled to a bill in chancery to compel such agents to enforce contribution from the stockholders according to their subscriptions. *Briggs v. Penniman*, 8 Cow. (N. Y.) 395.

5. A mortgage given to a trustee for the benefit of all the creditors of the corporation, is valid. *Astor v. Westchester Co.*, 33 Hun (N. Y.) 333; *Carpenter v. Black Hawk Min. Co.*, 65 N. Y. 43; *Lord v. Yonkers F. & G. Co.*, 99 N. Y. 547; *Central G. M. Co. v. Platt*, 3 Daly (N. Y.) 363.

When about to sell its real estate a manufacturing corporation may advance money to the purchaser for the erection of buildings, and take a mort-

they may mortgage is usually designated in the act of incorporation.¹ In *New York*, it is essential to the validity of a mortgage by a manufacturing company that the assent of at least two thirds of the capital stock of such corporation shall first be filed.²

gage for the purchase money and the advance. *Greenpoint Sugar Co. v. Whitin*, 7 Hun (N. Y.) 44; 69 N. Y. 328.

Where a mortgage is given in good faith, neither the corporation itself nor its stockholders can question its validity. *Carpenter v. Black Hawk Min. Co.*, 65 N. Y. 43; *Parish v. Wheeler*, 22 N. Y. 494. Neither can the validity of a mortgage be questioned against one who holds in good faith by one who takes with notice, although the assent to the execution of the mortgage required of the stockholders has not been filed. *Rochester Savings Bank v. Averell*, 96 N. Y. 467. But a receiver of the corporation may question the validity of such a mortgage. *Astor v. Westchester Co.*, 33 Hun (N. Y.) 333; *Vail v. Hamilton*, 85 N. Y. 453.

The "franchises, privileges, rights and liberties," which under the New York act of 1878, a manufacturing corporation is authorized to mortgage, to secure the payment of a debt, upon consent of the requisite number of stockholders, and which are not included in a consent to mortgage the real and personal estate of the corporation, are the corporate rights and franchises which became vested in the company by virtue of its organization as a corporation. Those deeds do not include patent rights, licences, easements or privileges acquired by the company after its incorporation, either from individuals or other corporations; these are in the nature of property, and are, therefore, included in a consent to mortgage the corporate property. *Lord v. Yonkers Fuel and Gas Co.*, 101 N. Y. 614.

A loan of money to pay debts of a manufacturing corporation where the money is so applied is a debt contracted in the business for which the corporation was organized, and may be secured by mortgage. *Rochester Savings Bank v. Averell*, 96 N. Y. 467.

1. A mining company organized under the New York act of 1848, chapter 40, upon filing the assent in writing of two thirds of its stockholders may mortgage its real estate to secure payment of its debts, but not to raise money to

carry on its operations. If intended to secure bonds raised for both purposes it is only void *pro tanto*. A separate mortgage need not be made to each creditor. Such mortgage is valid though it purport to cover the franchises and personal property of the corporation, and though it include after acquired real estate. *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

A franchise to use the streets may be mortgaged. *City of Brooklyn v. Jourdain*, 7 Abb. (N. Y.) N. C. 23.

2. The filing of the assent of the stockholders and the execution of the mortgage may be contemporaneous, the assent and the mortgage being substantially one transaction. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.

The assent is valid although there has been no meeting of the stockholders. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.

The New York act required the assent of two thirds of the stockholders, but "two thirds" in this connection means two thirds of the stock issued. *Vail v. Hamilton*, 85 N. Y. 453; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.

It is essential to the validity of the assent of the stockholders that the amount of the mortgage should be stated therein. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328.

Where a corporation buys real estate it has been held that a purchase money mortgage given by it without the assent of the stockholders is valid. *Coman v. Lakey*, 80 N. Y. 345; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328. A chattel mortgage also to secure purchase money given without the assent of the stockholders has been sustained as an equitable lien. *Coman v. Lakey*, 80 N. Y. 345. But as a general rule the assent of the stockholders is an indispensable condition to the creation of a valid mortgage. *Rochester Savings Bank v. Averell*, 96 N. Y. 467.

Where a corporation is itself the owner of a portion of its stock, it cannot give assent for the shares so owned by it to make up the requisite two thirds; nor can the assenting stock

2. Sale and Transfer of Goods.—A single and isolated act of selling outside of the legitimate business of the company is not illegal; it will be presumed to have been done in the exercise of its legitimate corporate powers.¹ And where the corporation has borrowed money upon an agreement to secure the same by a pledge of the goods, it may subsequently, while it has but two trustees, transfer such property to the lender, and the latter will acquire a good title.² A manufacturing company has also been held authorized to purchase goods of the kind which it was incorporated to manufacture.³

3. Stock and Stockholders.—It has been held, in *New York*, that a manufacturing corporation has no implied power to create a lien on its stock for a debt due from a stockholder.⁴ But a

holders be deemed to represent a proportional of the stock owned by the corporation. *Vail v. Hamilton*, 85 N. Y. 453.

Where, however, a mortgage has been executed without such assent it is validated by a subsequent assent where there are no intervening rights; such assent makes the instrument, as of the time it is given, a valid mortgage. The filing of the assent in the office of the clerk of the county where the mortgaged property is situated is not an indispensable condition to the validity of the mortgage; as against a subsequent mortgagee or purchaser with notice, the mortgage is valid. *Rochester Savings Bank v. Averell*, 96 N. Y. 467.

It will be presumed in the absence of proof that the required assent was obtained and filed; and one who is seeking to set aside a mortgage on the ground that the assent of the stockholders was not obtained must prove that the mortgage was neither given to secure a debt of the company nor that the money obtained, was used to pay debts. A judgment of foreclosure, unless impeached, is conclusive against the corporation and its stockholders as to the validity of the mortgage, and the burden of impeaching it is upon one who denies its validity. *Denike v. New York R. L. & C. Co.*, 80 N. Y. 599.

1. Such a sale may be made upon condition, and the condition will be binding upon the corporation. *De Groof v. American Linen Thread Co.*, 21 N. Y. 124.

Where the corporate powers are the manufacturing every variety of firearms and other implements of war applicable to the use of firearms, and all kinds of machinery adapted to the construction thereof, they do not include a

power to manufacture and deliver circular railroad locks. *Whitney Arms Co. v. Barlow*, 38 N. Y. Super. Ct. 554.

2. *Castle v. Lewis*, 13 Hun (N. Y.) 298.

3. A company newly incorporated "for the purpose of manufacturing and selling glass," contracted to purchase glassware, for the purpose of keeping up their stock, and supplying customers until the works which they bought from the company preceding them were put in repair; held that the contract was not *ultra vires*. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315.

A glass manufacturing company-keeping store and selling goods to employees, is authorized to recover an account for goods sold and delivered. *Chester Glass Co. v. Dewey*, 16 Mass. 94.

4. In *New York*, a manufacturing corporation, organized under the general Manufacturing law (Laws 1848, ch. 40) has no power, in the absence of a provision to that effect in its articles of association, to create or declare a lien upon its stock by by-law, or to refuse to permit a transfer until the indebtedness of the stockholder to the company is paid, and a *bona fide* purchaser of stock, without knowledge or notice of such a by-law, is not bound thereby, and can compel the transfer to him upon the books of the corporation of the stock purchased. The policy of the law is to protect a *bona fide* vendee of shares of stock against secret or equitable claims thereto of one who has endowed the vendor with the *indicia* of ownership. And a power to abridge the right of transfer will not be inferred from a statutory provision unless it cannot otherwise have efficacy, and un-

manufacturing company may, by agreement with a stockholder, acquire a valid lien upon his stock to secure his obligation to the company.¹ One manufacturing company may take shares of another in payment of a debt.²

It has been held, in *Connecticut*, that a minority of the stockholders of a manufacturing corporation cannot enjoin the company against erecting a new factory, and compel the distribution of the surplus which it was proposed to use in that way.³

4. Assignment for Benefit of Creditors.—An assignment for the benefit of creditors by a manufacturing corporation in contemplation of insolvency has been held to be void in *New York*.⁴ But in *Massachusetts*, the directors of an insolvent manufacturing corporation have authority to convey all the property of the corporation to one of its creditors upon condition that he shall apply the property to the payment of his claim and pay over the surplus, if any, to the treasurer of the corporation; and such conveyance is not fraudulent as against other creditors, by reason of its tendency to give a preference.⁵

5. Other Powers.⁶—Where a company was formed for the purpose of manufacturing a patent machine, it is not *ultra vires* to

less it present so strong a probability of intention that the contrary cannot be supposed. *Driscoll v. West Bradley etc. Mfg. Co.*, 59 N. Y. 96.

1. *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313.

2. *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493.

3. Where a manufacturing corporation had a large surplus above its stated capital, which the directors, with the concurrence of a majority of the stockholders, were about using for the purpose of extending the business of the company and erecting an additional factory against the objection of a minority of the stockholders, but it appeared that the business as extended was within the powers of the corporation, and that the stated capital was much less than the amount actually used and necessary for its ordinary operations. *Held*, on a bill brought by the dissenting minority praying for an order that the surplus be divided among the stockholders, and that the company be enjoined against erecting the new factory, and that the facts were not such as to require the interposition of the court in behalf of the minority. *Pratt v. Pratt*, 33 Conn. 446.

Purchase of Company's Own Shares.—A limited company was incorporated under the English Joint Stock Companies acts, with the objects, as stated in its memorandum, of acquiring and

carrying on a manufacturing business, and any other business and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for. *Held*, that such a company, having no power under the acts to purchase its own shares, the purchase was *ultra vires*, and the claim must fail. *Trevor v. Whitworth*, L. R., 12 App. Cas. 409; 57 L. J., Ch. D. 28; 57 L. T., N. S. 457; 36 Week. Rep. 145.

4. *Sibell v. Remsen*, 33 N. Y. 95. In this case the court said: "The assignment under which the plaintiff claims was made in contemplation of insolvency by a manufacturing corporation organized under the general act of 1848. It falls directly within the prohibition of the statute which condemns such instruments as utterly void. (1 R. S. 603, § 4; *Harris v. Thompson*, 15 Barb. (N. Y.) 62; *Robinson v. Bank of Attica*, 21 N. Y. 406.)"

5. *Sargent v. Webster*, 13 Metc. (Mass.) 497.

6. In *Maine*, manufacturing corporations "incorporated by general law,"

purchase the patent.¹ But a manufacturing corporation has been held not authorized to form a partnership with an individual.² The note of a manufacturing company, in the hands of a holder in good faith, for value, who took it before maturity, and without knowledge that the maker had not received full consideration, cannot be enforced against the corporation, although it was made as an accommodation note.³ A manufacturing corporation may temporarily lease its property to some person who will continue and carry on its business.⁴ But as a manufacturing company cannot, by lease from a railroad company, acquire the right of eminent domain, a municipal council cannot authorize it to build a railroad track on a street, such track being shown to be a nuisance.⁵ And a corporation chartered for a manufacturing busi-

under the provisions of Me. Rev. Stat., ch. 48, §§ 18, 19, 20, stand on an equality with those "incorporated by a special act" as to the rights and powers conferred, and the duties, obligations and liabilities imposed by Me. Rev. Stat., ch. 46, 48. *Poor v. Willoughby*, 64 Me. 379.

1. *In re British & Foreign Cork Co.*, L. R., 1 Eq. 231. And see *Gleadow v. Hull Glass Co.*, 19 L. J., Ch. Div. 44; *Dorsey etc. Rake Co. v. Marsh*, 6 Fish. Pat. Cas. 387.

2. *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582. A manufacturing corporation and an individual who have actually made a contract of partnership, and, either with or without the assent of all the stockholders of the corporation, acted and held themselves out to third persons as copartners for many years, and contracted debts as such, cannot, upon the petition of such individual, be put into insolvency as a partnership under Stats. 1838, ch. 163, and 1851, ch. 327; and proceedings in insolvency so instituted will be suspended by this court upon the application of the corporation. *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582.

3. *Bird v. Daggett*, 97 Mass. 494; *Monument Bank v. Globe Works*, 101 Mass. 57.

A corporation chartered for the sole purpose of "manufacturing and repairing machinery," and prohibited from contracting any debt without the written consent of its board of directors, assumed to act as A's agent in making sales of A's machinery, and took a note from a purchaser of such machinery. *Held*, in a suit on the note against the maker, and against the corporation as endorser, that the transaction was *ultra vires*, and that the note

acquired no validity from its endorsement by the corporation to A, who was fully cognizant of all the facts attending its creation. *Westinghouse Machine Co. v. Wilkinson*, 79 Ala. 312.

Note Not Signed by Secretary.—A by-law of a manufacturing corporation, adopted soon after its organization, but which had never been followed, provided that the obligations of the corporation should be signed by the secretary, but did not provide that the lack of his signature should render the instrument void. *Held*, that the signature of the secretary was not essential to the validity of a mortgage and notes signed by the president in the name of the corporation. *Martin v. Niagara Falls Paper Mfg. Co.*, 51 N. Y. Supm. (44 Hun) 130.

Notes of Company with Three Trustees.—Notes executed by a manufacturing company are not invalidated by the fact that, when they were given, the company had but two trustees and stockholders—the president and his daughter—notwithstanding a provision of the statute that the affairs of every such corporation shall be managed by not less than three trustees, who shall be stockholders. (N. Y. L. 1848, ch. 40, § 3); such provision being for the protection and benefit of the stockholders, they may dispense with it by unanimous consent. *Martin v. Niagara Falls Paper Mfg. Co.*, 51 N. Y. Supm. (44 Hun) 130.

4. *Denike v. New York & R. L. & C. Co.*, 80 N. Y. 599.

If, however, such a lease is unlawful, it does not give a portion of the stockholders a standing in a court of equity to ask for a dissolution of the corporation. *Id.*

5. *Appeal of Hartman Steel Co.*,

ness has not power to purchase bank stock for the purpose of carrying on or controlling the banking business.¹

There is no legal objection to the manufacture, by a single corporation, of the greatest variety of articles, if the purpose be "distinctly and definitely specified" in the articles of association.²

IV. OFFICERS AND AGENTS—1. Generally.—In *Indiana*, it is held that the directors of an incorporated manufacturing company are officers and within the meaning of the act providing for the incorporation of such companies.³ Unless the by-laws of a manufacturing company, or a statute, expressly provide otherwise, the same person may be treasurer and director, and a majority of the directors constitute a quorum, and a majority of a quorum have authority to decide any question upon which they can act.⁴ The secretary of a Connecticut manufacturing company is not required to reside within the State.⁵

2. Powers.—It has been held that the *president* of a manufacturing corporation has no power merely as a president to give a confession of judgment.⁶ Nor can he bind the corporation by a purchase of goods, required in its business, when there is a resolution upon the books of the corporation forbidding the same, even though the seller had no notice thereof.⁷ Nor has the president authority as such to commence an action in the name of the corporation.⁸

The *vice president* and *secretary* of a manufacturing corporation, although the active managers of the business of the corporation, superintending the erection of its buildings, making its contracts and signing its drafts, checks and notes, have not, by virtue thereof, authority to bind the corporation by a promise to pay the debts of another and distinct corporation.⁹

Limited. (Penn. 1889), 18 Atl. Rep. 553.

1. Sumner v. Marcy, 3 Woodb. & M. (U. S.) 105.

2. Bird v. Daggett, 97 Mass. 494.

3. Gaff v. Theis, 33 Ind. 307.

Company Must Act by Its Board.—A and B owning a manufacturing establishment obtained an act incorporating a company, and subscribed each for half of the stock, except four shares, which were put in the names of four other persons, for the purpose of having a sufficient number of persons to organize under the act. After the organization of the company, by the election of directors, A and B continued to conduct the business as before the act, by and between themselves as individuals, the company not acting by its board. *Held*, that they were bound to conduct their business as a corporation, and were to be governed by the law of corporations. *Vandyke v. Brown*, 8 N. J. Eq. (4 Halst.) 657.

4. Sargent v. Webster, 13 Metc. (Mass.) 497.

5. McCall v. Byram Mfg. Co., 6 Conn. 428.

6. Thew v. Porcelain Mfg. Co., 5 S. Car. 415.

7. This is so unless by a well recognized general course of dealing the president has been held out to the community as possessed of such authority. *Westerfield v. Radde*, 7 Daly (N. Y.) 326. And see *Rathburn v. Snow*, 22 N. Y. St. Rep. 227.

8. Ashuelot Mfg. Co. v. Marsh, 1 Cush. (Mass.) 507.

9. Rahm v. King Wrought etc. Mfg., 16 Kan. 277.

Where the vice president of a manufacturing corporation, after it had become insolvent, gave a note to his clerk, under the seal of the corporation, for an alleged debt due to himself, for the purpose of charging the stockholders of the company personally

In *Massachusetts*, it is held that the *treasurer* of a manufacturing corporation has authority, by virtue of his office, to give negotiable notes in the prosecution of the business of the company, but not for the accommodation of third persons.¹

The *general agent* of a manufacturing company is not authorized, without a special power, to transfer by deed the real estate of the company;² and a managing agent of such a company has been held authorized to employ workmen to carry on the business of the corporation, and to pay them with its funds.³ The agent of a manufacturing corporation is not necessarily authorized to make a note on behalf of the corporation. To render such a note valid as against the company, the powers of the agent must be shown.⁴ The general agent may call a meeting of the corpo-

with the payment of the note, *held*, that the note was not evidence of a debt due to the officer of the company who affixed the seal of the corporation thereto; and that the persons to whom he had transferred the note by assignment could not recover the amount thereof from the stockholders, after the dissolution of the corporation, without proving that it was given for a debt actually due. *Bonaffe v. Fowler*, 7 Paige Ch. (N. Y.) 576.

1. *Ex parte Estabrook*, 2 Low. (U. S.) 547.

And a note given by such an officer, without authority, is valid in the hands of an innocent purchaser for value before maturity. *Ib.*

But the treasurer of a manufacturing corporation has no authority to release a claim for a loss under a policy of insurance obtained by him in behalf of the corporation. *E. Carver Co. v. Mfrs. Ins. Co.*, 6 Gray (Mass.) 214.

2. Therefore, when a person executed a deed in behalf of a manufacturing company, and therein declared that he was empowered, by a vote of the company, to execute such deed, it was *held* that he was thereby estopped to deny that he was thus empowered. *Stow v. Wyse*, 7 Conn. 214.

Creation of Lien on Personality.—Where a manufacturing corporation has a board of directors, under whose general supervision and control the business is transacted, and an agent, who attends to the daily routine of business, and its management under all ordinary circumstances, the agent has no authority, by virtue merely of his agency, to conclude a contract creating a general lien upon the personal property of the company, to secure money borrowed, but such contract must re-

ceive the approval of the board of directors. *Whitwell v. Warner*, 20 Vt. 425.

3. The agent of a manufacturing corporation was empowered by its by-laws to manage the affairs of the corporation committed to his care, and to exercise the powers committed to him according to his best ability and discretion, and promptly to collect all assessments and other sums that should become due to the corporation, and to disburse them according to the order of the board of directors, who were made a board of control over him. *Held*, that the agent, if the board of directors did not interpose to control his proceedings, had authority to employ workmen to carry on the business of the corporation, and to pay them with its funds, or, not being in funds, to give the notes of the corporation in payment. *Bates v. Keith Iron Co.*, 7 Metc. (Mass.) 224.

4. *Benedict v. Lansing*, 5 Den. (N. Y.) 283.

Where the agent of a manufacturing corporation was authorized, by a vote of the directors, to raise money for his own use, upon the credit of the company, and to give therefor a "company note," it was *held* that the directors had not exceeded their authority derived from the general statutes regulating manufacturing corporations. *Held* also, that the term "company notes" was not used in the vote to designate a technical promissory note, and that a bill of exchange drawn by the agent in the name of the company, upon the dishonor of which they could not be liable for any damages, was a company note, within the meaning of the vote. *Tripp v. Swanzy Paper Co.*, 13 Pick. (Mass.) 291.

ration without any special authority, in the absence of any statute or by law providing for the calling of meetings.¹

The directors of a manufacturing corporation, as the best means of continuing the business and pursuant to the votes of a majority of the stockholders, though against the protest of a minority, may sell the whole property of the corporation to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them.²

3. Individual Liability of Trustees—(a) To Whom Liable.—The statutes imposing an individual liability upon the trustees of a manufacturing corporation in certain cases usually provide that such liability is to the creditors of the company.³ Accordingly, a trustee cannot be made liable to one to whom the bonds of the company have been issued as a mere gratuity; he is not a creditor.⁴ A creditor who is also a stockholder may recover against a trustee in the absence of any proof that the plaintiff was personally liable for the debts of the company.⁵

The clerk of a corporation borrowed a sum of money in the name of the corporation, without authority from the corporation, and absconded with it. It appeared that, in two or three previous instances, he had borrowed money of other persons in the name of the corporation, of which the plaintiff had no knowledge, which money was repaid by another clerk, it having been applied to the use of the company. *Held*, that the corporation was not liable. *Martin v. G. F. Mfg. Co.*, 9 N. H. 51.

The authority of the president, who was also general manager and financial agent of a manufacturing corporation, and who had control of all the corporate stock, to borrow money for the corporation, may be inferred from his exclusive control and management of the affairs of the company as though they were part of his personal and private concerns, for a period sufficiently long to establish a settled course of business; and a contract subsequently made by the corporation, by its president, with the lender, on a new consideration, adjusting the amount due on certain notes given for money so loaned, and recognizing the authority of the president to bind the company in future transactions, which contract is entered into pursuant to a resolution adopted by the board of trustees, who were also the sole stockholders, is a ratification of his act in giving the notes. *Martin v. Niagara Falls Paper Mfg. Co.*, 51 N. Y. Supm. (44 Hun) 130.

Persons dealing with a manufacturing and trading corporation organized under the laws of Massachusetts, are not bound by the specifically enumerated powers of the officers as contained in the by-laws, but as against third persons. Such officers shall be taken to have the authority which their designations ordinarily imply; the treasurer to do acts relating to their finances, the secretary to keep records, the general agent to manage the business, for which the corporation is chartered; and such acts are binding upon a corporation without express authority; and are not invalid merely because certain special and enumerated powers are conferred upon such officers by the by-laws, but which do not exclude other powers. *Fay v. Noble*, 12 Cush. (Mass.) 1.

1. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

2. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393.

3. Both Mass. Stat. 1870, ch. 224, § 69, —repealing a general statute under which a manufacturing corporation has been organized—and Mass. Stat. 1872, ch. 354, dissolving the corporation by name—reserve the rights of its creditors to sue the corporation upon liabilities previously incurred, for the purpose of charging its officers and stockholders. *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532.

4. *Norris v. DeWolf*, 12 Hun (N. Y.) 606; Affirmed 76 N. Y. 597.

5. *Sanborn v. Lefferts*, 16 Abb. (N. Y.) Pr. N. C. 42.

An action to enforce the individual liability of the trustees must usually be brought for the benefit of all the creditors.¹

(b) *Who Is Liable, and How.*—In an action against the trustees of a manufacturing corporation to enforce their individual liability, the plaintiff may recover against one or more severally.² The president of the company, though necessarily a trustee, must be sued as trustee and not as president.³ The same persons may be charged both as trustees and stockholders in one suit.⁴ But the recovery of a judgment against the defendant as a stockholder does not merge his liability as a trustee.⁵

In a suit to charge a trustee individually, it is not sufficient to show that he was elected; there must be proof that he assented to the election by some direct and positive act.⁶ A trustee whose term of office expires on a certain day, and who does not hold over, cannot be held liable for a subsequent default.⁷ But a trustee who, after default, retires from office, continues liable for an existing debt, and for an accruing liability, so long as he continues to act as trustee.⁸ And a trustee continues responsible, notwithstanding the expiration of his term, where no successor has been elected, and he has continued to act as trustee.⁹

(c) *For What Trustee Is Liable.*—An individual liability has been imposed by various statutes upon the officers and trustees of a manufacturing corporation for making a false certificate as

1. To a bill in equity under Mass. Stat. 1862, ch. 218, § 4, to enforce the liability of officers of a manufacturing corporation for its debts, an objection by one of the defendants that the bill was not brought in behalf of all the creditors of the corporation is fatal. *Moore v. Reynolds*, 109 Mass. 473. And the nonjoinder of the other creditors is not excused by an allegation in the bill that there are no other creditors known to the plaintiff. *Pope v. Leonard*, 115 Mass. 286.

2. *Hoag v. La Mont*, 60 N. Y. 96.

3. *McHarg v. Eastman*, 7 Rob. (N. Y.) 137. But under a *Massachusetts* statute, it appears to be otherwise. And if the property of the president of a manufacturing corporation, organized under Gen. Stat., ch. 61, is taken in satisfaction of an execution issued on a decree in equity against himself and the other officers, by which they are decreed to be personally liable to a creditor of the corporation, for neglect to file the certificates required by Stat. 1862, ch. 210, he may maintain a bill in equity against the other officers for contribution. *Nickerson v. Wheeler*, 118 Mass. 295.

4. *Sterne v. Herman*, 11 Abb. (N. Y.) Pr., N. S. 376. But see *Mappier v.*

Mortimer, 11 Abb. (N. Y.) Pr., N. S. 455.

Mass. Stat. 1851, ch. 315, § 3, does not authorize the levy of an execution, issued on a judgment recovered against a manufacturing corporation, on the property of an officer of the corporation, unless, if he is also a stockholder, he has been summoned and his liability established, or, if he is not a stockholder, some stockholder has been summoned and the liability of stockholders established, in the action in which judgment was recovered. *Dewey v. Baker*, 16 Gray (Mass.) 130.

5. *Vincent v. Sands*, 1 J. & Sp. (N. Y.) 511.

6. *Osborne & Cheesman v. Croome*, 14 Hun (N. Y.) 169. Affirmed 77 N. Y. 629.

To render a stockholder, who has been elected trustee, individually liable, there must be proof of his acceptance of the office. *Cameron v. Seaman*, 69 N. Y. 396.

7. *Wade v. Baker*, 14 Hun (N. Y.) 615; 81 N. Y. 46.

8. *Vincent v. Sands*, 1 J. & Sp. (N. Y.) 511; *Reed v. Keese*, 5 J. & Sp. (N. Y.) 269. And see *Sanborn v. Lefferts*, 16 Abb. (N. Y.) Pr., N. S. 42.

9. *Deming v. Puleston*, 35 N. Y.

to the payment of the capital stock,¹ for declaring a dividend which impairs the capital,² for unlawfully increasing the company's indebtedness,³ and, under certain circumstances, for the debts of the company.⁴ A trustee cannot, however, be made

Super. Ct. (J. & S.) 309, 55 N. Y. 655.

1. Under Mass. Rev. Stat., ch. 38, § 28, the officers of a manufacturing corporation cannot be made individually liable for its debts for making a false certificate that the capital stock has been paid in, unless it is wilfully false. *Stebbins v. Edmonds*, 12 Gray (Mass.) 203. See **INDIVIDUAL LIABILITY IN RESPECT TO FILING CERTIFICATES AND REPORTS, IV, 4, *infra*.**

2. A common law action will not lie by the corporation against the trustees for declaring a dividend which diminishes the capital stock where they acted in good faith and no question of negligence is raised. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422.

Under what circumstances a trustee becomes personally liable for the debts of the company in consequence of the declaring of a dividend which impairs its capital. *Rorke v. Thomas*, 56 N. Y. 559. And as to what constitutes such a withdrawal of the capital of a manufacturing corporation, as to make the directors thereof individually liable to creditors, see *Stebbins v. Cowles*, 10 Conn. 399.

In *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261, the defendants, who were trustees of a manufacturing corporation organized under the act of 1848 (Laws of 1848, ch. 40), and the acts amending the same, were charged with a violation of section two of chapter eighteen, title four of the first part of the Revised Statutes (vol. 1, p. 1175, 4th ed.), in having paid dividends not from the surplus profits of the plaintiff, but by withdrawing and dividing a part of the capital stock without the consent of the legislature. *Held*, that the two statutes were repugnant to and in conflict with each other; and that it was not the object or meaning of the law makers to apply both statutes to trustees of a corporation created under the act of 1848. *Held*, also, that the legislature designed to provide, by the act of 1848 itself, for the cases in which individual liability should result from the acts prohibited. Accordingly, *held* that an action could not be maintained against

the defendants as trustees under the provisions of the Revised Statutes.

3. To render a trustee personally liable on the ground that he has assented to an increase of the company's indebtedness beyond the amount of its capital, it must be averred that such excess was equal to the amount of the plaintiff's debt. *Chambers v. Lewis*, 28 N. Y. 454.

In an action by a bank receiver against certain trustees of a mill company, it appeared that the mill was indebted in excess of its capital stock to the bank; that a contract was made by which the bank agreed to treat the debt as dead or suspended, and thereafter to cash the mill paper when endorsed by one of the defendants, and the bank president individually, and that subsequent mill deposits were to be credited on the new account. They were credited on the old account and the endorsers of the paper under the new account had no notice of its dishonor. *Held*, that defendants were not liable under § 23, ch. 40, Laws N. Y. 1848, making trustees individually liable for indebtedness to which they may have assented in excess of the capital stock of the company, as the new paper made by the mill under the contract was paid, so far as defendants were concerned. *Patterson v. Robinson* (N. Y. 1889), 22 N. E. Rep. 372.

4. The trustees can only be held personally liable for debts of the company actually due, at the time of the commencement of the suit against them. *Jones v. Barlow*, 62 N. Y. 202.

An executory contract for the delivery of goods at a future day, does not create a debt within the meaning of the statute. *Garrison v. Howe*, 17 N. Y. 458; *Nimmons v. Tappan*, 2 S. W. (N. Y.) 652.

In proceedings under Mass. Stat. 1862, ch. 218, to enforce personal liability of officers of a manufacturing corporation, the judgment recovered against the corporation is conclusive of the existence of the debt for which it was rendered. *Thayer v. New England Lithographic Co.*, 108 Mass. 523.

A entered into an agreement with a

personally liable for the torts of the corporation.¹

(d) *Enforcement of Liability.*—In order to impose a personal liability upon a trustee, the plaintiff must establish a valid claim against the corporation.² But it appears that the liability of a trustee is not affected by an unsuccessful attempt to collect the

corporation, of which the plaintiff was appointed receiver, to sell said corporation certain patents for one thousand shares of the company's stock, but it turned out before the consummation of the transaction that A, to secure a perfect title to one of the patents, must pay to another party \$5,000. The company then adopted a resolution to pay \$5,000 to A, reserving \$10,000 of the preferred stock theretofore directed to issue to him under the agreement for the purchase of his property. Under this resolution the treasurer drew his check to A, and retained the \$10,000 of stock. In the books of the company the treasurer entered the transaction as a loan to A. *Held*, that the transaction was in no sense a loan so as to attach liability upon the officers of the company for its debts, under § 14, ch. 40, New York Laws of 1848. *Billings v. Trask*, 30 Hun (N. Y.) 314.

The liability of directors of a manufacturing corporation under Rev. Stat., ch. 38, §§ 25, 39, 31, for the excess of its debts over its capital stock must be enforced by bill in equity, and not by action at law, if the debts for which the directors are so liable amount to more than such excess. *Merchants' Bank v. Stevenson*, 10 Gray (Mass.) 232. See 13 Allen (Mass.) 456.

In a suit in equity under Mass. St. 1862, ch. 218, to charge officers of a manufacturing corporation with personal liability for a debt for which judgment has been rendered against the corporation, parol evidence is admissible in connection with the record of the judgment, to identify the debt and limit it to the time of the officer's default. *Norfolk v. American Steam Gas Co.*, 108 Mass. 404.

A sued B in a trustee process, and summoned a manufacturing corporation as his trustee. Pending this suit, B sued the corporation on the debt owing to him; the action was referred to arbitrators and an award returned for B, to which the corporation made no objection save its liability in the trustee process. A recovered judgment against B and the trustee and after-

wards against the trustee in *scire facias*. In B's action, by agreement of the parties, he took judgment for costs only. Upon failure of the corporation to satisfy these judgments, after due proceedings under Mass. St. 1862, ch. 218, A and B joined in a bill in equity to charge its officers with personal liability thereon. *Held*, that they were entitled to recover the amount of the judgments, excluding costs in the *scire facias*; and also to recover costs in the suit in equity. *Norfolk v. American Steam Gas Co.*, 108 Mass. 404.

Evidence of Debt—Due Bill.—In an action to charge trustees of a manufacturing corporation with a debt of the company, plaintiff offered in evidence a certificate or due bill signed for the company by their agent. The agent had been examined as a witness, and had testified to the existence of the debt, but did not recollect the exact amount, and had referred to the certificate as stating it. *Held*, that the certificate or due bill was admissible. *Squires v. Brown*, 22 How. (N. Y.) Pr. 35.

1. *Esmond v. Bullard*, 16 Hun (N. Y.) 65.

Under the Pa. act of 1863 (P. L. 1102), the directors cannot be made individually liable for a tort of the corporation. *Roberts v. Reed*, 4 W. N. C. (Pa.) 417.

2. *Hill v. Frazier*, 23 Pa. St. 320. A complaint against trustees is bad on demurrer if it show that the wrongful acts of the defendant were committed before the corporation incurred any obligation to the plaintiff. *Ogden v. Rollo*, 13 Abb. (N. Y.) Pr. 300.

Mass. Stat. 1862, ch. 218, § 3, providing that no stockholder or officer in a manufacturing corporation shall be held liable for its debts or contracts unless a judgment is recovered against it, etc., applies to manufacturing corporations organized under general laws as well as to those which have special charters. *Peele v. Phillips*, 8 Allen (Mass.) 86.

Averments in the complaint in an action against trustees of a corporation for the value of services ren-

claim by suit against the corporation;¹ and they can set up no defence to the original cause of action which would not have availed the corporation.² Nor can the acting officers of a manufacturing corporation avail themselves of irregularities or informalities in the meeting at which they were chosen, to avoid personal liability for debts of the corporation.³

After the liability of a trustee has become fixed, the creditor does not release it by taking the promissory notes of the company in renewal.⁴ In *Massachusetts*, the officers' individual liability cannot be proved against his estate in insolvency.⁵ Whether it is necessary to join the corporation as a party in a suit to enforce an officer's liability has been variously decided in the different States.⁶ The proceedings to enforce the individual liability of the officers of a manufacturing corporation must be in strict accordance with the statute.⁷

dered by plaintiff, that plaintiff has obtained judgment in a district court, and "that the said judgment was obtained for services rendered by the plaintiff to said corporation, in publishing their advertisement," etc., specifying the amount agreed to be paid by the corporation, are merely descriptive of the judgment that was entered, and not an assertion that in fact the services were rendered; and evidence as to such services is not admissible. *Tovey v. Culver*, 54 N. Y. Super. (22 Jones & S.) 123.

1. *Deming v. Puleston*, 35 N. Y. Super. Ct. 309; affirmed 55 N. Y. 655. An action against a trustee of a manufacturing company to enforce the statutory individual liability is on the original demand, not on the judgment upon it against the company. *McHarg v. Eastman*, 35 How. (N. Y.) Pr. 205.

2. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

Where there is proof of user and omission to file in the secretary of state's office a duplicate certificate of organization will not avail a trustee as a defence. *Meriden Tool Co. v. Morgan*, 1 Abb. (N. Y.) N. C. 125.

3. *Thayer v. New England Lithographic Co.*, 108 Mass. 523.

4. *Jones v. Barlow*, 6 J. & Sp. (N. Y.) 142.

5. *Bangs v. Lincoln*, 10 Gray (Mass.) 600.

6. In a suit against the directors, under the fourteenth section of the Pa. act of 1849, the company need not be joined as a defendant; the director has no right of subrogation. *Hill v. Frazier*, 22 Pa. St. 320.

In a bill filed, under the Pa. act of 1863, to enforce the individual liability of the officers of the company, the corporation should not be joined; the bill should be filed on behalf of the complainants and all other creditors. *Sheriff v. Globe Oil Co.*, 1 Brewst. (Pa.) 489; *Archer v. Rose*, 3 Brewst. (Pa.) 264; *Young v. Allegheny Oil Co.*, 30 Leg. Int. (Pa.) 13.

But to a bill in equity under Mass. Stat. 1862, ch. 218, § 4, to enforce the liability of the officers or stockholders of a corporation for its debts, the corporation must be made a party defendant. *Pope v. Leonard*, 115 Mass. 286.

7. The proceedings under Mass. Stat. 1862, ch. 218, to enforce the liability of the officers of corporations, must be in strict accordance with the statute, and a return of the execution unsatisfied on the same day on which the demand thereon was made, does not make the officers liable; and it is of no avail to show that the corporation neglected to pay the debt, made no attempt to exhibit property, and had none to exhibit. *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380.

The order of proceedings directed by Mass. Stat. 1862, ch. 218, §§ 3, 4, is to be followed whenever it is sought to charge the officers of a manufacturing corporation with personal liability for its debts, either under § 1 or otherwise. *Thayer v. New Eng. Litho. Co.*, 108 Mass. 523.

In a bill in equity under Mass. Stat. 1862, ch. 218, § 4, to enforce the liability of the officers of a corporation, an allegation that the corporation was organized as a manufacturing corporation under Gen. Stat., ch. 61, and that at a

4. Individual Liability in Respect to Filing Certificates and Reports

—(a) *Generally.*—The statutes of some of the States, notably *New York*, impose upon the trustees of manufacturing corporations an individual liability for failure to file an annual report of the affairs of the company or for any false statement in any report or certificate required to be filed.¹ And in an action against

certain meeting the said corporation was established in Boston, is a sufficient allegation that the corporation was organized and established in Boston, without showing in detail that all the preliminary steps were taken. *Pope v. Salamanca Oil Co.*, 115 Mass. 286.

1. N. Y. Laws 1848, ch. 40, § 12, as amended by Laws 1875, ch. 510, read as follows: "Every such company shall, within twenty days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate, make a report which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his cotrustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall affect any" action now pending.

"If any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." Laws 1848, ch. 40, § 15.

The amendment of section twelve of the *New York Manufacturing act* in 1875 did not relieve corporations organized, or to be organized, from filing an annual report, the purpose of the amendment being simply to absolve the company, at the occurrence of the period fixed for that purpose, from the duty of making a report, if at such time it was not yet a full year in existence. *Vernon v. Palmer*, 48 N. Y. Supr. (16 J. & S.) 231.

Section nineteen of the act of *New Jersey* relating to manufacturing corporations (*Nix. Dig.* 456), requires that the officers of the company shall within thirty days after the payment of the last instalment of the capital make, file and publish a certificate stating the amount of the capital fixed and paid in. Section twenty contains a like provision in case of an increase of the capital stock. *Held*, that under section nineteen certificates were required from time to time after the payment of the last instalment of the amount of stock fixed as that on which business should be commenced, and of the last instalment of the increase thereof between that amount and the limit of the original certificate. *Quimby v. Waters*, 28 N. J. L. (4 Dutch.) 533.

The *New York law* of 1853, ch. 333, is not affected by the law of 1875, ch. 510, amending the law of 1848, ch. 40, § 12, the cash paid in and the stock for personal property transferred to the corporation must still be specified in the annual report. *Pier v. George*, 17 Hun (N. Y.) 207.

But in an action to charge a trustee with the debt of a company for failure to file an annual report, it appeared that

a trustee, based on an alleged neglect to publish the annual report of a manufacturing corporation, the plaintiff must prove the default and that the debt was incurred previously thereto; an admission of neglect to report in a former year is not sufficient evidence thereof.¹

(b) *When Liability Is Incurred.*—In order to relieve the trustees of a manufacturing corporation from personal liability in this respect, they must not only make an annual report, but it must be actually made, filed²

the company was organized September, 1865; that the bonds on which the suit was brought were given at that time payable in October, 1868; that defendant was a trustee in January, 1867; and that no report was filed within twenty days of the first day of that month, as required by the New York act of 1848, which provided that every company should "annually," within twenty days from January 1st, make a report (L. 1848, ch. 40, § 12). *Held*, that the statute of 1875, in amending the act of 1848, so as to require the making of a report within twenty days from January 1st, "if a year from the time of the filing of the certificate of corporation shall then have expired, and if so long a time shall not have expired, then within twenty days from the first of January in each year after the expiration of the year from the time of filing such certificate," and omitting the word "annually," repealed the penalty imposed for a failure to make the report in any one year, and the report having been duly filed in the other years, plaintiff could not recover. *Carr v. Risher*, 57 N. Y. Supm. (50 Hun) 147.

The defendant loaned a sum of money to the president of a corporation, taking as collateral security bonds of the corporation, of which he was the owner. The indebtedness not being paid the defendant caused the bonds to be sold at auction, and they were purchased by one C for a nominal sum, the purchase being in the interest of and for the defendant. C recovered a judgment against the plaintiff, a trustee of the corporation, for the amount of the bonds, on the ground of a failure of the trustees to file an annual report. This judgment was satisfied by C without the defendant's knowledge, and discharged of record, and a motion to set aside the satisfaction on the ground that the defendant was the real owner of the judgment, was denied. The defendant afterward recovered a judg-

ment against the plaintiff and the other trustees for the amount of the loan, on the ground of the failure to file a report, the fact that the defendant sued in C's name and that both claims in fact belonged to the defendant, being unknown to the plaintiff and his co-trustees until long after both judgments were obtained. *Held*, that the defendant should be restrained from enforcing the second judgment. *Roach v. Duckworth*, 65 How. (N. Y.) 303, affirming s. c., 61 How. (N. Y.) 128.

1. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34.

2. *Gildersleeve v. Dixon*, 6 Daly (N. Y.) 76; *Cameron v. Seaman*, 69 N. Y. 396; reversing 7 Hun (N. Y.) 601.

The annual report is duly filed when handed to one of the deputies in the clerk's office. *Wyckoff v. Lawson*, N. Y. Trans., Aug. 22nd, 1870, p. 2.

Where it appears that the report was made within twenty days, but not filed until thereafter, the enquiry is as to whether the company is in default; while the law requires the filing to be within a reasonable time after the twenty days, and this exacts prompt performance and diligent action, if the company avails itself of the usual method of performing its duty, and the performance is within a reasonable time, having regard to the nature and circumstances thereof, in the absence of anything showing want of good faith and active diligence, the trustees are not liable. *Butler v. Smalley*, 101 N. Y. 71.

A manufacturing corporation made and published its report within twenty days after the first day of January, 1878, but through a mistake of its secretary, to whom it was delivered for that purpose, it was not filed within that time. Upon application to the supreme court an order was granted February 13th that the report be filed *nunc pro tunc*, and it was filed on that day. In an action by a creditor of the corpora-

and published¹ within the time named by the statute.² A report thus to be filed must comply with the statute, and must contain all the matters therein specified.³ Under the *New York* act, the trustees in their annual report must specify separately the amount of capital paid in cash and the amount of stock issued for property transferred to the company.⁴

tion against the trustees, *held* that the order did not relieve the defendants from the consequence of any default on their part, as the duty to file the report was imposed by statute, and over it the court had no jurisdiction; but that the application was an act by defendants in furtherance of their duty, and an indication of good faith; and a finding that there was neither a prompt performance nor diligent action on the part of the company with respect to the filing was error, as was also a refusal to find that whether the report was filed within a reasonable time after the expiration of the twenty days depended upon the circumstances of the case. *Butler v. Smalley*, 101 N. Y. 71.

If the officers of a manufacturing corporation, after neglecting, during the year succeeding an annual meeting, to make the certificate of its condition at that time, which was required by Mass. Stat. 1862, ch. 210, to be filed within thirty days afterwards, continue to act for more than thirty days after the next annual meeting, without making any certificate of its condition at either time, they are personally liable under Mass. Stat. 1863, ch. 246, § 2, for debts of the corporation contracted during these thirty days. *Thayer v. New Eng. Lithographic Co.*, 108 Mass. 523.

1. Under Mass. Rev. Stat., ch. 38, §§ 17, 22, the notice required to be published annually by the directors of a manufacturing corporation, in order to exempt the stockholders from liability for its debts, may be published at any time within a year from the filing of the certificate of capital stock. *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493.

What is sufficient publication under the *New York* statute when no newspapers are published in the town, city or village where the business of the company is carried on. *Cameron v. Seaman*, 69 Hun (N. Y.) 396.

2. The requirements of the *New York* manufacturing act that corporations filed thereunder shall, within twenty days from the first day of January, make a report of its affairs which

shall be published and filed in the county clerk's office, are not complied with by filing such report in the month of December previous and within twenty days before the first day of January. *Cincinnati Cooperage Co. v. O'Keefe*, 51 N. Y. Supm. (44 Hun) 64.

3. **Amendment of 1875 to New York Act—Accrual of Cause of Action.**—The certificate of a manufacturing company was filed October 6th, 1874. In 1875 the legislature amended the manufacturing act of 1848 so as to require such company to file an annual report within twenty days from the first of January if a year from the time of the filing of the certificate should then have expired, otherwise within twenty days from the first of January in each year after the expiration of a year from the time of the filing of the certificate. In 1878 an action was commenced against the trustees for a failure to file a report upon a cause of action alleged to have accrued against the company in 1875. At the time the above amendment took effect the plaintiff's causes of action had not fully accrued and no action therefor was pending. *Held*, that no penalty could be recovered for a failure to file a report within twenty days from the 1st day of January, 1875. *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 48.

4. *Pier v. George*, 14 Hun (N. Y.) 568. And see *Glenn's Falls Paper Co. v. White*, 18 Ind. 214; *Brockway v. Ireland*, 61 How. Pr. (N. Y.) 372; *Bonnell v. Griswold*, 89 N. Y. 122; *Blake v. Griswold*, 103 N. Y. 429.

The capital stock of a corporation was \$300,000; all of which had been issued in payment for patent rights; a report was made and filed stating that "the amount of the capital stock of this company, and which has been issued for the purchase of patent rights, and which has not been paid in cash, is \$300,000." *Held*, that this was a sufficient compliance with the *New York* statute, requiring the filing of a report, to save the trustees from liability. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

The liability, however, for failure to make and file an annual report as prescribed does not attach if the report is made and filed in terms complying with the statute, although some of the material representations are untrue.¹ The object of the legislature in requiring reports to be made and filed was to secure accessible means of information respecting the financial condition of the corporation wherever it should be actually conducting its operations. The neglect of the trustees to make and file a report, therefore, as required, will be presumed to be intentional, and, in the absence of explanation, will impose upon them the statutory liability.² Where there are five trustees, of whom the president is one, a report signed by the president and two trustees is sufficient, and it is enough that it is sworn to by the president to the best of his knowledge and belief.³

In order to maintain an action against a trustee for signing a *false report*, the plaintiff must show bad faith and an intent to deceive.⁴ This rule has been applied to representations in the

The penalty does not attach when the stock of the corporation has been issued in payment for property as authorized by the *New York* Amendment act of 1853, and this fact is not stated in the report as required by said act. *Bonnell v. Griswold*, 80 N. Y. 128.

A report made and filed by a manufacturing corporation, stated that the "capital stock has been paid up in full." *Held*, that this was equivalent to a statement that all the capital had been paid in, and so was a compliance with said provision of the *New York* act of 1848 (§ 12), that the report "shall state . . . the proportion actually paid in" of the capital. *Bonnell v. Griswold*, 80 N. Y. 128.

Issue of Stock for Property—Excessive Valuation.—Where, on the trial of an action to charge a trustee of a manufacturing corporation with the amount of a certain debt, for not having made the annual report of the corporation as required by section twelve of the *New York* General Manufacturing act of 1848, it appears that the whole of the capital stock was issued in payment for the property of the corporation, it is not error to submit the case to the jury on the theory that, if the property had been purchased by the corporation for a price in excess of its value, and if the defendant knew at the time when he signed such report that such was the fact, then the plaintiff was entitled to the debt sued for of the defendant, individually. *Brockway v. Ireland*, 61 How. (N. Y.) Pr. 372.

Amount Paid in Cash and Amount Paid in Property.—An annual report filed by a manufacturing corporation stated the amount of its capital and that all of it had "been paid in in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business, and for which stock to the amount of the value thereof has been issued by the company." In an action by a creditor of the corporation against the trustees for alleged failure to make the prescribed report, *held*, that the report made was a sufficient compliance with the requirements of the act; that it was not necessary to specify therein how much of the capital was paid in cash and what amount in property; and that, therefore, the action was not maintainable. *Whitaker v. Masterton*, 106 N. Y. 277.

1. *Bonnell v. Griswold*, 80 N. Y. 128.

2. *Van Etten v. Eaton*, 19 Mich. 187, decided under §§ 5, 18, and 19, Comp. Laws Michigan.

3. *Glenn's Falls Paper Co. v. White*, 18 Hun (N. Y.) 214.

The verification to a report was as follows: "Sworn to before me this 13th day of January, 1870, Charles W. Anderson, notary public, New York, county." The report was signed by the president of the corporation and was actually verified by him before a proper officer. *Held*, that the verification was sufficient. *Bonnell v. Griswold*, 80 N. Y. 128.

4. *Bonnell v. Griswold*, 68 N. Y. 294; *Pier v. Hanmore*, 86 N. Y. 95;

report concerning the value of property for which stock has been issued,¹ and to statements alleging that the capital stock has been paid up in full, without stating that all or a portion was paid for in property.² The penalty imposed upon the trustees for signing a report "false in any material representation," with knowledge of its falsity, is not incurred simply because of an omission from the aggregate of indebtedness of certain liabilities

Stebbins v. Edmands, 12 Gray (Mass.) 203.

1. In this action the plaintiff sought to charge the defendant, as one of the trustees of a manufacturing corporation, with the amount of a certain debt of the corporation, under the provisions of section fifteen of the General Manufacturing act, on the grounds that certain reports made by the corporation were false in material representations contained therein, and that the defendant, who had signed the same, knew such reports to be false. It appeared, among other things, on the trial, that the whole capital stock (\$300,000) was issued in payment for the mine, manufactory and other property of the corporation. The case was tried and submitted to the jury on the theory that if the property had been purchased by the corporation for a price in excess of its value, and if the defendant knew at the time when he signed such reports that such was the fact, then the plaintiff was entitled to the debt sued for. *Held*, on the question of the good faith of the trustees in their estimate of the value of the property for which the capital stock was issued, and on the question of their notice of its actual value, that it was competent to show the representations made to them by experts and others competent to judge of the actual value of the property. But it was for the jury to determine whether they, in good faith, acted and relied on the opinions which they so received and believed the value of the property to be as represented. *Held*, further, that it is not necessary that each trustee should have actual personal knowledge of the property and of its value. That in many cases they must depend upon the representations of experts and others presumed to have a practical knowledge of the property and its value. *Brockway v. Ireland*, 61 How. Pr. (N. Y.) 372.

2. Where, in an action against the trustees of a manufacturing corporation to enforce the liability imposed by the New York Manufacturing act (§ 15, ch. 40, Laws of 1848), for the making of

a false report, the sole falsity of the report alleged is in a statement that the capital stock has been paid up in full, without stating that all or a portion was paid for in property, as is required by the New York act of 1853 (ch. 333, Laws of 1853), when such is the case, to sustain the action proof is necessary of some fact or circumstance indicating bad faith, a wilful fraudulent purpose on the part of defendants; the penalty follows an actual, not a constructive falsehood. *Bonnell v. Griswold*, 89 N. Y. 122.

Defendant G, as trustee of a manufacturing corporation, joined in making an annual report, which stated that the capital stock of the corporation (\$2,000,000) had been paid up in full. In an action by a creditor of the corporation, under the Manufacturing act (§ 15, ch. 40, Laws of 1848), to recover of the trustees signing the report the amount of his claim, on the ground that such statement was false, to the knowledge of the signers, it appeared that the stock of the corporation was issued to one R in payment for certain iron mining property, then undeveloped. The property had been purchased by R of another corporation in which G was a stockholder. G received from R \$10,000 of the stock of the new company, given to him without consideration, to enable him to act as trustee. R surrendered to the new company one thousand shares of the stock, which was pledged, with \$70,000 of the corporate bonds to secure a loan of \$35,000, and gave five hundred shares as a commission to the officer who negotiated the loan. The property was proved to be worth not over \$60,000. It was sold to R for \$1,000,000 of stock and \$200,000 of bonds of the new company, and in his deed to that company the consideration expressed was \$600,000. Of all of which facts it appeared G had knowledge. *Held*, the facts justified a finding that G signed the report in bad faith, knowing it to be false. *Blake v. Griswold*, 103 N. Y. 429.

of the company, although this was known to the defendants at the time the report was made.¹

(c) *What Officers Are Liable—Continuance and Cessation of Liability.*—The duty imposed by statute upon manufacturing corporations of making and filing an annual report is a corporate duty; it is not a duty cast upon the trustees as such in their individual capacity.² One who is elected a trustee without authority, and who has not even a colorable title, is not chargeable by reason of the neglect of the company to publish and file such annual report.³ And a newly elected trustee does not become liable for debts previously contracted until after a subsequent neglect to make and publish the annual report.⁴ If a trustee resign, he does not become individually liable by reason of the subsequent neglect of his cotrustees.⁵ And where a trustee's term of office expires before the contracting of the debt for which he is sought to be made liable, the plaintiff must prove that the trustee held over and continued to act after the expiration of his term.⁶ A false statement in the report renders liable

1. *Butler v. Smalley*, 101 N. Y. 71.

2. *Validity of Complaint.*—In an action against trustees of a manufacturing corporation to recover a debt of the corporation because of a failure to make and file a report for the year 1877, four of the defendants joined in an answer, one count of which averred that said defendants failed to make a report for the year 1873, and for each year thereafter, and that more than three years had elapsed since any penalty or claim arose against them in favor of plaintiff. The number of trustees of the corporation was not alleged. On demurrer to this court, *held*, that it was defective, in that it did not aver that defendants were trustees in 1873, or thereafter, previous to 1877; nor did it allege any default by the corporation prior to 1877, as if it was to be assumed that defendants were trustees, still it did not appear and could not be assumed that they constituted a majority of the board, and the corporate duty might have been performed without their joining in the report. *Cornell v. Roach*, 101 N. Y. 373.

But the liability of trustees is a penalty, and attaches to the delinquent persons, and not to the office, and therefore makes them liable only for debts contracted while they are respectively in office, and not for those contracted by their successors. *Shaler etc. Co. v. Bliss*, 34 Barb. (N. Y.) 309; *McHarg v. Eastman*, 4 Robt. (N. Y.) 635. 3. *Craw v. Easterly*, 4 Lans. (N. Y.) 513; affirmed 54 N. Y. 679.

Abandonment of Enterprise.—Persons who are induced, by fraudulent representations to sign and file a certificate, but abandon the enterprise, before any stock is subscribed, cannot be personally liable, by a neglect to file the annual report. *Squires v. Brown*, 22 How. Pr. (N. Y.) 35.

4. *Boughton v. Otis*, 21 N. Y. 261; *Shaler v. Brewster*, 10 Abb. Pr. (N. Y.) 464; *McHarg v. Eastman*, 4 Robt. 635; s. c., 7 Ib. 137; 35 How. Pr. (N. Y.) 205. *Compare* *Buck v. Barber*, 5 N. Y. St. Rep. 826.

The directors of a corporation whose terms of office began after an indebtedness had been created against the corporation, and after default had been made by the previous board in failing to file, as required by law, a report showing the amount of the corporate indebtedness, are not liable under section 252 of the General Statutes, which provide "that all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should . . . have been made and filed, and until such report shall be made." *Austin v. Berlin* (Colo.), 22 Pac. Rep. 433.

5. *Squires v. Brown*, 22 How. Pr. (N. Y.) 35; *Boughton v. Otis*, 21 N. Y. 261; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297; *Chandler v. Hoag*, 2 Hun (N. Y.) 613.

6. *Philadelphia R. C. & I. Co. v. Hotchkiss*, 82 N. Y. 471.

only the trustee who signed it.¹ The secretary of a manufacturing corporation cannot make the report in the name of the trustees, nor that of the corporation, the duty being devolved upon the trustees; consequently he is not chargeable with the consequences of an omission to perform it.² Unless the statute so provides, one trustee who has been held individually liable cannot sue his cotrustees for contribution, there being no right to contribution between wrongdoers.³

(d) *Who May Enforce Liability.*—The cause of action given by statute against a trustee for failing to make a report, or for false statements in such report, is usually given to a creditor of the corporation. Each creditor, therefore, may maintain a separate action. That all the creditors should join in one action is not necessary.⁴ Notwithstanding the general words of the New York statute, the trustees do not become individually liable thereunder by the failure to make an annual report for a debt owing to one of their number.⁵ And one who has acted as trustee, though not legally elected, cannot maintain an action as a creditor of the company against his cotrustees for a failure to report.⁶ Where a husband is a trustee, his wife cannot take advantage of his omission to file an annual report.⁷ In *New York*, the creditor's right of action dies with him.⁸

(e) *Extent and Nature of Liability.*—The liability incurred by the trustees for neglecting to make and file an annual report, or for making a false report, is in the nature of a penalty for misconduct in office,⁹ the penalty being a responsibility for the debts

Expiration of Term—Refusal to Act Further.—Defendants, in February, 1874, were elected trustees of a manufacturing corporation for one year. Before the expiration of the year the corporation had become insolvent and discontinued business. It did no business after January 15th, 1875. On that day the trustees passed a resolution that the corporation should cease to transact business and resigned their office, to take effect at the end of their term. Defendants did not act as trustees after that date. In an action under the Manufacturing act (§ 12, ch. 40, Laws of 1848), to recover the amount of a debt due from the corporation because of a failure to file an annual report in January, 1876, *held*, that defendants were not liable; that while, if they had continued to act as trustees after the expiration of their term, they would have been bound to make the report, they were not bound to hold over, and unless they chose to act, their offices became vacant at the end of the year. *Van Amburgh v. Baker*, 81 N. Y. 46.

1. *Pier v. Hanmore*, 86 N. Y. 95.

2. *Bolen v. Crosby*, 49 N. Y. 183.

3. *Andrews v. Murray*, 33 Barb. (N. Y.) 354.

4. *Wiles v. Suydam*, 10 Hun (N. Y.) 578. See also s. c., 64 N. Y. 173.

5. *Briggs v. Easterly*, 62 Barb. (N. Y.) 51; *Bronson v. Dimock*, 4 Hun (N. Y.) 614; *Estes v. Burns*, 5 J. & S. (N. Y.) 1; *Andrews v. Murray*, 33 Barb. (N. Y.) 354.

But where a debt against such a corporation owned by a trustee thereof is assigned by him absolutely for value, the assignee, on a default in making and filing a report subsequently occurring, may proceed against trustees to recover the debt, although the assignor continues to be a trustee up to the time of the default. *Cornell v. Roach*, 101 N. Y. 373.

6. *Easterly v. Barber*, 65 N. Y. 252.

7. *Adams v. Mills*, 6 J. & S. (N. Y.) 16.

8. *Brackett v. Griswold*, 103 N. Y. 425.

9. *Anderson v. Speers*, 8 Abb. (N. Y.) N. C. 382; *Gadsdon v. Woodward*, 103 N. Y. 242; *Dabney v. Stephens*, 46 N. Y. 681.

of the corporation.¹ A judgment for costs recovered against a corporation in an action for trespass brought by it is a debt within the meaning of the *New York* manufacturing act.² The liability also includes claims founded on a judgment of record against the company.³ But it is very doubtful whether causes of action for breaches of contract are debts for which trustees are liable.⁴ Liabilities of a company which may give causes of action against it resulting in judgments, but which do not constitute present debts, are not within the statute.⁵

To charge a trustee individually the debt must have been contracted during a default, or have existed at the time of a subsequent default.⁶ The liability incurred by the omission to file a report is for existing debts, not existing liabilities.⁷ The *New York* statute makes no distinction as to the place where such debts have been contracted, nor does it distinguish between creditors residing in that or in other States.⁸ Where no annual report is filed, a trustee is liable for a debt contracted whilst he was in office and before his resignation.⁹

(f) *Enforcement of Liability*.—In an action to enforce the liability of the trustees, the plaintiff must show affirmatively that the debt was contracted by the corporation.¹⁰ It must also be

1. *Dabney v. Stephens*, 46 N. Y. 681.

For an omission to file the annual report required by statute, the trustees become individually liable for all the debts of the corporation then owing. *Miller v. White*, 57 Barb. (N. Y.) 504; *Nimmons v. Tappan*, 2 Sw. (N. Y.) 652; *Nimmons v. Hennion*, 2 Sw. (N. Y.) 663.

2. *Allen v. Clarke*, 108 N. Y. 269, reversing s. c., 43 Hun (N. Y.) 377. See also *Andrews v. Murray*, 9 Abb. (N. Y.) Pr. 8.

3. *Lewis v. Armstrong*, 8 Abb. (N. Y.) N. C. 385.

4. *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 48; *Chambers v. Lewis*, 28 N. Y. 454.

Where a manufacturing corporation, by a resolution adopted September 15th, 1855, appointed K the general agent and attorney of the company, he to receive a salary of \$1,000 a year for his services besides expenses, the salary to commence September 1st, 1855, but no time being fixed when it was to become due and payable, held that the company did not thereby contract a "debt" within the meaning of the *New York* act, for the salary of K, nor did they contract a debt for such services from day to day, or month to month, as they were rendered; as the statute speaks of "debts," existing, or contracted, not of liabilities which may

ripen into debts. *Oviatt v. Hughes*, 41 Barb. (N. Y.) 541.

5. *Lockhart v. Van Alstyne*, 31 Mich. 76, decided under Comp. Laws Mich., § 1821, making the directors of manufacturing companies on their neglect or refusal to file the reports, etc., required by the statute individually liable for all debts of the corporation contracted during the period of such neglect or refusal.

6. *Garrison v. Howe*, 17 N. Y. 458; *Nimmons v. Tappan*, 2 Sw. (N. Y.) 652.

Upon the default of a corporation, organized under the act of 1848, in filing its annual report, all the trustees in office become jointly and severally liable for all the debts of the company contracted by them or their predecessors, and for all that are subsequently contracted during their continuance in office and the continuance of the default, though not payable until after they have ceased to be trustees. *Vernon v. Palmer*, 14 Week. Dig. 324; reversing s. c., 62 How. (N. Y.) 425.

7. *Oviatt v. Hughes*, 41 Barb. (N. Y.) 541; *Nimmons v. Hennion*, 2 Sw. (N. Y.) 663.

8. *Sears v. Waters*, 51 N. Y. Supm. Ct. (44 Hun) 101.

9. *Chandler v. Hoag*, 63 N. Y. 624.

10. *Dabney v. Stephens*, 46 N. Y. 681.

averred that the debt existed at the time of the default or was contracted before the report was published.¹

A cause of action arising out of an omission to report may be joined with one for making a false report.² After the appointment of a receiver,³ or an assignee in bankruptcy,⁴ the trustees are no longer liable for omitting to file the report. The failure of the company to file an annual report does not extend the time within which to commence an action against a trustee to enforce his personal liability for a previous failure to report.⁵ While the

1. *Chambers v. Lewis*, 28 N. Y. 454; *McHarg v. Eastman*, 7 Rob. (N. Y.) 137; 35 How. (N. Y.) Pr. 205; *Weymouth v. Dimock*, 41 How. (N. Y.) Pr. 92.

Allegations Necessary in Complaint.—

The complaint in an action to enforce, against directors of a corporation, their statutory liability for the corporation debts for the preceding year by reason of their failure to file the report of debts and capital required by statute (Col. Gen. Stat. 184, § 16), failed to allege that the corporation was doing business in the county, in the recorder's office of which the report should have been filed, and to set out the contract sued on, the default of the corporation, and the directorship of defendants as of such dates as to show their liability under the statute. *Held*, that a demurrer to the complaint should be sustained. *Anfenger v. Anzeiger Pub. Co.*, 9 Col. 377.

The amended complaint in an action to enforce the liability of defendants as trustees of a corporation for neglect to file the annual report as required by the *New York Manufacturing Companies' act*, plaintiff being at the time a creditor of such corporation on account of services rendered, failed to allege that such services were rendered at the request of the corporation. *Held*, such statute being penal, that, as every fact necessary to establish defendant's liability must be affirmatively proved, the order allowing such amended complaint to be served should be reversed. *Tovey v. Culver*, 54 N. Y. Super. (22 Jones & S.) 404.

In a suit under the statute, against the directors of the "Neal Manufacturing Company," for failing to make a report of the amount of capital stock of the company, the amount of assessments thereon and actually paid in, and the amount of existing debts of the company, the complaint averred that the defendants were the directors and

sole stockholders of the company; "that said Neal Manufacturing Company was organized April 10th, 1866, by articles of association filed and recorded in the Jefferson county recorder's office on said day, a copy of which articles of association is filed herewith as part hereof; and said company carried on said business at said Madison." *Held*, that this sufficiently showed that said company was a corporation. *Traber v. Bright*, 32 Ind. 69.

2. *Bonnell v. Wheeler*, 1 Hun (N. Y.) 332.

The pendency of an action against all the trustees, to enforce their personal liability, for a false certificate of capital, is not a bar to another action against one of them, for an omission to make the annual report. *Nimmons v. Tappan*, 2 Sw. (N. Y.) 652.

3. *Huguenot Bank v. Studwell*, 74 N. Y. 621.

The directors of a corporation did not file a report for the year 1881, because the corporate property had gone into the hands of a receiver. *Held*, that the fact that they did file one in 1882, did not estop them from claiming and showing that it was not their duty to file one in 1881. *Cochran v. Smith*, 54 N. Y. Super. (22 Jones & S.) 117.

4. A corporation was adjudged a bankrupt in November, 1870, and on January 3rd, 1871, its entire property passed into the hands of an assignee in bankruptcy. *Held*, that no report subsequent to that of January, 1870, was necessary. *Bonnell v. Griswold*, 80 N. Y. 128.

5. *Rector etc. of Trinity Church v. Vanderbilt*, 98 N. Y. 170.

In this case plaintiff leased a corporation, organized, under the General Manufacturing act (ch. 40, Laws of 1848), certain premises for a term of years commencing November 1st, 1872. The lessee, among other things, agreed to pay all taxes and water rates imposed each year, and in case the same

nature of the remedy against the trustees varies according to the statutes of the different States,¹ it is apparently well settled that an action against a trustee to impose the statutory liability is local,² and that each act of this character enters into and becomes a separate ground of action.³ In *New York*, it is held that upon the death of the defendant the action cannot be revived against his personal representatives,⁴ and that the liability is not a "fine"

were not paid before the first day of February next, after they were imposed, it agreed to pay to plaintiff on that day as additional rent the amount necessary to pay and discharge them. The lessee did not pay the taxes and water rates imposed for the years 1873 and 1874. The lessee failed to make annual reports as required by said act (section 12) for the years 1873, 1874 and 1875. Because of such failure this action was brought in January, 1878, against defendant, a trustee of said corporation, to recover the amount of said taxes and water rates. *Held*, that at the time the reports should have been filed both for the years 1874 and 1875, a debt existed for the taxes and water rates of the preceding year; but as the lessee had the alternative either to pay to the proper authorities or to pay on the first of February thereafter to the plaintiff, no cause of action accrued to it until that time; that, therefore, as to the taxes, etc., for 1873, the three years' statute of limitations began to run February 1st, 1874, and the cause of action was barred, but that for the taxes, etc., of 1874, the action was not barred and plaintiff was entitled to recover.

1. The officers of a manufacturing corporation, who have neglected to file the certificates required by Massachusetts Gen. Stat., ch. 60, § 24, are not liable in an action at law for the debts of the corporation contracted during the continuance of such neglect; but the remedy against them is by a suit in equity. *Cochrane v. Reed*, 13 Allen (Mass.) 455.

In an action to charge a trustee for a failure to publish the statutory annual statement, a complaint setting out a copy of the report as published, and alleging that it does not comply with the statute, need not set forth the particular defects. *Glenn's Falls Paper Co. v. White*, 18 Hun (N. Y.) 214.

As the rights and liabilities under the penal provisions of the *New York* General Manufacturing act (ch. 40, Laws of 1848), are not only "regulated

by special provision of law," but have no existence outside of the statute, the right of transfer given by the N. Y. Code of Civil Procedure (section 1910) does not, under said code, give a right of enforcement to the transferee (section 1909), but leaves the question of that right to the existing law. The rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report; it is not affected by any provision of the code, and the action abates upon the death of either party. *Blake v. Griswold*, 104 N. Y. 613.

Form of a complaint against the trustees, for a neglect to file their annual report. *Andrews v. Murray*, 9 Abb. (N. Y.) Pr. 8.

2. *Veeder v. Baker*, 85 N. Y. 156.

Venue.—Where the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. *Veeder v. Baker*, 83 N. Y. 156.

Action in Another State.—The *New York* statute of 1848, requires certain corporations to make annual reports within twenty days after the first of January of their condition, and to publish the same; on failure to do so, all the trustees to be liable jointly and severally for all debts then existing, and all contracted before making the report. *Held*, that this was, in its operation, a penal statute, and that an action, brought by a creditor of the corporation to enforce the statute liability against a trustee, could not be maintained in *New Jersey*. *Derrickson v. Smith*, 27 N. J. L. (3 Dutch.) 166.

3. *Anderson v. Speers*, 8 Abb. N. C. (N. Y.) 382.

4. An action against a trustee of a corporation, organized under the *New York* General Manufacturing act (ch. 40, Laws of 1848), to recover the penalty

or "penalty" in the sense in which those terms are used in the code¹ so as to subject the party to arrest.² The provisions of acts of this nature are to be construed like other penal statutes; their scope may not be enlarged by construction or implication, and the penalty may not be imposed except in cases where the plain language of the provision requires it.³

V. INDIVIDUAL LIABILITY OF STOCKHOLDERS—1. Who Are Liable.—

In order to impose upon a member of a manufacturing corporation⁴ the statutory liability, he must be, or have been, legally and in fact a stockholder.⁵ And in determining the individual liability

imposed by that act (section 12), because of failure to make and file an annual report, is one *ex delicto*; and is not in any respect based upon the theory of affording compensation to the injured party, for damages sustained by reason of the omission complained of. Such a cause of action, therefore, is not within the provisions of the statute authorizing the survivorship of certain actions for tort (2 Rev. Stat. 448, § 1), as it is not for "wrongs done to the property rights or interests of another;" and upon the death of the defendant the action cannot be revived against his personal representatives. *Stakes v. Stickney*, 96 N. Y. 323.

1. N. Y. Code, § 549, subd. 1.

2. *Glens Falls Paper Co. v. White*, 58 How. (N. Y.) Pr. 172.

3. *Whitaker v. Masterton*, 106 N. Y. 277.

4. The liabilities of the stockholders of a manufacturing corporation, under Mass. Rev. Stat., ch. 38, attached to the stockholders of a corporation subsequently incorporated for the purpose of bleaching goods, and made subject by the charter to Rev. Stat., ch. 38, 44. *Johnson v. Somerville Dyeing and Bleaching Co.*, 15 Gray (Mass.) 216.

5. A person who gives his note for shares of stock and takes a receipt, expressing that the note, when paid, will be in full for such shares, does not become a stockholder until the note matures and is paid. *Tracy v. Yates*, 18 Barb. (N. Y.) 152. But if one person subscribe for stock in his own name, for the benefit of another, he is not exempted from individual liability as a trustee, under the statute. *Stover v. Flack*, 30 N. Y. 64. And if the name of the defendant appear upon the stock book of the company, this is *prima facie* evidence of his being a stockholder. *Hoagland v. Bell*, 36 Barb. (N. Y.) 57. And even the charter of incorporation is *prima facie* evi-

dence that all the persons named therein were, at the commencement, members of the corporation. *McHose v. Wheeler*, 45 Pa. St. 32. Persons who sign the articles of association are stockholders; and they are presumed to continue stockholders until a surrender or assignment be shown. *Strong v. Wheaton*, 38 Barb. (N. Y.) 616. And the person who appears upon the books of the company as the legal owner of the stock is liable to creditors, though he in fact only held it in collateral security for a debt. *Rosevelt v. Brown*, 11 N. Y. 148; *S. P. Worrall v. Judson*, 5 Barb. (N. Y.) 210. It is not necessary, in order to constitute a member of a manufacturing corporation, in *Massachusetts*, that he should have a certificate of his shares. He may have all the rights and be liable to all the duties of a member without such certificate. *Chester Glass Company v. Dewey*, 16 Mass. 94.

One who has signed and acknowledged the articles of association, and was named a trustee therein, is estopped from denying that he was then a stockholder; and he is presumed to continue such until the contrary is shown. The list of stockholders required to be kept is not the only nor even the best evidence that the defendant is a stockholder. *Herries v. Wesley*, 13 Hun (N. Y.) 492. So one to whom stock has been apportioned is liable as a stockholder, although no certificate therefor has been issued, and the apportionment was made for him to an agent, who subscribed at his request. *Burr v. Wilcox*, 22 N. Y. 551. And a person named in the certificate or charter is liable as a stockholder unless he promptly disavow the act. *McHose v. Wheeler*, 45 Pa. St. 32. And generally there may be a recovery against such of the defendants as are proved to have been stockholders. *McHose v. Wheeler*, 45 Pa. St. 32.

ity of stockholders, the court will not look beyond the legal title.¹ A completed transfer of the stock entered upon the books of the company is essential to exonerate the original stockholders from liability for the debts of the corporation.² A stockholder who is also a creditor to an amount equal to his stock cannot be made

Giving Proxy.—Where the evidence to show that the defendant, in an action to enforce individual liability was a stockholder when the debt was contracted, was a proxy given by him shortly afterwards, to vote at the ensuing annual election, the time for holding which was less than thirty days from the time when the debt was contracted, and by the charter the stockholders could only vote upon stock which they had held for thirty days preceding the election, *held* that the evidence was *prima facie* sufficient. *Harger v. McCullough*, 2 Den. (N. Y.) 119.

Incorporator, Subscriber to Stock and Secretary.—In an action to charge one with personal liability, as stockholder of a manufacturing company, for an indebtedness alleged to have been incurred by that company to the plaintiff's assignors because of a failure to pay in the amount due upon his stock, it is sufficient to show that the defendant was one of the trustees named in the certificate of incorporation, a subscriber for fifty shares of the stock, and subsequently acting secretary of the company. *Wheeler v. Miller*, 24 Hun (N. Y.) 541; 90 N. Y. 353.

Previous Appointment of Receiver.—In an action seeking to charge defendant as a stockholder of such a corporation with a judgment against it, on the ground that the whole capital stock was not paid in, or a certificate of payment filed as required by the act, the answer set up among other things, in substance, that more than four years before the commencement of the action a judgment was rendered in an action against the corporation sequestering its property, appointing a permanent receiver thereof and restraining its officers and agents from all interference with it; that said corporation has not since transacted any business, that the receiver took possession of the property and has distributed the proceeds among creditors pursuant to order of the court, the same not being sufficient to pay all of the company's debts, and that defendant by reason thereof ceased to be a stockholder from the date of said judgment. On de-

murrer, *held* that the answer set up a good defence; that by the conceded facts it appeared that when the organization was divested of its rights, privileges, franchises and property by virtue of the appointment of a receiver, it for all practical purposes ceased to exist, and the defendant ceased to be a stockholder within the meaning of the act, and after the expiration of two years he was discharged from all liability. *Hollingshead v. Woodward*, 107 N. 96.

Allegations in Bill—Par Value of Shares.—A bill in equity, under Mass. Stat. 1862, ch. 218, to charge persons with individual liability as members or stockholders, for the debt of a manufacturing corporation, sufficiently describes such a holding of the stock as would bring the holders within the provisions of the statute by alleging that the defendants were "members of and stockholders in said corporation, holding the stock of the same undivided," and need not allege the par value of shares in the capital stock. *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

1. *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162; *Shellington v. Howland*, 53 N. Y. 371.

2. *Shellington v. Howland*, 67 Barb. (N. Y.) 14; 53 N. Y. 371; *Rosevelt v. Brown*, 11 N. Y. 148.

Exoneration by Transfer of Shares.—Where certificates of stock are issued to a subscriber, stating that the stock is "transferable on the books of the company in person or by attorney on the surrender of this certificate," and he, after making payments on the shares, sells them at a time when there are no calls thereon unpaid, and the transferee surrenders them to the company and receives new certificates, such stockholder is released from liability on his original subscription since the transferee is, under the statute, liable for the amount unpaid thereon, and the company, by entering the transfer upon its books, has consented to it. *Billings v. Robinson*, 28 Hun (N. Y.) 122. Affirmed 94 N. Y. 415.

Where stock in such a corporation is

individually liable.¹ But where a person holds stock in a manufacturing company as trustee, and also holds other property on the same trust, such other property may be taken for the debts of the company.² Generally a suit can only be maintained against those who were stockholders when the debt was contracted.³ A

transferred by one acting as agent for the owner, and the assignee receives a certificate and appears as a stockholder on the books of the corporation, he is, as between himself and the creditors of the corporation, a stockholder. *Wakefield v. Fargo*, 90 N. Y. 213.

If a member of a manufacturing corporation transfers his shares to an insolvent person for the purpose of avoiding his liability to an execution in favor of a creditor of the company, such transfer will be deemed fraudulent and void as to a creditor of the corporation who may levy his execution on the body or estate of such member, pursuant to Mass. Stat. 1808, ch. 65, and Stat. 1817, ch. 183. *Marcy v. Clark*, 17 Mass. 330.

A holder of shares in a manufacturing company by an absolute certificate thereof is liable for the debts of the company under Mass. Rev. Stat., ch. 38, § 16, in the same manner as any member, although he had agreed to re-transfer said shares to his vendor upon the performance of certain conditions, and although the transfer was intended merely as collateral security. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

The holder of stock in a manufacturing corporation by an absolute transfer is subject to the liability imposed on stockholders by Mass. Rev. Stat., ch. 38, § 22, although he held the stock as collateral security only, and, having been paid his debt, had delivered the certificate to his debtor with a transfer endorsed thereon, signed, but not filled up nor recorded, before the contracting of the debt on which he is sought to be charged. *Johnson v. Somerville Dyeing and Bleaching Co.*, 15 Gray (Mass.) 276.

Under Mass. Stat. 1808, ch. 65, enacting that any share of the property of a manufacturing corporation may be transferred by the proprietor thereof by deed acknowledged and subsequently recorded by the clerk of the corporation, a transfer by a deed not recorded was *held* to be so far effectual as to render the vendee personally liable to a creditor of the corporation. *Eames v. Wheeler*, 19 Pick. (Mass.) 442.

A retransfer of shares of stock in a manufacturing company by B to A, in pursuance of an agreement made contemporaneously with the original transfer by A to B terminates B's liability as a stockholder under Mass. Rev. Stat. ch. 38, § 16, for the debts of the company, although made for that very purpose. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

Although the provisions of the statute relating to the sale and transfer of stock of a corporation have been literally complied with, the transfer will not be available as a protection against liability to the company and its stockholders and creditors to pay the balance due on the shares, unless the transaction was an honest one, entered into in entire good faith with the intent and purpose of disposing of the entire interest in the shares and surrendering all dominion over them. *Billings v. Robinson*, 28 Hun (N. Y.) 122.

1. *Mathez v. Neidig*, 72 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620.

2. *Stedman v. Evelith*, 6 Metc. (Mass.) 114.

3. *Moss v. Oakley*, 2 Hill (N. Y.) 265.

Stockholders When Debt Was Contracted.—A stockholder is not individually liable for the debts of the company contracted before he became a stockholder. *Tracy v. Yates*, 18 Barb. (N. Y.) 152; *Phillips v. Therasson*, 11 Hun (N. Y.) 141.

Under Mass. Stat. 1829, ch. 53, one who was a member of a manufacturing corporation which had neglected to publish, an annual statement of the amount of its capital stock at the time a debt was contracted by the corporation was held to be individually liable for such debt though not a member at the time of the trial of the action. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417. See 11 Cush. (Mass.) 183.

In an action against a manufacturing corporation to recover a debt, it appeared that the annual notice published by the corporation next before the debt was contracted, did not certify the amount both of their debts and of their capital stock as required by

stockholder who has fully paid his subscription either in cash or in property, after a certificate is duly filed is relieved from personal liability; but evidence is admissible of the value of the property put in for the purpose of impeaching the transaction on the ground of fraud.¹

Mass. Stat. 1829, ch. 53, but of their debts only. *Held*, that one who was a member of the corporation when the debt was contracted, but who had ceased to be such when the action was tried, was individually liable for the debt. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417. See 11 Cush. (Mass.) 183.

The liability of stockholders for the debts of a manufacturing corporation under Mass. Rev. Stat., ch. 38, § 25, binds a holder of stock at the time of contracting the debts, who ceases to be a stockholder before they are payable, *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray (Mass.) 216.

In an action to enforce the personal liability of a stockholder of a manufacturing company for a debt of the company, it appeared that the debt in question arose upon an agreement of the company made June 10th, 1875, to insert an advertisement in a journal for one year and pay for the privilege \$400 payable quarterly, that the defendant became a stockholder October 7th, 1875. *Held*, that the defendant was not exempt from liability for the instalments falling under the contract after he became and while he remained a stockholder, by the fact that he was not a stockholder when the contract was made. *McMaster v. Davidson*, 29 Hun (N. Y.) 542.

But the provision of Mass. Rev. Stat., ch. 38, § 16, that all the members of an incorporated manufacturing company shall be liable in certain cases, for the debts of the company, extends to those who are members when the liability of the company is sought to be enforced, and is not confined to those who were members when the debts were contracted. *Curtis v. Harlow*, 12 Metc. (Mass.) 3. See 11 Cush. (Mass.) 188.

A note given by the company will be presumed to have been made when the debt was contracted unless the contrary be shown. *Moss v. Oakley*, 2 Hill (N. Y.) 265.

Under Mass. Rev. Stat., ch. 38, § 16, a member of a manufacturing company may be liable for the debts of the cor-

poration contracted while he was a member, although he ceases to be such before the debts become payable; but he is not liable for debts contracted before he became a member if his membership expires before the debts become payable and action brought. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

1. *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 N. Y. 133.

Stock Issued for Property.—One to whom stock is issued in payment for property purchased by the company, without fraud in the valuation, does not become individually liable to creditors, because of a failure on the part of the president and trustees to file the certificate required by the statute. *Brown v. Smith*, 13 Hun (N. Y.) 408.

Under the N. Y. act of 1853, one who receives stock in payment for property necessary for the purposes of the company, is not individually liable to its creditors, though such stock be part of the capital originally authorized. *Schenck v. Andrews*, 40 N. Y. 589; s. c., 57 N. Y. 133; and see *Lewis v. Ryder*, 13 Abb. (N. Y.) Pr. 1.

Where property is purchased at a gross over-valuation, and stock issued in payment therefor, the holder thereof is personally liable for the debts of the company, as the owner of stock not fully paid. *Boynton v. Andrews*, 63 N. Y. 93; *S. P. Douglass v. Ireland*, 73 Ib. 100.

The company being indebted to J, a subscriber, for original stock, for work in constructing its furnaces, the amount of his account was applied as a payment upon his stock. *Held*, that this was a payment in money within the meaning of the act. *Veeder v. Mudgett*, 95 N. Y. 295.

To entitle a creditor of a manufacturing company to recover against a stockholder individually for the indebtedness of the company, he must make it appear that an over-valuation was allowed for the property with the knowledge of the party proceeded against. *Nat. Tube Works Co. v. Gilfillan*, 52 N. Y. Supm. Ct. (46 Hun) 248.

In *Massachusetts*, it is held that an execution against a manufacturing corporation cannot be levied upon the estate of a corporation who died before the suit was brought,¹ as it created no charge upon the estate of a deceased stockholder.² Nor is the individual liability of a stockholder a "debt" provable against the estate of an insolvent debtor.³

If a creditor of a manufacturing corporation release one of the stockholders, such release does not discharge the others from liability.⁴

2. Who May Enforce Liability.—In *New York*, an action will not lie by one stockholder against his fellow stockholders to enforce

A corporation having been organized under the New York General Manufacturing act (ch. 40, Laws of 1848, as amended by ch. 333, Laws of 1853) with a nominal capital of \$2,500,000, divided into shares of \$100 each, a proposition was made to its board of trustees to sell to it certain patents and property for \$2,500,000, and to receive in payment the whole capital stock, the vendors, however, to deliver nine thousand of the shares to the trustees; six thousand thereof to be sold for \$50 per share. \$50,000 of the purchase price to be paid to the vendors, and the balance to be paid over to the treasurer of the company for its use. This proposition was accepted, and subscriptions were opened for the six thousand shares. When all of it was subscribed for, the transfer was made and the whole capital stock issued to the vendors in one certificate. On the same day this was returned and cancelled, certificates for the nine thousand shares were issued to the trustees, and the six thousand shares were transferred to the subscribers. Defendant subscribed and paid for five hundred shares at \$50 per share. In an action brought by a creditor of the company to enforce the liability for the company's debts, imposed by said act (§ 10) upon the stockholders, until the whole capital stock has been paid in, all of the trustees were called as witnesses and each testified that he acted in good faith in the transaction, and believed the property purchased to be worth \$2,500,000, and other evidence was given tending to show they had good grounds for such belief. *Held*, that the question was properly submitted to the jury as to whether the purchase and issue of the stock for the property was in good faith, or simply a scheme to evade the statute; and that the evidence justified a verdict for de-

fendant. *Lake Superior Iron Co v. Drexel*, 90 N. Y. 87.

1. *Child v. Coffin*, 17 Mass. 64.

If, pending an action against a manufacturing corporation, a stockholder, who has been summoned in pursuant to Mass. Stat. 1951, ch. 315, dies, his executor cannot be required to take upon himself the defence of the action. *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488.

2. *Ripley v. Sampson*, 10 Pick. (Mass.) 371. See also *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488.

3. **Estate of Insolvent Debtor.**—*Kelton v. Phillips*, 3 Metc. (Mass.) 61; decided under Mass. Stat. 1838, ch. 163. See also *Bangs v. Lincoln*, 10 Gray (Mass.) 600.

Since Mass. Stat. 1838, ch. 98, the assignees of an insolvent debtor, a part of whose assets consist of shares in a manufacturing corporation, the stockholders of which are individually liable for its debts, are not liable either in law or in equity to a creditor of the corporation, himself a stockholder, under any statutes of this commonwealth, although such assignees have attended meetings of the corporation and voted as stockholders. *Gray v. Coffin*, 9 Cush. (Mass.) 192.

4. **Release by Creditor.**—*Bank of Poughkeepsie v. Ipatson*, 5 Hill (N. Y.) 461.

If, after the retiring of a stockholder from the corporation by the sale of his stock, and due public notice thereof, as required by the charter, the creditor gives up old notes upon which the stockholder was liable and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him of the debt both at law and in equity. *New England etc.*

a personal liability for a debt of a manufacturing corporation.¹ But it appears to be otherwise in *Massachusetts*.² The liability of stockholders is a several liability of each stockholder directly to such of the creditors as have complied with the requisities and conditions precedent, and a receiver of a corporation has no authority to enforce or assert that liability.³ A creditor of a corporation may sue alone to enforce a stockholder's liability, although there may be other creditors similarly situated.⁴ The officers who have been compelled to pay corporate debts cannot maintain a bill in equity for contribution against the stockholders.⁵ The endorsee of a promissory note given for a simple contract debt, may maintain an action against a stockholder in his own name.⁶

3. Extent and Nature of Liability—(a) To Creditors.—Statutes providing for the formation of manufacturing corporations usually provide that the stockholders shall be individually liable⁷ to the

Bank *v.* Newport Steam Factory, 6 R. I. 154.

1. *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162.

2. A member of a manufacturing corporation who is a creditor thereof has the same right as any other creditor to secure the payment of his demand by attachment or levy on the property of the corporation, although he may be personally liable by Mass. Stat. 1808, ch. 65, § 6, to satisfy other judgments against the same corporation. *Peirce v. Partridge*, 3 Metc. (Mass.) 44.

3. **Receiver.**—*Farnsworth v. Wood*, 91 N. Y. 308; *Mason v. Silk Mfg. Co.*, 27 Hun (N. Y.) 307.

To entitle a receiver of an insolvent manufacturing company to maintain an action against a subscriber to the stock of the company who has sold and transferred his interest, to collect the amount unpaid upon such shares, the corporation must have had such right of action before the receiver was appointed. *Billings v. Robinson*, 28 Hun (N. Y.) 122. But see *Cuykendall v. Corning*, 88 N. Y. 129.

4. *Weeks v. Love*, 50 N. Y. 568.

The filing of a bill in equity by one creditor for the benefit of all, against the directors and stockholders of a manufacturing corporation, to charge them with personal liability for its debts does not bar an action at law previously brought against the corporation by another creditor, or affect his right to levy upon the stockholders summoned in that action. *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray (Mass.) 216.

5. *Stone v. Fenno*, 6 Allen (Mass.) 579.

Allowing Stockholders to Forfeit Shares.—A resolution allowing stockholders, on paying thirty per cent. on their shares, to forfeit their stock is void as against creditors; and a creditor who was also a trustee and protested against the resolution, did not ratify it, by accepting the money raised under it. *Slee v. Bloom*, 19 Johns. (N. Y.) 456; reversing s. c., 5 Johns. N. Y. Ch. 366. But a creditor who was present and assented to a resolution that any stockholder paying fifty per cent. on his shares should be discharged from all future calls, except by way of forfeiture, is bound by it, so far as respects those who complied with its terms before a dissolution. *Slee v. Bloom*, 19 Johns. (N. Y.) 456; reversing s. c., 5 Johns. (N. Y.) Ch. 366.

6. *Freeland v. McCullough*, 1 Den. (N. Y.) 414.

7. **By Maine Rev. Stat. of 1857**, ch. 48, § 9, manufacturing corporations are prohibited to contract debts exceeding, at any one time, the amount of the capital invested within the State in real estate and fixtures thereon, including machinery; and from becoming indebted to an amount exceeding one-half their capital paid in and remaining undivided, and of their other property and assets. When they comply with these prohibitions and limitations, their stockholders are relieved from all individual liability for their debts. When either of these limitations is violated, their stockholders become individually liable for the debts of the corporation in the manner provided in chapter 46. The liability

creditors of the company to an amount equal to the amount of the stock held by them, for the debts and contracts of the company,¹ until the whole amount of capital stock shall have been

arising under chapter 48, section 9, is to be made available to creditors of the corporation in the manner prescribed in chapter 46, section 24. *Lovegrove v. Hunt*, 58 Me. 9.

Massachusetts Stat. 1851, ch. 315, § 3, forbids the property of stockholders in a manufacturing corporation, though incorporated since the revised statutes, and before said act took effect, to be taken on execution against the corporation, if there are officers liable, upon whose property the execution may be levied; although the execution was issued on a judgment recovered on a debt payable before that act took effect. *Denny v. Richardson*, 4 Gray (Mass.) 274.

The New York Act of 1848, § 10, provides that the stockholders shall be liable to the creditors to an amount equal to the amount of stock held by them respectively for all debts and contracts of the company until the whole amount of capital stock shall have been paid in, and a certificate thereof made and recorded.

Pennsylvania.—Where the certificate of a company, organized in *Pennsylvania*, under the general manufacturing law of April 7th, 1849, shows stock subscribed for and unpaid, a creditor of the company, failing to obtain payment from the company, may recover against the stockholders individually, to the extent of the unpaid stock. *Allibone v. Hager*, 46 Pa. St. 48.

Pennsylvania act of March 27th, 1854, § 5, relative to the individual liability of the stockholders in manufacturing companies, is not retroactive, and does not apply to companies which were incorporated, and had paid up their stock under the provisions of act of April 7th, 1849. *Megargee v. Wakefield Mfg. Co.*, 48 Pa. St. 442.

1. Debts for Which Stockholder Is Liable.—*Costs* of an action by a manufacturing corporation, are not contracted as a "debt" until judgment is rendered for them against the corporation. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417. And an *unliquidated claim* for damages against a manufacturing corporation is a debt within the meaning of Massachusetts Stat. 1829, ch. 53, making individual members liable. *Mill Dam Foundry v.*

Hovey, 21 Pick. (Mass.) 417. But the liability of a stockholder does not extend to a *promissory note* held by a third person, though given for materials. *Weigley v. Coal Oil Co.*, 5 Phila. (Pa.) 67. And a stockholder in a slate company is not individually liable for hay furnished for *feeding the company's mules*; it is not "materials furnished," within the meaning of the act of 1854. *Featherman v. Wolle*, 3 Leg. Gaz. (Pa.) 86.

Where a merchant furnishes provisions to the hands of a manufacturing company, upon their orders, which they take up monthly, by giving their notes, the stockholders are liable therefor. *Reading Industrial Mfg. Co. v. Graeff*, 64 Pa. St. 395. But they are not individually liable for the breach of a *contract to deliver stock*, in exchange for certain specific articles; they are only so liable where an action of debt will lie. *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. St. 295.

A *purchase of property*, for the purpose of carrying on the company's business, is not void because it includes some articles not needed for the business, if made in good faith; and the stockholders are individually liable therefor. *Moss v. Averell*, 10 N. Y. 449.

A stockholder is liable for *interest* upon an amount equal to his stock, from the time of the commencement of suit against him. *Burr v. Wilcox*, 22 N. Y. 551. But, in an action against a stockholder, the plaintiff cannot recover the *costs of a former action* against the company. *Bailey v. Bancker*, 3 Hill (N. Y.) 188. See *Fisk v. Keeseville Woollen & Cotton Mfg. Co.*, 10 Paige (N. Y.) 592.

One manufacturing corporation may take shares of another in payment of a debt; and neither the first corporation, nor any person taking from it, with knowledge of all the facts, a negotiable promissory note of the second corporation, can, in an action thereon against the latter, summon in other stockholders and have execution against them, under Stat. 1851, ch. 315. *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493.

Though a creditor, who has two or more demands against a manufacturing

paid in¹ and a certificate thereof made and recorded.² The stockholder's liability is not confined to the original capital stock, but attaches to an increase of the capital if authorized by the statute.³ The individual liability of a stockholder is extin-

company, one only of which the stockholders are liable to pay, recovers a single judgment on all the demands, yet he may levy his execution on the personal property of a stockholder, to the amount of the demand which the stockholders are liable to pay. *Stedman v. Eveleth*, 6 Metc. (Mass.) 114.

Bringing Suit Within a Year.—Among the claims presented was one in favor of a bank which had discounted a note dated October 2nd, 1876, payable in four months. Upon maturity it was renewed for four months, and again renewed for five months. Suit was brought against the company on November 3rd, 1877. *Held*, that this was a debt to be paid within one year from the time it was contracted, and that suit was brought within one year after it became due, within the meaning of the provision of the statute exempting stockholders from liability from claims not contracted to be paid or not sued within the year, and that the claim was properly allowed. *Veeder v. Mudgett*, 95 N. Y. 295.

1. A stockholder is liable, under the Pennsylvania act of 1853, for the debts of the company incurred whilst he is a stockholder, though he has paid up the whole of his stock. *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117.

2. Making and Recording Certificate.—The certificate of the officers of a manufacturing company, prescribed by Massachusetts Rev. Stat., ch. 38, § 17, stating the amount of the capital fixed and paid in, sworn to and recorded, within thirty days, in the registry of deeds, is conclusive evidence, for the stockholders, of the facts therein stated, so far as to exempt them from personal liability for the subsequent debts of the company. *Stedman v. Eveleth*, 6 Metc. (Mass.) 114. See 127 Mass. 569.

But in *New York* it is *held* that the liability to creditors imposed upon the stockholders is not taken away by the making and recording of a certificate as is required by the statute stating the amount of the capital stock, and that the whole thereof has been paid in. To end the liability both the stock must

be paid in and the certificate must be recorded; the certificate is not conclusive as to the payment. *Veeder v. Mudgett*, 95 N. Y. 295.

The provision requiring the recording of the certificate within thirty days is directory merely, and where a certificate is properly made and given to the county clerk for record, the duty imposed upon the stockholders is performed, and they are not liable because of an omission to record, which is wholly the fault of that officer. *Id.*

3. Increase of Capital.—*Veeder v. Mudgett*, 95 N. Y. 295.

Where, however, the original capital is paid in in full, and a certificate made and recorded, the liability of the stockholders thus far is ended and cannot be revived by an increase of the capital; the liability rests solely upon the holders of the increased stock and is limited by the par value of such stock.

The R. I. Co. was organized in 1868, with a capital of \$200,000, which was paid in, but no certificate thereof was made and recorded. In 1869 the trustees passed a resolution increasing the stock to \$300,000, and at a meeting of the stockholders, by a vote of two-thirds, the increase was ratified; no notice of such meeting was published, nor was a certificate of its proceedings made and filed, as required by the New York act (sections 21, 22). The increased stock was issued, but not fully paid in; holders thereof voted at stockholders' meetings, shared in dividends, and in all respects were treated and acted as holders of legal stock. In 1873 a certificate was made by the proper officers and delivered to the county clerk for record, which stated the capital to be \$300,000, and that it was actually paid in. In an action brought by a creditor to enforce the liability imposed upon stockholders because of failure to pay in the capital stock, *held*, that the certificate was sufficient to exonerate the holders of the original stock, but was not conclusive, as against the creditors, that the increased stock had been paid in; and that the holders thereof were estopped from questioning the validity of the increase; also that, as the indebtedness provable under said act (section 24)

guished by a payment of debts of the corporation equal in amount to his stock.¹

A creditor of a manufacturing corporation cannot maintain an action against a stockholder to enforce the liability to creditors imposed by statute, until he has obtained a judgment upon his claim against the corporation, and an execution has been issued thereon and returned unsatisfied.² The statute of limitations, therefore, does not begin to run in favor of a stockholder until

was more than the amount of the increase, such holders were liable to the extent of the par value of the increased stock. *Veeder v. Mudgett*, 95 N. Y. 295.

1. *Garrison v. Howe*, 17 N. Y. 458; *Woodruff etc. Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

Advances for Benefit of Company.—On a bill against the stockholders, they are to be allowed for advances made for the benefit of the company, beyond the value of their stock, whether made before or after dissolution. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387. See *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217. See *Skinner v. White*, *Hopk. Ch.* (N. Y.) 107; *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 382.

Trustees Who Have Already Been Held Personally Liable.—In an action to enforce the individual liability of the stockholders of a manufacturing corporation it appeared that defendants, M and T, were trustees of said company for the years of 1875 and 1876. No annual reports for those years were filed as required by the statute. A creditor, after judgment against the company in an action brought more than a year after his claim fell due, sued said trustees because of the omission to comply with such requirement, and recovered judgment for the amount of his claim, which they paid. They claimed to be allowed the amount so paid in reduction of their liability. *Held*, that said claim was properly rejected. *Veeder v. Mudgett*, 95 N. Y. 295.

2. *Handy v. Draper*, 89 N. Y. 334; *Lindsley v. Simonds*, 2 Abb. (N. Y.) Pr., N. S. 69.

Judgment and Execution Against Corporation.—The return of an execution unsatisfied against a manufacturing corporation is a condition precedent to the right of a creditor to bring an action against a stockholder, and the recovery of a judgment and return of an execution unsatisfied in a foreign State is not sufficient. *Rocky Mountain Nat.*

Bank v. Bliss, 14 Week. Dig. (N. Y.) 553.

This condition applies to a continuing stockholder as well as to one who has ceased to be such. *Rocky Mountain Nat. Bank v. Bliss*, 14 Week. Dig. (N. Y.) 553.

The commencement of a suit against the company, for a part of the plaintiff's claim, is not sufficient to render a stockholder liable for the residue. *Shellington v. Howland*, 67 Barb. (N. Y.) 14; s. c., 53 N. Y. 371.

After the return of an execution unsatisfied, a bill may be filed in equity against the corporation and the stockholders jointly, to enforce their individual liability. The decree may subject them all to the debt, with leave to apply to enforce contribution among each other. *Masters v. Rossie Lead Mining Co.*, 2 Sandf. Ch. (N. Y.) 301.

A mere return of *nulla bona* is not sufficient to found a bill against the stockholders; the return must be special. *Bacon v. Morris*, 30 Leg. Int. (Pa.) 392.

To hold a stockholder personally liable, on the ground that the capital stock has not been paid in full, a suit must be commenced against the corporation within one year after the debt became due; and this notwithstanding proceedings against it in bankruptcy, in which the creditor proved his claim. *Birmingham Bank v. Mosser*, 14 Hun (N. Y.) 605.

To maintain an action against a stockholder of a manufacturing corporation the necessity of a previous execution unsatisfied against the corporation is dispensed with, where it is rendered impossible by proceedings under the bankrupt act instituted by the stockholder himself. And proof of the debt against the corporation in bankruptcy is not a bar to an action thereon against the stockholder. *Shellington v. Howland*, 53 N. Y. 371.

The complaint alleged that a judgment was obtained against the company

the return of the execution against the corporation.¹ In *New York* a judgment against the company is not even *prima facie* evidence of the validity of the debt, in an action to enforce the individual liability of a stockholder.² The stockholder's liability

within a year after the debt became due. *Held*, upon demurrer, sufficient to indicate that the recovery was for the same debt as that set forth in the complaint, and that such recovery of the whole debt included the instalments for which the defendant was liable. *McMaster v. Davidson*, 29 Hun (N. Y.) 542.

Though a creditor who has two demands against a manufacturing company, one only of which the stockholders are liable to pay, recovers a single judgment on both demands, yet he may levy his execution on the personal property of a stockholder, to the amount of the demand which the stockholders are liable to pay. *Stedman v. Eveleth*, 6 Metc. (Mass.) 114.

Expiration of Charter—Formation of New Company.—Where the charter of a manufacturing company expires by lapse of time, and a new company is formed by the stockholders, or some of them, under the same name, to which all the assets are transferred, the new company and the personal liability of its stockholders, constitute the primary fund for the payment of a judgment recovered against it, for a debt of the original company, which must be exhausted before recourse can be had to the individual liability of the stockholders of the latter. *Cushman v. Shepard*, 4 Barb. (N. Y.) 113.

Demand Upon Officer of Corporation.—Under Mass. Stat. 1808, ch. 65, § 6, and Stat. 1817, ch. 183, an execution against a manufacturing corporation cannot be levied on the property of its members, unless there has first been a demand on the president, treasurer or clerk of the corporation, by the officer who holds the execution, to show to him property sufficient to satisfy and pay the sum due thereon; although on the original writ property of the members was attached, after a default of the corporation to show to the officer, who held the writ, property sufficient to satisfy the judgment which might be recovered thereon. *Stone v. Wiggin*, 5 Metc. (Mass.) 316.

A *supersedeas*, annexed to an execution issued on a judgment against a manufacturing corporation, as to certain stockholders who had been summoned

in the action in which the judgment was recovered, pursuant to Mass. Stat. 1851, ch. 315, § 2, does not exonerate such stockholders from any liability as officers of that corporation. And such execution and *supersedeas* afford no protection to an officer against another stockholder upon whose property he levies the execution, when there are such persons, liable as officers, and having property upon which the execution might be levied. *Denny v. Richardson*, 4 Gray (Mass.) 274.

Independent Action at Law.—A state statute making stockholders of a manufacturing corporation liable for debts of the company, provided for the enforcement of the liability against them on writs of attachment or execution issued against the company, or by bill in equity against the stockholders (R. I. Act 1847, §§ 1, 14); but a subsequent statute enacted that "all proceedings to enforce the liability of a stockholder for the debt of a corporation shall be either by suit in equity . . . or by an action of debt upon the judgment obtained against such corporation" (Act 1877, ch. 600). *Held*, that under either statute the debt must be established by a judgment against the corporation, before the creditor could proceed against the stockholders; that the liability imposed upon the stockholders by statute could not be enforced even by a court out of the State without a compliance with the statutory conditions; and an independent action at law could not be maintained by a creditor of the corporation, having no judgment against it, in a circuit court of the United States in another State, to enforce such liability against a stockholder, even though the corporation was bankrupt. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; 30 Lawyers' ed. 825; 7 Supr. Ct. Rep. 757.

1. *Handy v. Draper*, 89 N. Y. 334. See DEFENCES, V. 5, *infra*.

2. **Judgment as Prima Facie Evidence.**—*Moss v. McCullough*, 5 Hill (N. Y.) 131; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Strong v. Wheaton*, 38 Barb. (N. Y.) 616; *Miller v. White*, 50 N. Y. 137; *Squires v. Brown*, 22 How. (N. Y.) Pr. 35; *Peckham v. Smith*, 9

is limited to the amount of his stock with interest from time of the commencement of the action. The allowance of interest from the date of recovery of judgment against the corporation is, therefore, improper.¹

The stockholders are only individually liable to creditors to an amount equal to the stock held by them; if the plaintiff be also a stockholder the defendant is only entitled to an abatement of the sum equal to the amount of the stock held by the plaintiff; it is not a bar to the action.² On the dissolution of a manufacturing company, an action lies against an individual stockholder for a debt of the company, and he is liable to the extent of his stock.³

Ib. 436; *Moss v. McCullough*, 7 Barb. (N. Y.) 279; *Nimmons v. Tappan*, 2 Sw. (N. Y.) 652; *Conklin v. Furman*, 57 Barb. (N. Y.) 484; *Hall v. Seigel*, 7 Lans. (N. Y.) 206.

A judgment against the company is not even *prima facie* evidence of the validity of a promissory note, upon which it was obtained. *Moss v. McCullough*, 5 Hill (N. Y.) 131. See *Moss v. Oakley*, 2 Hill (N. Y.) 265.

But in *Massachusetts* it appears to be otherwise. In an action on an account annexed, against a manufacturing corporation, under Mass. Gen. Stat., ch. 61, begun more than a year after the signing of the articles of association, and nearly a year after the first meeting of the signers and their choice of officers, the corporation filed an affidavit of merits and an answer, and afterwards submitted to a default and judgment thereon. In a suit in equity brought by the creditor, under Mass. Stat. 1862, ch. 218, § 4, to recover from the stockholders individually the amount of this judgment, *held*, that the judgment, if not conclusive, was at least *prima facie* evidence that the account was one on which the corporation was liable, even though the account bore date three days before said meeting. *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

But in an action against a manufacturing corporation, on a promissory note, if they admit the debt sued on, it cannot be disputed by a stockholder summoned in under Mass. Stat. 1851, ch. 315, § 1. *Johnson v. Somerville Dyeing and Bleaching Co.*, 15 Gray (Mass.) 216.

And in *Pennsylvania* the Massachusetts rule is followed. It is accordingly *held* that in a *scire facias* against a stockholder, the judgment against the company is conclusive; the defendant

can only show that he is not a stockholder, or that the judgment was recovered for a claim for which stockholders are not personally liable. *Wilson v. Pittsburgh & Youghiogheny Coal Co.*, 43 Pa. St. 424.

1. Allowance of Interest.—*Handy v. Draper*, 89 N. Y. 334.

In *Wheeler v. Millar*, 90 N. Y. 353, the referee computed the interest on plaintiff's demand from the date on which it became due from the company instead of from the date of the commencement of the action; the indebtedness was less than defendant's liability as a stockholder, and the allowance of interest did not swell it beyond that limit. *Held*, no error.

2. *Woodruff & Beach Iron Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

But such deductions would not avail the party in a subsequent suit by another creditor. *Woodruff & Beach Iron Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

The creditors may enforce their claims by suit against the corporation, though they be stockholders therein; and obtain contribution in the mode prescribed by the statute. *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43.

3. Dissolution.—*Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

In the event of a dissolution, the stockholders are individually liable for a bond executed by the trustees under the corporate seal, upon which judgment has been entered, unless they can impeach it for fraud or mistake. *Slee v. Bloom*, 20 Johns. (N. Y.) 669.

A manufacturing company which has ceased to do business, and is without funds, is held to be dissolved without any judgment of ouster, so far as to give a remedy to its creditors against

(b) *To Laborers and Servants*.—The New York manufacturing act provides that the stockholders of companies organized thereunder shall be jointly and severally individually liable for all the debts which may be due and owing to all their laborers, servants and apprentices for services performed for the corporation.¹ The word "servant" as used in this act is, it seems, not restricted to one who performs menial service.² A reporter employed by a newspaper company is a servant within the meaning of this act; and so is a city or assistant editor if not an officer of the company.³ But the secretary of a manufacturing company is not a servant or laborer within the meaning of the act;⁴ nor is a contractor for the construction of part of a railroad.⁵ Nor does the act include one who contracts for and furnishes laborers and servants for others, or who contracts for and furnishes teams for work whether with or without his own services.⁶ An overseer and bookkeeper is a servant within the meaning of the act.⁷ But it has been held that one employed at a yearly salary as a bookkeeper and general manager is not a laborer, servant or apprentice.⁸

In an action against a stockholder, who is personally liable for wages, where the same were payable monthly, only so much thereof can be recovered as become due within one year prior to the commencement of the action.⁹ It is also held that an action

the individual stock holders; and a colorable election of trustees will not prevent such dissolution. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387. See *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217.

1. Laws of 1848, ch. 40, § 18.

2. It includes, therefore, one acting as an engineer and fireman, and sometimes the superintendent of a mining company. *Vincent v. Bamford*, 1 J. & S. (N. Y.) 566. But in *Wakefield v. Fargo*, 90 N. Y. 213, the court of appeals were inclined to the opinion, although it was not decided, that the services referred to are menial or manual services performed by one of a class whose number usually look to the reward of the day's service for immediate or present support. And the agent of a mining corporation employed to take charge of its mines in another country has been held not to be a servant within the meaning of the act so as to render the stockholders individually liable for his services. *Hill v. Spencer*, 61 N. Y. 274; reversing s. c., 2 J. & Sp. 304; *Dean v. DeWolf*, 16 Hun (N. Y.) 186. And see *Krauser v. Ruckel*, 17 Ib. 463.

3. *Harris v. Norvell*, 1 Abb. N. C. (N. Y.) 127.

4. *Coffin v. Reynolds*, 37 N. Y. 640.

5. *Aikin v. Wasson*, 24 N. Y. 482.

6. *Balch v. New York etc. R. Co.*, 46 N. Y. 521.

7. The stockholders are individually liable to an overseer and bookkeeper for wages which became due to him within one year prior to a recovery against the company, though the hiring was for a longer term than one year. *Hovey v. Ten Broock*, 3 Rob. (N. Y.) 116.

The plaintiff's assignor acted as foreman of a corporation rendering manual service of the same kind as that performed by the other laborers, kept the time of the men, solicited orders, collected bills and did whatever was required of him by the secretary and treasurer of the company, who acted as general superintendent. *Held*, that he was a laborer or servant within the meaning of the act. *Short v. Medberry*, 29 Hun (N. Y.) 39.

8. *Wakefield v. Fargo*, 90 N. Y. 213.

9. *Short v. Medberry*, 29 Hun (N. Y.) 39. And this is so although the employment of the plaintiff's assignor was upon the condition of his obtaining a loan of money for the company. *Short v. Medberry*, 29 Hun (N. Y.) 39.

will not lie by one stockholder against a fellow stockholder to enforce a personal liability under this section of the New York act.¹ The liability of the stockholders is joint and several,² and the complaint must show that the money was payable by the terms of the contract within twelve months from the time of making the contract.³

4. Contribution Among Stockholders.—When a stockholder of a manufacturing corporation has been compelled to pay a corporate debt he may have an action for contribution against the remaining stockholders who were originally liable with him for such debt.⁴ In *New York*, it is held that a stockholder who has paid

1. *Richardson v. Abendroth*, 43 Barb. (N. Y.) 142.

2. *Dean v. Whiton*, 16 Hun (N. Y.) 203.

3. *Hill v. Conkling*, 7 Daly (N. Y.) 397.

What is a sufficient complaint in an action against the stockholders of a manufacturing company to enforce a personal liability for the wages of laborers. *Dempsey v. Willett*, 16 Hun (N. Y.) 264.

4. *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381; *Stover v. Flack*, 30 N. Y. 64; *Masters v. Rosie Lead Mining Co.*, 2 Sands Ch. (N. Y.) 301. But in *Massachusetts*, a member of a manufacturing corporation who has voluntarily paid a debt of the corporation for which the members were by Mass. Stat. 1808, ch. 65 and 1817, ch. 183, personally liable, has no remedy at law against the other members for a contribution. *Andrews v. Callender*, 13 Pick. (Mass.) 484. See Stat. 1829, ch. 53, § 11; Gen. Stat., ch. 60, § 35.

A creditor who is also a stockholder individually liable for its debts, cannot take, under Mass. Rev. Stat., ch. 38, §§ 16, 30, upon attachment or execution against the corporation, the property of other stockholders equally so liable; but must resort to a bill in equity against them for contribution under Rev. Stat., ch. 38, § 32, and ch. 81, § 8. *Thayer v. Union Tool Co.*, 4 Gray (Mass.) 75. See *Thompson v. Bemis Paper Co.*, 127 Mass. 595.

The stockholders of a mining company are individually liable for its debts, only in proportion to the number of shares held; if one stockholder pays a debt he can only recover from another such proportionate part thereof. *Thomas v. Bevans*, 2 Luz. L. Obs. (Pa.) 99.

A bill for contribution by one stockholder of a manufacturing corporation who has paid debts of the corporation

under legal process is open to a demurrer by one of the respondents not shown to have been a stockholder in said corporation. *Heath v. Ellis*, 12 Cush. (Mass.) 601.

Apportionment of Liability.—In a suit in equity on Mass. Rev. Stat., ch. 38, § 32, by a stockholder of a manufacturing corporation who has paid a debt of the corporation, for which the stockholders are liable, to compel contribution by the other stockholders, the amount of the liability of each stockholder is to be determined by an apportionment of the debt among the shares held by solvent stockholders within the jurisdiction of the court. *Cary v. Holmes*, 16 Gray (Mass.) 127.

Agreement Among Stockholders—Remedy.—If the members of a manufacturing corporation, which is regulated by Mass. Stat. 1808, ch. 65, and Mass. Stat. 1817, ch. 183, enter into an indenture under seal, by which they agree to reimburse each other proportionally for such sums as they shall respectively be obliged to pay in consequence of endorsing the notes of the corporation, the remedy for a contribution should be sought by the proper form of action under the indenture; assumpsit will not lie. *Andrews v. Callender*, 13 Pick. (Mass.) 484.

Stockholders Compelling Payment of Subscriptions.—When the property of a manufacturing company, incorporated under the general corporation law of Maryland, has been assigned in trust and creditors are seeking their statutory remedy against the stockholders, thus compelling them to pay the debts contracted and due by the company, a court of equity has the right, at the instance of such stockholders, to compel subscribers to pay the amounts of their several subscriptions, in order that the common assets of the company may be realized and

the claims of laborers, on a recovery against him, in a suit for contribution must join all the other stockholders.¹ If a stockholder, after a sale of his stock, with a power of attorney to transfer the same, which has not been executed by a transfer upon the books of the company, be compelled to pay a debt of the corporation, he has a right of action over against his vendee; as between the parties, the title passes with all its obligations.²

5. Defences.—As in the case of other corporations, there are certain defences which the stockholders of a manufacturing corporation may set up when sued to enforce their individual liability to the creditors of the company. But the courts do not favor such defences, especially if the corporation has become insolvent.³ If a stockholder invokes the process of a bankrupt court to stay proceedings in an action against the corporation he cannot avail himself of the lapse of time in a suit to enforce his individual liability.⁴ It is no defence, also, that the defendant was induced to become a stockholder by certain promises made by others in behalf of the company.⁵ Stockholders individually liable are principal debtors, not sureties, and therefore the giving of time to the corporation does not release them.⁶ They are severally and not jointly liable for the debts of the company; and accordingly a release to one of them does not discharge the others.⁷ Where the defendant sets up, as an equitable offset, an alleged indebtedness of the corporation to him, and it appears that the amount of his claim is less than the amount due upon his subscription, he is not entitled to the offset claim.⁸ A stockholder

applied to their legitimate purposes and the stockholders relieved to that extent from a liability to which they are exposed, and which every principle of justice required should be borne alike by each. *Fiery v. Emmert*, 36 Md. 464.

1. *Clark v. Myers*, 11 Hun (N. Y.) 605.

2. *Johnson v. Underhill*, 52 N. Y. 203.

3. *Cook on Stock and Stockholders*, § 210.

4. Plaintiff, a creditor of a manufacturing corporation, sued it within one year after the maturity of the debt, but an order of the United States district court procured by defendant in proceedings in bankruptcy commenced by him against the corporation, forbade the further prosecution of the action and prevented judgment. In an action to charge defendant as a stockholder, *held*, that plaintiff was excused from prosecuting to judgment. *Shellington v. Howland*, 53 N. Y. 371.

5. *Collins v. Swann*, 7 Rob. (N. Y.) 623.

6. *Hager v. McCullough*, 2 Den. (N. Y.) 119.

7. *Bank of Poughkeepsie v. Ibbotson*, 5 Hill (N. Y.) 461.

8. This was decided in *Wheeler v. Millar*, 90 N. Y. 353. The court held that the defendant was bound first to pay his own debt to the corporation, and only in case there was a balance due him after such payment was he entitled to an allowance to the extent of that balance; that it was immaterial that his claim had not been actually applied on the subscription, as plaintiff had a right to insist that equitably it should be so applied when defendant stands upon an equitable right. Also *held* that it was not necessary that defendant's indebtedness to the corporation should have been pleaded, as it was not required of plaintiff to anticipate the defence. Also *held* that it was no answer that defendant's liability upon his subscription could not be asserted in this action; that plaintiff had the right to contend that as defendant's claim could apply only on one liability, the other remained, and could

in a manufacturing company, who, with full knowledge that the whole capital stock has not been subscribed, as required by the statute under which the company was incorporated, participates in the organization of such company, attends its meetings, accepts the office of director, and is privy to the contracting of a debt by the company, cannot, in an action against him to enforce his individual liability for the debt, set up as a defence irregularity in the organization of the company, or that the entire capital stock had not been paid in.¹ And a person summoned as a stockholder cannot appear and plead to the merits or make any defence which goes to defeat the action as between the original parties.² His defence must be confined to matters which tend to show that he is not liable as a stockholder for the debts of the corporation.³

In *Massachusetts*, it has been held that stockholders in a manufacturing corporation with whom a summons has been left,⁴ in an action against the corporation on a promissory note, may defend against the action by showing that the plaintiff took the note when overdue and without consideration and holds it for the sole use and benefit of the payee, who was a stockholder in the corporation and equally liable with the defendants for its debts.⁵ In the same State stockholders need not show, in order to exempt themselves from liability, that they were not officers of the corporation, and as such liable for its debts.⁶ A person who is summoned as a stockholder, and defaulted, cannot afterwards deny the existence of the corporation or his liability to be arrested as a stockholder upon an execution against the corporation.⁷ The stockholder cannot defend himself from judgment against him in an action against the corporation by showing that the officers of the company have sufficient property to pay the judgment.⁸

The individual members sued cannot set up their own defaults or mistakes of organization as a defence against creditors.⁹ And it is no defence to an action against the stockholders that the company has not paid to the State the bonus on its capital stock required by law.¹⁰ Proving the debt in bankruptcy against the

insist that no equitable right arose against the statutory liability.

1. *Hager v. Cleveland*, 36 Md. 476.

2. *Holyoke Bank v. Goodwin Paper Mfg. Co.*, 9 Cush. (Mass.) 576, 582.

Prior to Mass. Stat. 1851, ch. 315, if a manufacturing corporation was defaulted in an action, the stockholders therein who had been summoned in as being individually liable could not deny the liability of the corporation but were confined to the question of their individual liability. And if that statute allows a different course it does not affect a case pending when it was enacted. *Farnum v. Ballard Vale Ma-*

chine Shop, 12 Cush. (Mass.) 507.

3. *Hobbs v. Dane Mfg. Co.*, 5 Allen (Mass.) 581.

4. Pursuant to Mass. Stat. 1851, ch. 315.

5. *Thayer v. Union Tool Co.*, 4 Gray (Mass.) 75.

6. *Thayer v. Union Tool Co.*, 4 Gray (Mass.) 75.

7. *Richmond v. Willis*, 13 Gray (Mass.) 182.

8. *Brayton v. New England Coal Min. Co.*, 11 Gray (Mass.) 493.

9. *McHose v. Wheeler*, 45 Pa. St. 32.

10. *Patterson v. Wyomissing Mfg. Co.*, 40 P. St. 117.

corporation is not a bar to an action against a stockholder.¹ Nor can the statute of limitations be pleaded in an action to enforce the individual liability of a stockholder to the extent of his subscription; it is a continuing liability until the whole amount of capital stock is paid in.² If the certificate show stock subscribed for, but unpaid, it is conclusive as to the liability of the stockholders to that extent.³

6. Actions to Enforce Liability.—The individual liability of stockholders can only be enforced in the mode provided by statute.⁴ In an action against an alleged manufacturing corporation, the plaintiff, in order to charge as stockholders the persons summoned, must prove the legal existence of the corporation, although it has never been defaulted.⁵ And in an action against a stockholder, the plaintiff must show affirmatively that the whole of the capital

1. *Shellington v. Howland*, 53 N. Y. 371.

2. *Allibone v. Hager*, 46 Pa. St. 48.

3. They cannot be permitted to show that such stock was subscribed for by them as agents of the company, and that the stock owned by them individually was fully paid. *Allibone v. Hager*, 46 Pa. St. 48.

4. *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43. *Hoard v. Wilcox*, 47 Pa. St. 51; *Youghiogeny V. Shaft Co. v. Evans*, 72 Pa. St. 331.

The only remedy against stockholders of a manufacturing corporation, who are jointly and severally liable for the debts of the corporation, under Massachusetts Rev. Stat., ch. 38, § 16, is either to take their persons and property on a writ of attachment or execution issued against the corporation, according to section 30, or to bring a bill in equity against them, under section 31; and no action at law will lie against the stockholders on a contract originally made with the corporation. *Knowlton v. Ackley*, 8 Cush. (Mass.) 93.

Under the New Jersey statute of 14th February, 1846, the individual liability of stockholders who have not paid up their subscriptions in full, is only enforceable by an equitable action, in which the corporation and all the delinquent stockholders are made defendants. *Griffith v. Mangam*, 10 J. & Sp. 369; s. c., 73 N. Y. 611.

Form of a complaint against the stockholders of a manufacturing company, for a debt of the corporation. *Linsley v. Simonds*, 2 Abb. (N. Y.) Pr. N. S. 69.

Time of commencing an action of sci. fa. brought against stockholders in a

manufacturing corporation, may be commenced as soon as the officer has ascertained, and certified upon the execution, that he cannot find corporate property or estate. *Whitney v. Hammond*, 44 Me. 305.

Action in Another State.—An action at law cannot be maintained in *Massachusetts* to enforce the personal liability of a stockholder of a corporation established in another State for a debt of the corporation, if the laws of the other State provide that the remedy against a stockholder upon a debt of the corporation in that State shall be by bill in chancery, and not otherwise. *Erickson v. Nesmith*, 15 Gray (Mass.) 221.

Where a decree is sought against the stockholders of a corporation for manufacturing purposes, formed under New York act of March 22nd, 1811, on a bill filed by a creditor subsequent to the dissolution of the corporation, to compel the payment, by the defendants of a debt owing by the corporation, *held*, that there should be a reference to ascertain the debts due by the company, the stockholders who are liable, and if any of them have paid, on the debts due by the company, over and above the amount of their stock paid in, so as to reduce their respective liabilities, to ascertain such sum in each case, and to apportion among the stockholders who are liable the amounts respectively chargeable on each; and the decree should first require the payment of all unpaid instalments of stock, which are collectible and then duly apportion the residue. *Cushman v. Shepard*, 4 Barb. (N. Y.) 113.

5. *Utley v. Union Tool Co.*, 11 Gray (Mass.) 139.

stock has not been paid in.¹ An admission in the stockholder's answer that the defendant is a holder of stock coupled with an averment that it was such as to exempt him from further liability puts the plaintiff upon further proof.² In *Pennsylvania*, there may be separate actions against the company and the stockholders; and a claim not included in an action against the company may be recovered in a subsequent suit against the stockholders.³ An injunction, after a receiver has been appointed in an action to compel the officers and trustees to account, restraining creditors of the corporation from prosecuting actions against it, when the object of such actions is to obtain judgments and executions against it, to enable the creditors to proceed against the stockholders and trustees to enforce their individual liability, is unauthorized.⁴ The books of a corporation relating to its private transactions are not admissible in evidence, in an action against a stockholder in a manufacturing corporation incorporated under the general incorporation law of *Maryland*, by a creditor, to enforce the stockholder's individual liability for a debt contracted by the company.⁵

Where it is intended to hold the stockholders individually liable, they, or a portion of them, should be joined in the original action against the company.⁶ But a creditor cannot maintain a suit against a part of the stockholders without joining the corporation, even though he may have previously obtained a judgment against it; and the nonjoinder may be pleaded in the action.⁷ In a suit

1. *Bruce v. Driggs*, 25 How. (N. Y.) Pr. 71.

Allegations Necessary.—It is not necessary, in the declaration, to charge specially the grounds relied on as evidence of dissolution; a general averment is enough. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

In an action against a manufacturing corporation, in which individuals are summoned in as stockholders, according to Stat. 1851, ch. 315, their liability as stockholders need not be alleged in the declaration. *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray (Mass.) 216.

An answer, setting up the plaintiff's liability as a stockholder of a manufacturing company, by way of counter claim, must aver that he held an amount of stock equal to the debt for which he is sought to be made personally liable. *Chambers v. Lewis*, 28 N. Y. 454.

The plaintiff must show on the trial that the capital stock had not been paid in when the debt was contracted. *Bruce v. Driggs*, 25 How. (N. Y.) Pr. 71.

In an action of assumpsit by the creditors of an association incorporated under Pennsylvania manufacturing law 1849, against the stockholders under the personal liability clause of that statute, it is competent for the plaintiffs to show: 1. That the certificate required by law in order to obtain the charter is essentially untrue; or, 2. That a portion of the stock was not paid in money according to law, if the declaration recognizes the validity of the charter as granted. *Paterson v. Arnold*, 45 Pa. St. 410.

2. *Lewis v. Ryder*, 13 Abb. (N. Y.) Pr. 1.

3. *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117, decided under act of 1853.

4. *Mason v. New York Silk Mfg. Co.*, 27 Hun (N. Y.) 307.

5. *Hager v. Cleveland*, 36 Md. 476.

6. *Mansfield Iron Works v. Wilcox*, 52 Pa. St. 377.

7. *Hoard v. Wilcox*, 47 Pa. St. 51.

A creditor may file his bill in equity against the company and such stockholders as he knows, in order to charge them with payment of his debt, and at

to charge a stockholder with a debt of the company the trustees are not necessarily parties.¹

VI. ACTION BY STOCKHOLDER AGAINST COMPANY.—A stockholder in a manufacturing corporation may maintain an action against the company for an indebtedness to him, although the company has ceased to do business and a new one has been organized with a larger capital and additional members, to which its property has been transferred.²

VII. MUNICIPAL AID.—The power to levy and collect taxes conferred in the charter of a municipal corporation does not authorize the purchase by the municipality of stock in a manufacturing corporation, or the issuance of bonds for the payment thereof, and bonds issued for such purpose are void.³

VIII. TAXATION.—A statute abolishing taxes⁴ laid upon manufacturing corporations exempts from taxation only the capital actually employed by such corporations in manufacturing. Accordingly the mining of iron ore has been held not to be manufacturing within the meaning of an act exempting manufacturing

the same time pray a discovery of the names and residences of the unknown stockholders, with the amount of their stock, in order to make them parties by amendment. *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147.

1. *Harris v. Norvell*, 1 Abb. N. Cas. (N. Y.) 127.

2. *Cary v. Schoharie V. M. Co.*, 2 Hun (N. Y.) 110.

3. *Cook v. Sumner S. & N. Co.*, 1 Sneed (Tenn.) 698.

The legislature of a State has no authority to authorize taxation in aid of *private* enterprises or objects; and municipal bonds issued under legislative authority, to be paid by taxation, as a *bonus* or donation to secure the location or aid in the erection of a manufactory or foundry owned by private individuals, are void even in the hands of holders for value. *Commercial Nat. Bank of Cleveland v. City of Iola*, 2 Dill. (C. C.) 353.

4. **Local Taxation.**—The "revenue laws of the commonwealth" referred to in section 20 of the Pennsylvania act of June 30th, 1885, which exempts manufacturing corporations from taxation thereunder, are those which provide revenue for the commonwealth as distinguished from those which provide revenue for county, borough, school and township purposes. Appeal of *Hawes Mfg. Co.* (Pa. 1889), 17 Atl. Rep. 219.

Validity of Exemption—Consideration.—The municipality of a town agreed with T to exempt from taxation for a

series of years two of T's manufacturing establishments already in operation, in consideration of his assuming their place in an arrangement made by them with a railway company, by which they were bound to pay the latter \$1,800, and also to find the railway company the right of way free upon the company constructing a switch from the latter's station into the town. The law in force when the agreement in question was passed was section 368 of the Consolidated Municipal act, 1883, as amended by the Municipal Amendment act, 1884, section 8, which read: "Every municipal council shall, by a two-thirds vote of the members thereof, have the power of exempting any manufacturing establishment, or any water works or water company, in whole or in part, from taxation for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years." *Held*, that the case was not within this section; that there was not a proper public consideration from T for granting the exemption, and that the arrangement was in effect a purchase by T and a sale to him of an exemption from taxation; and a by-law passed by the municipality for the purpose, but not submitted to the rate payers, was therefore quashed, with costs. *In re Scott et al.*, 10 Ont. Rep. (Q. B. Div.) 119.

Carrying on Business in the State.—Under the New Jersey Tax law of 1884, manufacturing companies or mining corporations carrying on business in

corporations from taxation.¹ The capital invested by a rolling mill company in building houses for the purpose of leasing the same to its employees is not within such an exemption.²

Under a statute which subjects to taxation as real estate "manufactories of all descriptions," an unfinished factory and the lot upon which it is erected is taxable.³

the State were excepted from the operation of the act. *Held*, that the term "carrying on business in the State," as applied to manufacturing companies, meant the establishing of a factory in the State, the bringing of new material thereto, and converting it into wares. *State v. American Glucose Co. (N. J.)*, 15 Am. & Eng. Corp. Cas. 112.

Gas Companies—State Board of Equalization.—Gas companies are assessable by the State board of equalization under sections 32 and 33 of the Illinois Revenue act (Rev. Stat. Ill., ch. 120), providing that banking, bridge, express, ferry, gravel road, gas, insurance, mining, plank road, savings bank, stage, steamboat, street railroad, transportation and turnpike companies shall be assessed in a particular manner by the State board, although a previous section of the same act provides that companies and associations organized for purely manufacturing purposes shall be assessed by the local assessors in like manner as the property of individuals. *Ottawa Gas Light & Coke Co. v. Downey (Ill. 1889)*, 20 N. E. Rep. 20.

1. *Appeal of Com. (Pa. 1889)*, 25 Am. & Eng. Corp. Cas. 320. And a corporation engaged in the manufacture of steel rails is assessable upon the value of coal and iron ore mines owned by it, and used for the purpose of supplying raw material for the manufacture of rails. The fact that, by its charter, the corporation is authorized to own and operate its own coal and iron ore mines, does not bring it within the exemption. *Id.*

2. *Com. v. Mahoning Rolling Mill Co. (Pa. 1889)*, 18 Atl. Rep. 135. In this case the court said: "While the tenant houses in which about \$2,000 of the company's capital is invested, are in a certain sense 'reasonably necessary for the use of its employees,' the evidence clearly shows that they are not a necessary part of its manufacturing plant, and have no necessary connection with the business for which the

company was incorporated. They are a convenience and advantage both to the company and its employees, and doubtless a profitable investment for the former; but, in principle, the employment of its capital in building houses, for the purpose of leasing the same to its employees, does not differ materially from any other investment that might be made outside of its business as a manufacturing corporation. The only question is whether capital thus employed or invested is within the exemption of the section above quoted. We are of opinion that it is not. In some respects the question is similar to one that was presented in *Appeal of Com. (May term, 1889)*, in which opinion has just been filed. In that case we *held* that the section in question was intended to operate solely on capital actually employed in manufacturing, and not on capital employed in any other business or pursuit. In *Gas Co. v. Chester Co.*, 30 Pa. St. 232, the question was whether houses erected by the company for its workmen were a part of the plant, and, as such, exempt from taxation. MR. JUSTICE PORTER, speaking for this court, said: 'The gas works are clearly exempted, but the dwelling houses do not appear necessary to the performance of the company's proper work. On the other hand, they are stated to have been erected for the accommodation of their workmen. This is convenience, not necessity. For anything that appears, these workmen might be able to discharge their duties as satisfactorily if they lived elsewhere.'

"It may be difficult in some cases to determine just where necessity ends and mere convenience begins. In the case before us, however, it appears to be quite clear that the investment of part of the company's capital in dwelling houses for the use of its employees was a measure of mutual convenience and advantage, and not of necessity."

3. *Appeal of Hawes Mfg. Co. (Pa. 1889)*, 17 Atl. Rep. 219.

IX. DISSOLUTION.—A manufacturing corporation may, by suspending, and failing to carry on its business, or by the manner in which it carries it on, effect a dissolution.¹ And the statutes frequently give the courts power, upon proper cause being shown, to dissolve such corporations.² A portion of the stockholders, however, cannot maintain an action to dissolve the corporation; nor have they, in the absence of proof of fraud, mismanagement, or wrongdoing on the part of the directors, an absolute right to have a receiver of its property appointed; and this, although the corporation be utterly insolvent, is at least discretionary with the court.³

1. When Dissolution Is Effected.—Under N. Y. act of March 22nd, 1811, a manufacturing corporation, having ceased to act as a manufacturing company, and being without funds, and indebted, is dissolved so far as to give its creditors a remedy against the individual stockholders. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387.

A corporation, incorporated under New York act in relation to manufacturing corporations, for twenty years allowed all the corporate property to be sold on execution, and had wholly ceased to act in any manner for nearly two years, and had utterly abandoned the objects of the corporation; the stockholders also, upon a bill against them, under the statute, either suffered the bill to be taken *pro confesso*, or denied that they were corporators. *Held*, that the corporation was dissolved, though but a small part of the time for which it was incorporated had elapsed. *Slee v. Bloom*, 19 Johns. (N. Y.) 456.

But under the statutes of *New York*, a manufacturing corporation which has become actually insolvent, and suspended business by a resolution for less than a year, having, however, buildings, machinery, etc., by which to carry on its business, is not dissolved. *Bradt v. Benedict*, 17 N. Y. 93. And a lease by the stockholders of a manufacturing corporation of all its property, to its president for two years, though the business was carried on as before, *held* a suspension of its ordinary business for the period of more than one year, in violation of 2 N. Y. Rev. Stat. 4634, §§ 38, 56, and a forfeiture of its franchise. *Conro v. Gray*, 4 How. (N. Y.) Pr. 166.

2. Pa. act of April 9th, 1856, does not restrict the power of the courts of common pleas to dissolve corporations to any class of corporations. Act of

July 18th, 1863, being an act to provide for incorporating companies for mechanical and other purposes, expressly confers power on these courts to dissolve such corporations. *Com. v. Slifer*, 53 Pa. St. 71.

3. *Denike v. New York R. L. & C. Co.*, 80 N. Y. 599.

Grounds for Dissolution.—It is no ground for dissolving a manufacturing corporation on the petition of a majority in number of the stockholders owning a minority of the stock, that one owner of the majority of the stock has for many years controlled the election of officers and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners"; that, according to his statement, the corporation has been doing a losing business for many years; that he has refused to make any change in the business or to purchase the shares of the petitioners; and that, if the business were skilfully and properly managed it might be made a source of profit to all concerned. *Pratt v. Jewett*, 9 Gray (Mass.) 34.

Neglect on the part of a corporation for a greater period than one year to pay its debts is sufficient to justify an action for its dissolution. And such an action may be maintained by a stockholder of a manufacturing corporation organized and existing under the laws of this State. *Kittredge v. Kellogg Bridge Co.*, 8 Abb. N. C. (N. Y.) 168.

Defendant, a corporation formed under the New York General Manufacturing act of 1848, to manufacture etc. certain machines under letters patent specified in the certificate of its incorporation, in order to prevent ruinous competition and litigation, entered into an agreement with a rival company under which the patents of both com-

An assignment by a manufacturing corporation of its entire business to creditors for the purpose of preferring them made at the request of the debtor and not the creditor, and not in any way brought about by legal proceedings, is within the meaning of a statute giving to employees a prior lien for wages to a certain amount when such business "shall be suspended by the action of creditors or be put into the hands of an assignee, receiver, or trustee."¹

MANUMISSION.—The giving of liberty to one who has been in just servitude, with the power of acting except as restrained by law.²

MANUFACTURES OF METALS (as used in an act regulating duties), means manufactured articles in which metals form a component part, and not articles in which they have lost their form entirely, and have become the chemical ingredients of new forms.³

MANURE.—This name may be applied to all substances which

panies were placed in a new corporation, the stock of which was assigned to the two companies. Defendant kept up its organization and continued to receive royalties, etc., and prosecute and defend actions to which it was a party, and its assets largely exceeded its indebtedness. *Held*, that a judgment of dissolution on the ground that defendant had suspended its ordinary and lawful business would not be sustained. *Kelsey v. Pfaudler Process Fermentation Co.*, 52 N. Y. Sup. (45 Hun) 10; 19 Abb. N. Cas. 427.

Action by Receiver.—In an action brought against a manufacturing corporation after recovery of judgment and return of execution unsatisfied, a receiver of its property and effects was appointed. An order was subsequently granted by the court directing that on payment of the judgment and satisfaction thereof, the order appointing the receiver should be vacated; thereupon the corporation turned out to the judgment creditor a note owned by it in payment; this was accepted, the judgment satisfied and said order vacated. The note was left by said creditor in the hands of defendant, who was president of the corporation, and he afterwards collected the same. Another receiver of said corporation having been appointed in another action, brought an action to recover the money paid on the note as money belonging to the corporation. *Held*, that the action was not maintainable; that the note became the property of the creditor, not only by the act of the com-

pany, but by the direction and with the approval of the court; that the new receiver gained no right in regard thereto except to question the validity of the payment, and this could only be done in an action against the creditor, not in an action against his agent. *Prentiss v. Nichols*, 100 N. Y. 227.

1. *Bass v. Doerman*, 112 Ind. 390.

2. *Lenwick v. Chapman*, 9 Pet. (U. S.) 472. And see *State v. Emmons*, Penn. (N. J.) 10, and *State v. Admrs. of Prall, Cox* (N. J.) 4.

"In the absence of statutory regulations, it has been held in this country, in accordance with the principles of the common law, that no formal mode or prescribed words were necessary to effect manumission; it could be by parol; and any words were sufficient which evinced a renunciation of dominion on the part of the master. . . . But mere declarations of intention were insufficient unless subsequently carried into effect. . . . Manumission could be made to take effect in future. . . . In the meantime the slaves were called *statu liberi*. See *Cobb*, Law of slavery." *Bouv. L. Dict.*

The term is also used to denote that a parent has released his child before majority, from its duty to serve in such capacity. *Bell v. Bumpus*, 63 Mich. 375. Also title PARENT AND CHILD.

3. Thus white lead, nitrate of lead, oxide of zinc, and dry and orange mineral, are not manufactures of metals within the meaning of the phrase. *Meyer v. Arthur*, 91 U. S. (1 Otto) 570.

subserve the purpose of enriching the soil and thus increasing the crops to be raised upon it.¹

MANUSCRIPT.—As to what constitutes a manuscript and the property rights of the author, see LITERARY PROPERTY; LETTERS; COPYRIGHT.

MANY does not mean a mere excess above a "few." "Many" denotes "multitude," and while it is not the synonym of the word "majority," it means a relatively large number as compared with the whole.²

MAP.—(See also BOUNDARIES, vol. 2, p. 502; CHART, vol. 3, p. 138; DEDICATION, vol. 5, pp. 405, 407; EMINENT DOMAIN, vol. 6, p. 622; EVIDENCE, vol. 7, p. 76; REGISTRATION OF INSTRUMENTS.)—A transcript of the region which it portrays narrowed in compass so as to facilitate an understanding of the original.³

MARAUDER.—A marauder is defined in the law to be "one who, while employed in the army as a soldier, commits larceny or robbery in the neighborhood of the camp or while wandering away from the army;"⁴ but in the modern and metaphorical sense of the word as now sometimes used in common speech, it seems to be applied to a class of persons who are not a part of any regular army, and are not answerable to any military discipline, but who are mere lawless banditti, engaged in plundering, robbery, murder, and all conceivable crimes.⁵

1. *Heller v. Magone*, 38 Fed. Rep. 911, where the clause in the tariff act admitting free of duty "guano, manures and all substances expressly used for manure," was so interpreted.

Where an act exempted from tolls carts employed in carrying "mould, dung, soil, marl, manure, or compost employed in husbandry for manuring or improving land," it was held that this exemption included soil carried by the owner to be deposited in a place belonging to himself and there sold for the purpose of its being employed as manure by others. *Reg. v. Freke*, 5 El. & Bl. 944.

Manure, in a heap, before it is spread on the land is a personal chattel. *Toll. Ex. 150*; *Pinkham v. Gear*, 3 N. H. 484. But manure lying upon the land passes to a grantee as an incident to the land, unless it is reserved in the deed. *Kittredge v. Woods*, 3 N. H. 503; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Parsons v. Camp*, 11 Conn. 525; *Plummer v. Plummer*, 30 N. H. 558; *Connor v. Coffins*, 22 N. H. 538, where the fact that it is in heaps was not considered material.

But manure in a stable cellar unconnected with any farm was held not to

pass by the conveyance of the house and stable. *Proctor v. Gilson*, 49 N. H. 62; 21 Pick. (Mass.) 222. See also *LANDLORD AND TENANT*, vol. 12, p. 713. When manure is made in the ordinary course of husbandry on farming lands it is considered a part of the real estate and cannot be attached or sold on an execution separately from the land. *Sawyer v. Twiss*, 26 N. H. 345.

2. *Louisville & N. R. Co. v. Hall*, 6 South. Rep. 282 (Ala.); 6 S. C., 4 Law. Rep. An. 710.

In *Miller v. Beates*, 3 S. & R. (Pa.) 490, it was said that where "many years" had elapsed without hearing from a person, a jury might presume his death. "Many years is an indefinite expression. I am not for fixing, at present, any precise period after which a presumption of death arises," but it was held that fourteen years and nine months in the present instance was a sufficient period.

3. *Anderson's Law Dict. Banker v. Caldwell*, 3 Minn. 103.

4. 2 Bouv. L. Dict. 133.

5. *Curry v. Collins*, 37 Mo. 328. "But we cannot say that the word has yet received any such fixed, definite and generally received sense in the popular

MARE.—See note 1.

MARGIN.—A sum of money or its equivalent placed in the hands of a stock broker by the principal or person on whose account the purchase is to be made as a security to the former against losses to which he may be exposed by a subsequent depression in the market value of the stock.²

mind, much less in any critical use of the language, that it can be declared as a matter of law, by its own force, to convey a direct imputation of any specific indictable offence."

1. In *Ware v. Juda*, 2 Car. & P. 351, an allegation in the declaration that the plaintiff lent a horse is supported by evidence that what he lent was a "mare."

"**Mare**" Not Included in "Cattle."—2 W. Bl. 721; 2 East Pl. Cr. 1074.

Mare.—The Sea. Rap. & Law. L. Dict.

Mare Clausum.—The sea closed, or close.

Mare Liberum.—The sea free.

The statute 9 Geo. I, ch. 22, was designed to extend the offences described in 22 and 23 Car. II, ch. 7, and therefore horses, mares and colts, are included in the word *cattle*. The words of the statute are: "That if any person shall unlawfully and maliciously kill, maim or wound any cattle, he shall suffer death without benefit of clergy." *Paty's Case*, 1 Leach, C. C. 72.

2. *Bouv. L. Dict.* The effect of the contract is that the broker, upon the performance of certain conditions by the customer, will buy and hold a certain number of shares, and in case any advance accrues and is secured by a sale, made under the direction or authority of the customer, he shall enjoy the benefit of it, and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it. *Markham v. Jandon*, 49 Barb. (N. Y.) 462.

In *Baker v. Drake*, 66 N. Y. 518. Plaintiff employed defendants to purchase stocks for him upon margin, he agreeing that all transactions in stocks should be in every way subject to the usages of defendants' office. In an action for conversion, by an alleged sale without notice, of stock purchased, defendants offered to prove that it was the custom of their office to sell on account of failure to furnish sufficient margin at the Stock Exchange without giving notice to the customer of the time and place of sale. This offer was rejected.

Held (CHURCH, C. J., ANDREWS and MILLER, JJ., dissenting) error. See also *Gregory v. Wendall*, 40 Mich. 432.

In *McNeil v. The Tenth Nat. Bank of New York*, 55 Barb. (N. Y.) 59, the court held that where certificates of stock are deposited with a broker, by a customer, as *margin*, or additional security against loss to him while carrying other stock for the depositor, the transaction is in law a pledge; and being such, annexing to the scrip pledged a power of attorney from the owner authorizing the transfer of the scrip does not change the character of the transaction, but is merely a necessary act to put the pledge in a condition to be available as such, in case of the pledgor's default. As between the pledgor and the pledgee, in such a case, the latter has no legal right, secretly or without the knowledge of, or notice to, the pledgor, to sell the stock pledged. The use of the certificates of stock by the pledgee, beyond the mere purpose of a pledge, or *margin*, is tortious, if not felonious. And a transfer of the certificates by the broker to a third person gives no title to the latter as purchaser, though he pays a valuable consideration therefor, and though the scrip has a blank power of attorney attached; and even though such person believed he was dealing with a person who had authority to sell. This is the rule in regard to every species of personal property, except commercial paper.

Purchase and Sale of Stock on Margins.—In purchases and sales of stock on "*margins*," the customer deposits with the broker as security a sum of money equal to but a small part of the value of the stock involved. This sum of money is the "*margin*." In these purchases and sales on margins, frequently no stock passes, nor is intended to pass, but merely the ultimate profit or loss called "*differences*" is paid; the losing customer loses the whole or part of his margin, the winning customer getting back his margin and also the profits, less commissions. *Cook on Stock* (2nd ed.) 457.

The border, brink, edge or verge of anything; the boundary line or contour of a body;¹ the blank edge of a leaf or page.²

MARINE.—Belonging to the sea; relating to the sea; naval. A soldier employed or liable to be employed on vessels of war under the command of an officer of marines, who acts under the direction of the commander of the ship.

This is a gambling contract, and, whether in or out of the stock exchange, is not enforceable where there is proof of an intent not to actually deliver the stock. *McBurney v. Martin*, 6 Conn. 502. See generally GAMBING CONTRACTS, vol. 8, p. 1013.

But a "Margin" Transaction is not Necessarily Gambling and Invalid.—In *Hatch v. Douglas*, 48 Conn. 116, the court observes: "It is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant. The defendant (customer) through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery, not to the principal, but to the agents for the principal. The brokers knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral. No case has been decided which declares such a contract illegal. If we should so hold it would be difficult if not impossible to draw the line between legal and illegal transactions."

The broker is bound to keep on hand the amount of stock so held on *margin*, i. e. pledged. *Taussig v. Hart*, 58 N. Y. 425; *Rogers v. Gould*, 6 Hun (N. Y.) 229. See generally STOCK BROKERS.

1. **Margin of a Creek.**—A boundary on the *margin* of a creek, or river, seems to be the very dividing line between the water and the land, the line touching both. It is synonymous with *shore*, which *PARSONS, C. J.*, says in *Storer v. Freeman*, 6 Mass. Rep. 439, when applied to the sea, "must be understood to mean the *margin* of the sea in its usual and ordinary state. Thus, when the tide is out, low water mark is the *margin* of the sea, and when the sea is full, the *margin* is high water mark. In analogy to the *margin* of the sea, it would seem that the *margin* of a fresh water river or creek must be the ordinary water mark. *Ex parte Jennings*, 6 Cow. (N. Y.) 547.

In *The Indiana Central Canal Co. v.*

The State, 53 Ind. 589, the court held that the governor, having been directed by law to execute and deliver to the purchaser a "deed for the bed for the Northern Division of the Central Canal, including its banks, *margins*, tow-paths, side cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging," these words contain a specification of things included in the sale, and are each to be so construed as, if possible, to have effect, and the word "*margins*" is to be interpreted as embracing something distinct from the banks, tow-paths, side cuts, feeders, basins, right of way, dams, water power, and structures, and to embrace something adjacent to the canal, but distinct from these, and the purchaser had a right to suppose, if not otherwise informed, that any property belonging to the State adjacent and on the *margin* of the canal which had been appropriated or set apart or occupied by the State for canal uses, or was reasonably necessary for such uses, was included within his purchase.

In a suit to reform a deed to land sold as "bounded on" an artificial lake, and simultaneously resold with like description to defendant, who thereupon claimed an interest in the lake, evidence that defendant had, by an antecedent contract with the first vendor, agreed to buy the land under the lake, was proof of the intention of the parties to convey only to the *margin* of the lake, and the deeds should be reformed accordingly. *Fowler v. Vreeland*, 14 Atl. Rep. (N. J.) 116.

2. **Marginal Note.**—An abstract of a reported case, a summary of the facts, or brief statement of the principle decided which is prefixed to the report of the case, sometimes in the *margin*, is spoken of by this name. The marginal notes which appear in the statute books have not the authority of the legislature, and cannot alter the interpretation of the text. *Rap. & Law. L. Dict.* See also *Marriage v. Great Eastern R. Co.*, 9 H. L. Cas. 32, and 31 L. J. Ex. 73.

It is also used as a general term to denote the whole naval power of a state or country.¹

1. Bouv. L. Dict.

Marine Corps.—A body of officers and soldiers under an organization separate and distinct from that of the army, and intended for service in detached portions, on board ships of war.

Marine Causes.—An action for wages as master of a canal boat is not a *marine* cause, within the meaning of Code Civil Proc., § 317 (New York), declaring an action in favor of a person belonging to a vessel in the merchant service for services during a voyage to be a marine cause, and is not triable forthwith at chambers. *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620.

Marines Included in "Persons Enlisted for the Navy."—The act of congress passed on the 2nd of March, 1837 (5 Stat. at Large 153), authorized a reenlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the navy." Prior laws recognize marines as a part of the navy. Under the same act the commander of the squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it. *Wilker v. Dinsman*, 7 How. (U. S.) 89.

Marine League.—A measure equal to the twentieth part of a degree of latitude. Bouv. Inst. N. 1845.

Three geographical miles. U. S. Laws, act June 5th, 1794; April 20th, 1818; 1 Story's Laws 352; 3 ib. 1694.

It is generally conceded that a nation has exclusive territorial jurisdiction upon the high seas for a marine league from its own shores. 1 Kent 29; *The Franconia*, 2 Ex. Div. 63.

Marine Contract.—Is one which relates to business done or transacted upon the sea and in seaports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law. *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1.

A contract for the transportation of passengers by a steamship on the ocean is a maritime contract, and there is no distinction in principle between it and a contract for the like transportation of merchandise. The same liability attaches upon its execution both to the owner and the steamship. *The Moses Taylor*, 4 Wall. (U. S.) 411. See also *The Schooner Titian*, 5 Mason (U. S.) 465; *Plummer v. Webb*, 4 Mason (U. S.) 380; *Drinkwater v. The Brig Spartan*, Ware (U. S.) 91; *The Sloop Mary*, 1 Paine (U. S.) 673; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Bazin v. Liverpool Steamship Co.*, 5 Am. Law Reg. 465; *The Eddy*, 5 Wall. (U. S.) 481.

What Is Not a Marine Contract.—Contracts for building ships or vessels, or for labor done, or materials furnished in their construction, are not maritime contracts. *The scow M. Tuttle v. Buck*, 23 Ohio St. 565. See also *Peyroux et al. v. Howard et al.*, 7 Pet. (U. S.) 343; *Roach et al. v. Chapman et al.*, 22 How. (U. S.) 129. See generally ADMIRALTY, vol. 1, p. 197-8.

Marine Court in the City of New York.—A local court originally erected for the determination of controversies between seamen, but now a court of record, possessing general jurisdiction of controversies involving not more than \$2,000, and special jurisdiction of civil actions for injuries to person or character without regard to the amount of damages claimed. Rap. & Law. L. Dict.

Marine Interest.—A compensation paid for the use of money loaned on bottomry or *respondentia*. Provided the money be loaned and put at risk, there is no fixed limit to the rate which may be lawfully charged by the lender; but courts of admiralty, in enforcing the contract, will mitigate the rate when it is extortionate and unconscionable. Bouv. L. Dict. See also Sm. Merc. Law (8th ed.) 410; BOTTOMRY BOND, 2 Am. & Eng. Encyc. of Law 483; RESPONDENTIA, *infra*.

MARINE INSURANCE.—See GENERAL AVERAGE; JETTISON; INSURANCE; SHIPPING.

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See also AGENCY; GENERAL AVERAGE.

I Definition.—Marine insurance is “a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks to which his ship, merchandise or other interest may be exposed during a certain voyage or a certain period of time.”¹

II. What May be Insured.—Insurance may be effected upon the vessel, goods on board the vessel, the freight, a profit expected, a commission, passage money, bottomry and respondentia, salvage, on general average, a lien for disbursements, advances, the master's wages, an insurance premium, the solvency of an insurance company.²

1. 1 Arnould Mar. Ins. (6th ed.) 16. This is the ordinary definition. 1 Phillips Ins. 1; 1 Duer Ins. 1; Marshall Ins. 1; 3 Kent Com. *253.

Perhaps the most accurate definition is that of Laundes Mar. Ins. (1st ed.) 1: “A contract whereby one who has an expectation of pecuniary gain . . . depending on the safety of property exposed to hazard at sea, may secure himself by paying beforehand a fixed sum as the price of the risk.”

2. **The Vessel.**—1 Arnould Mar. Ins. (6th ed.) 18.

The words of the policy, “and also the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture of and in the good ship or vessel called the,” etc., include—

Provisions.—Brough v. Whitmore, 4 T. R. 206.

Boats.—Hoskins v. Pickersgill, 3 Doug. 222; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472.

Whatever Is Appurtenant to the Ship—3 Kent Com. (13th ed.) 258; *Plantamour v. Staples*, 1 T. R. 611, n.

In some places they include instruments for navigation belonging to the ship owners. 1 Parsons Mar. Ins. 525; 1 Phillips Ins. (5th ed.), § 468.

Outfit.—Hill v. Patten, 8 East 375; *Forbes v. Aspinall*, 13 East 323.

But in whaling voyages where the implements for trying out blubber, harpoons, etc., are technically spoken of as "outfit," an insurance merely on the ship does not cover such "outfit." *Hoskins v. Pickersgill*, 3 Doug. 222; *Gale v. Laurie*, 5 B. & C. 156; *Taber v. China Ins. Co.*, 131 Mass. 239 at 251; *Lewis v. Manufacturers' Fire etc. Ins. Co.*, 131 Mass. 364.

The words include the interest of captors. *Routh v. Thompson*, 11 East 433; 13 East 274.

But do not cover loss by collision for which the body of the vessel is liable. *De Vaux v. Salvador*, 4 Ad. & El. 420.

The case of *Peters v. Warren Ins. Co.*, 3 Sumn. (U. S.) 389; 14 Pet. (U. S.) 99, is *contra*, but is opposed by *General Mar. Ins. Co. v. Sherwood*, 14 How. (U. S.) 352.

Insurance on the ship while it is being built does not include timber or materials intended for the vessel, but not as yet incorporated with it. 1 Parsons Mar. Ins. 524; *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. (Md.) 468; *Hood v. Manhattan F. Ins. Co.*, 11 N. Y. 532.

The identity of the vessel insured is not affected by repairing, no matter how extensive. *Le Cheminant v. Pearson*, 4 Taunt. 367; *Livie v. Janson*, 12 East 648.

Prior total loss may be insured against. *Hughes v. Mercantile Ins. Co.*, 44 How. Pr. (N. Y.) 351; *Insurance Co. v. Folsom*, 18 Wall. (U. S.) 237; *Continental Ins. Co. v. Allen*, 26 Ill. App. 576.

Goods.—This covers such articles as are on the vessel for the purposes of commerce. 1 Arnould Mar. Ins. (6th ed.) 27; *Brown v. Stapylton*, 4 Bing. 121, per BEST, C. J.; *Hill v. Patten*, 8 East 374, per LD. ELLENBOROUGH; *Thwing v. Great Western Ins. Co.*, 103 Mass. 401 at 406.

So it includes bullion, coin, jewels, etc., on board for purposes of commerce. *Da Costa v. Firth*, 4 Burr. 1066; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *American Ins. Co.*

v. Griswold, 14 Wend. (N. Y.) 399. See *Seton v. Delaware Ins. Co.*, 2 Wash. (U. S.) 175 at 178, per WASHINGTON, J.

But not such articles worn on the person. 1 Arnould Mar. Ins. (6th ed.) 27.

It covers also an immigrant's equipments. *Wilkinson v. Hyde*, 3 C. B., N. S. 30; 27 L. J. (C. P.) 116.

The catch of a whaling vessel is covered by insurance of "goods." *Hill v. Patten*, 8 East 373; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429.

"Goods" does not include ship's provisions. *Ross v. Thwaites*, 1 Park Ins. 23.

Nor its outfit for whaling. *Hill v. Patten*, 8 East 373. But see *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

Nor provender for live stock. *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429.

Nor live stock itself. *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429.

Unless live stock is the usual cargo carried in the trade for which the insurance is made. *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; *Chesapeake Ins. Co. v. Allegre*, 2 Gill & J. (Md.) 164.

Nor the captain's clothing. *Duff v. Mackenzie*, 3 C. B., N. S. 16, 26 L. J. (C. P.) 313.

Nor bank notes. *Palmer v. Pratt*, 2 Bing. 185.

Nor (*semble*) bills of exchange. *Thomas v. Royal Exch. Ass. Co.*, 1 Price 95.

Profits, however, have been held properly insured as "goods." *Pritchett v. Ins. Co. of N. A.*, 3 Yeates (Pa.) 458.

Where the word "property" was used it has been held to include bank bills carried for purposes of trade. *Whiton v. Old Colony Ins. Co.*, 2 Met. (Mass.) 1.

And commissions of the master. *Holbrook v. Brown*, 2 Mass. 280; *Wiggin v. Mercantile Ins. Co.*, 7 Pick. (Mass.) 271.

The phrase "goods, specie and effects" has been held to cover money advanced by the master for the benefit of the ship. *Gregory v. Christie*, 3 Doug. 419.

Whether goods laden on deck are included in an ordinary policy on goods, see under title JETTISON.

Freight.—The French law does not allow insurance of freight, and some other Continental laws are in accord.

1 Arnould (6th ed.) 33; Lowndes Mar. Ins. (2nd ed.) 12.

But the English and American law permits freight to be insured. 3 Kent Com. 270; *Lucena v. Craufurd*, 3 B. & P. 102; *Michael v. Gillespy*, 26 L. J., C. P. 306; 2 C. B., N. S. 627; *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405.

"The word comprises all that is implied in the benefit derived by the ship owner from the employment of his ship." 1 Arnould Mar. Ins. (6th ed.) 31; *Flint v. Flemyng*, 1 B. & Ad. 45; *Riley v. Delafield*, 7 Johns. (N. Y.) 522.

Thus, besides ordinary freight, it includes chartered hire. *Winter v. Haldimand*, 2 B. & Ad. 649, per LORD TENNENT; *Forbes v. Aspinall*, 13 East 323, per LORD ELLENBOROUGH; *Etches v. Aldan*, 1 Man. & Ry. 157; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Cheriot v. Barker*, 2 Johns. (N. Y.) 346; *Huth v. N. Y. etc. Ins. Co.*, 8 Bosw. (N. Y.) 538; *Robbins v. N. Y. Ins. Co.*, 1 Hall (N. Y.) 325; *Mellen v. Nat. Ins. Co.*, 1 Hall (N. Y.) 452. And the benefit to the owner of both ship and cargo accruing from the transportation of her goods to a market. *Flint v. Flemyng*, 1 B. & Ad. 45; *De Vaux v. J'Anson*, 5 Bing. N. C. 519; *Miller v. Woodfall*, 8 E. & B. 493; 27 L. J. (Q. B.) 120; *Paradise v. Sun Mutual Ins. Co.*, 6 La. An. 596; *Hart v. Delaware Ins. Co.*, 2 Wash. (U. S.) 346; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Dumas v. Jones*, 4 Mass. 647; *Stillwell v. Commercial Ins. Co.*, 2 Mo. App. 22.

A charterer may insure his interest in freight under the general term "freight." 1 Parsons Mar. Ins. 174; 1 Arnould Mar. Ins. 35; 1 Phillips Ins. (5th ed.), § 480; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Higginson v. Dall*, 13 Mass. 96; *Sansom v. Ball*, 4 Dall. (Pa.) 459.

The *contra* has been held in New York. *Riley v. Delafield*, 7 Johns. (N. Y.) 522; *Robbins v. New York Ins. Co.*, 1 Hall (N. Y.) 325. Where also it was held that when a person had sold a vessel reserving the right to receive the freight due at the end of the voyage assured this would not be covered as freight. *Mellen v. National Ins. Co.*, 1 Hall (N. Y.) 452. This is disapproved by 1 Parsons Mar. Ins. 174, and by 1 Phillips Ins. (5th ed.), § 480.

"Freight on board" is equivalent to "freight" simply. *Robinson v. Manufacturers' Ins. Co.*, 1 Met. (Mass.) 143.

It has been held that "freight" alone would not cover the freight on live an-

imals. *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; 6 Harr. & J. (Md.) 408.

The freight insured may be for either the whole or any part of a voyage. *Violett v. Allnutt*, 3 Taunt. 419; *Taylor v. Wilson*, 15 East 324; *Leathely v. Hunter*, 7 Bing. 529; *Barclay v. Stirling*, 5 M. & S. 6; *Hall v. Brown*, 2 Dow's P. C. 367; *Michael v. Gillespy*, 26 L. J. (C. P.) 306; 12 C. B., N. S. 627.

The case of *Murdock v. Pott*, 2 Park Ins. 399, *contra*, is overruled.

"Freight" does not include passage money. *Denoon v. Home & Col. Ass. Co.*, L. R., 7 C. P. 341.

Profits.—Insurance of profits, though not allowed in France, Lowndes Ins. (2nd ed.) 15, is valid in England and the United States. 1 Arnould Mar. Ins. (6th ed.) 37; 1 Parsons Mar. Ins. 191; 1 Phillips Ins., § 181; 3 Kent Com. *271; *Grant v. Parkinson*, 6 T. R. 483; *Barclay v. Cousins*, 2 East. 544; *Eyre v. Glover*, 3 Camp. 276; 16 East 218; *Fosdick v. Norwich Mar. Ins. Co.*, 3 Day (Conn.) 108; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Mumford v. Hallett*, 1 Johns. (N. Y.) 433, 439; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39; *Tom v. Smith*, 3 Cai. (N. Y.) 245. But not on a bare expectation that a profit will be earned by a cargo not yet contracted for. *Knox v. Wood*, 1 Camp. 543; and see *Lucena v. Craufurd*, 3 B. & P. 84; *Anderson v. Morrice*, L. R., 10 C. P. 621, per BLACKBURN, J.

They may also be insured as part of the value of the goods. *Ionides v. Pender*, L. R., 9 Q. B. 531 at 535.

Profits expected from his investment by a shareholder in a company formed to lay an Atlantic cable are insurable. *Wilson v. Jones*, L. R., 1 Ex. 193; 2 Ex. 129; *Paterson v. Harris*, 30 L. J. (Q. B.) 354.

The goods from which the profit is expected must have been actually exposed to risk. 1 Arnould Mar. Ins. (6th ed.) 38; *McSwiney v. Royal Exch. Ass. Co.*, 14 Q. B. 634, 646; *Halhead v. Young*, 6 E. & B. 312; 25 L. J. (Q. B.) 290. And, in England, the assured must be legally interested in the goods at the time of the loss. *Stockdale v. Dunlop*, 6 M. & W. 224. But not so in the United States. *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; 1 Parsons Mar. Ins. 192.

The English law is clear that there can be no recovery unless there would

in fact have been a profit on the goods, 1 Arnould Mar. Ins. (6th ed.) 38; Grant v. Parkinson, 3 Doug. 16; Hendrickson v. Margitson, 2 East 549; Hodgson v. Glover, 6 East 316; Eyre v. Glover, 16 East 218.

The law of the United States is otherwise, there being a conclusive presumption that there would have been a profit. 1 Phillips Ins. (5th ed.), § 318; 1 Parsons Mar. Ins. 281; Patapasco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222; Alsop v. Commercial Ins. Co., 1 Sumn. (U. S.) 451; Fosdick v. Norwich Mar. Ins. Co., 3 Day (Conn.) 108; Mumford v. Hallett, 1 Johns. (N. Y.) 433; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39; Locke v. North American Ins. Co., 13 Mass. 61.

Profit must be named in the policy. Lucena v. Craufurd, 2 B. & P. N. R. 315; Anderson v. Morrice, L. R., 10 C. P. 609, 622, 624; cf. Niblo v. North Amer. Fire Ins. Co., 1 Sandf. (N. Y.) 551; but were held covered as "property" in Holbrook v. Brown, 2 Mass. 280.

Commissions.—1 Arnould Mar. Ins. (6th ed.) 39; Lowndes Ins. (2nd ed.) 18; 3 Kent Com. *271; Flint v. Le Mesurier, 2 Park. Ins. 563; Barclay v. Cousins, 2 East 544; King v. Glover, 2 B. & P., N. R. 206; Wells v. Philadelphia Ins. Co., 9 S. & R. (Pa.) 103; Putnam v. Mercantile Mar. Ins. Co., 5 Met. (Mass.) 386; Holbrook v. Brown, 2 Mass. 280.

The goods on which the commissions are to be paid must be actually on board at the time of the loss. 1 Arnould Mar. Ins. 39; Knox v. Wood, 2 Park. Ins. 563; 1 Camp. 543.

Passage Money.—1 Arnould Mar. Ins. (6th ed.) 36; Lowndes Ins. (2nd ed.) 58; Truscott v. Christie, 2 B. & B. 320; Gibson v. Bradford, 4 E. & B. 586; 24 L. J. (Q. B.) 159; Willis v. Cooke, 5 E. & B. 641; 25 L. J. (Q. B.) 16.

Bottomry and Respondentia.—These interests are insurable. 1 Arnould Mar. Ins. (6th ed.) 40, Lowndes Ins. (2nd ed.) 19; 1 Parsons Mar. Ins. 210; Glover v. Black, 3 Burr. 1394; 1 W. Bl. 396; Kenney v. Clarkson, 1 Johns. (N. Y.) 385.

They must be named. Glover v. Black, 3 Burr. 1394; 1 W. Bl. 396; Simonds v. Hodgson, 3 B. & A. 50; Robinson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250; cf. 1 Phillips Ins., § 427. But only the lender can properly insure. 1 Arnould Mar. Ins. (6th ed.) 40; 1 Phillips Ins., § 307; Williams v. Smith, 2 Cai. (N. Y.) 138; Cai. Cas. in Error (N. Y.) 119.

Salvage.—Lowndes Ins. (2nd ed.) 21. **General Average.**—1 Arnould Mar. Ins. (6th ed.) 68; Lowndes Mar. Ins. (2nd ed.) 21; Briggs v. Merchant Traders' Ass., 13 Q. B. 167.

Lien.—Lowndes Mar. Ins. (2nd ed.) 9. 21; Ebsworth v. Alliance Mar. Ins. Co., L. R., 8 C. P. 596; Donath v. Ins. Co., 4 Dall. 463; Russell v. Ins. Co., 4 Dall. 421; Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302.

Advances.—1 Arnould Mar. Ins. (5th ed.) 62; Lowndes Ins. (2nd ed.) 21; 1 Phillips Ins. (5th ed.), § 204; Anon., 2 Shaw 283; DeSilvale v. Kendall, 4 M. & S. 37; Wilson v. Martin, 2 Exch. 684; Hicks v. Shield, 7 E. & B. 633; 25 L. J. (Q. B.) 205; Allison v. Bristol Mar. Ins. Co., 1 App. Cas. 209; Williams v. North China Ins. Co., 35 L. T., N. S. 384; The Karnac, L. R., 2 P. C. 505, 514; Currie v. Bombay Native Ins. Co., L. R., 3 P. C. 72, 83; cf. Watson v. Shankland, L. R., 2 S. & D. App. Cas. H. L. 304; Russel v. Union Ins. Co., 1 Wash. (U. S.) 409; Seamans v. Loring, 1 Mason (U. S.) 127; Phoenix Ins. Co. v. Chadbourne, 31 Fed. Rep. 300; Burnham v. Boston Marine Ins. Co., 139 Mass. 399; Wright v. Williams, 20 Hun (N. Y.) 320; cf. The Thyatria, 8 Pro. Div. 155.

But advances are insurable only when the debt or the security will be extinguished by the loss. Lowry v. Bourdieu, 2 Doug. 468.

Thus, if the owners of a fishing vessel have a lien on the catch for money expended for bait, such money may be insured under the term "advances." Burnham v. Boston Ins. Co., 189 Mass. 399; Swift v. Mercantile Ins. Co., 113 Mass. 287.

A shipowner who is liable to refund advanced freight may insure it. Hall v. Janson, 4 E. & B. 500; 24 L. J. (Q. B.) 97.

A part owner of a vessel, who makes advances and disbursements on a venture engaged in by himself and the other owners, is in the position of a partner making advances to his firm, and has a lien on the vessel and cargo for his reimbursement, which constitutes an insurable interest. International Mar. Ins. Co. v. Winsmore (Pa.), 16 A. 516.

Where the agents, in New York, of the owners of a vessel in Georgia advanced, at the request of the owners, the necessary money to enable the vessel to proceed upon a voyage, taking out a policy of insurance to secure the money advanced, and on the loss of the vessel collected the insurance money,

But the wages of seamen or officers other than the master cannot be insured.¹

III. Who May be Insured—1. *Alien Enemies*.—Insurance effected by an alien enemy is void.²

2. *Insurable Interest*.—No policy of insurance is valid unless the assured has an interest in the property or thing insured, such that the loss of that property will be a pecuniary damage to him.³

the receipt thereof operated at once as an extinguishment of the debt, and a formal assignment of the claim by the agents to the libellant passed nothing; nor, by paying the loss, did the libellant acquire a right by way of subrogation to enforce the debt against the owners. *Phoenix Ins. Co. v. Chadbourne* (Mass.), 31 Fed. Rep. 300.

Master's Wages.—1 *Arnould Mar. Ins.* (6th ed.) 45, 89; 1 *Phillips Mar. Ins.* (5th ed.), § 213; *King v. Glover*, 5 B. & P. 206; *Hawkins v. Twizell*, 5 E. & B. 883; 25 L. J. (Q. B.) 160; *Foster v. Hort*, 2 Johns. Cas. (N. Y.) 327.

The master may also insure his "effects." *Duff v. Mackenzie*, 3 C. B., N. S. 16; 26 L. J. (C. P.) 313; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 163.

Premium.—*Glaser v. Corrie*, 1 M. & S. 52.

The Solvency of a Company.—1 *Phillips Ins.* (5th ed.), § 205, citing *Emerigon*, tom. 1, ch. 1, § 2.

1. 1 *Phillips Ins.* (5th ed.), § 212; *The Lady Durham*, 3 Hagg. 201; *The Neptune*, 1 Hagg. 222 at 239; *Webster v. De Tastet*, 7 T. R. 157.

While conceding this to be probable law, Mr. Arnould points out that under modern practice the seaman's wages should be insurable. No recent case has passed upon the subject. 1 *Arnould Mar. Ins.* (6th ed.) 42-45, 89.

A seaman who has the privilege of carrying goods may insure those goods. *Galloway v. Morris*, 3 Yeates (Pa.) 445.

A supercargo who is to receive as his compensation a gross sum out of the proceeds of the return cargo has an insurable interest. *New York Ins. Co. v. Robinson*, 1 Johns. (N. Y.) 616.

2. The early cases allowed such insurance without actually deciding it to be legal. See 1 *Arnould Mar. Ins.* (6th ed.) 131, *et seq.*; 1 *Parsons Mar. Ins.* 18, n. 3. But the law is now definitely settled as stated in the text. 1 *Arnould Mar. Ins.* (6th ed.) 131; 1 *Parsons Mar.*

Ins. 18-23; 1 *Phillips*, § 147, *et seq.*; 1 *Duer Mar. Ins.* 463; *Brandon v. Nesbitt*, 6 T. R. 23; *Bristow v. Towers*, 6 T. R. 35; *Furtado v. Rogers*, 3 B. & P. 191; *McConnell v. Hector*, 3 B. & P. 114; *Le Luneville v. Phillips*, 2 B. & P., N. R. 97; *Warin v. Scott*, 4 Taunt. 604; *Kellner v. Le Mesurier*, 4 East 396; *Gamba v. Le Mesurier*, 4 East 407; *Brandon v. Curling*, 4 East 410; *The Hoop*, 1 Rob. Admr. 196.

An alien enemy who has been licenced to trade may make a valid insurance. 1 *Arnould Mar. Ins.* (6th ed.) 134; *Wells v. Williams*, 1 Salk. 45; *Kensington v. Inglis*, 8 East 273; *Canway v. Gray*, 10 East 536; *De Tastet v. Taylor*, 4 Taunt. 233; *Usparicha v. Noble*, 13 East 332.

If the loss occurs before the assured becomes an alien enemy he can recover after the hostilities are over. 1 *Arnould Mar. Ins.* (6th ed.) 135; *Flindt v. Waters*, 15 East 260; *Harman v. Kingston*, 3 Camp. 150.

If the policy is made in ignorance of the existence of hostilities, although the insurance is void, the premium may be recovered. *Cone v. Bruce*, 12 East 225; *Hentig v. Staniforth*, 5 M. & S. 122. And so if the risk has not attached, although the policy is bad, if the contract is renounced. *Palyart v. Leckie*, 6 M. & S. 290 (*semble*). See 1 *Arnould Mar. Ins.* (6th ed.) 134.

The premium cannot be recovered if the contract was legal at its inception. *Furtado v. Rogers*, 3 B. & P. 191.

3. **Insurable Interest**—An exact definition of insurable interest is difficult to obtain. 1 *Parsons Mar. Ins.* 161, defines it as stated in the text, "any such interest as shall make the loss of that property a pecuniary damage to the insured." Perhaps the best, certainly the most celebrated statement is that of LAWRENCE, J., in *Lucena v. Craufurd*, 2 B. & P., N. S. 269, at 302: "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which at-

tend it, and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring. . . . The property of the thing and the interest derivable from it may be very different. . . . By interest in a thing, every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."

By the early common law insurance without interest was invalid. 1 Arnould Mar. Ins. (6th ed.) 126; Lucena v. Craufurd, 3 B. & P. 75; 2 B. & P., N. R. 269; Barclay v. Cousins, 2 East 244. But a class of policies in course of time came into use which contained clauses dispensing with proof of interest by the use of the phrases "interest or no interest," "without further proof of interest than the policy," or "this policy to be deemed sufficient proof of interest," or similar forms of words, which were purely wager policies yet were declared to be valid. Asseviedo v. Cambridge, 10 Mod. 77; De Paiba v. Ludlow, 1 Comyns 361; Dean v. Decker, 2 Stra. 1251; 1 Arnould Mar. Ins. (6th ed.) 123. The statute of 19 Geo. II, ch. 37, § 1, however, declared all insurance on ships belonging to his majesty or his subjects, or on goods laden on board them "interest or no interest, or without further proof of interest than the policy, or by way of wagering or gaming, or without benefit of salvage to the assurer." null and void. Berridge v. Mau On Ins. Co., 18 Q. B. Div. 346.

The result of the law and the statute is that an insurance of British property without interest is invalid, but insurance of foreign property without interest is valid. Thellusson v. Fletcher, 1 Doug. 315; provided the policy on its face shows that the insurance is made without interest. Cousins v. Nantes, 3 Taunt. 513; Nantes v. Thompson, 2 East 385; Craufurd v. Hunter, 8 T. R. 13.

The law of the United States clearly requires the assured to have an interest. 1 Parsons Mar. Ins. 160 and notes; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 163; Hancock v. Fishery Ins. Co., 3 Sumn. (U. S.) 132.

But one whose interest was not intended to be insured cannot claim the benefit of an insurance effected by others, although by the terms of the policy his interest would seem to be covered. Pacific Ins. Co. v. Catlett, 4 Wend. (N. Y.) 75.

Policies for Whom It May Concern.—An insurance for whom it may concern is limited to those who have an insurable interest, who may be lawfully insured, and for whom it was intended. Frierson v. Brenham, 5 La. An. 540; Haynes v. Rowe, 40 Me. 181; Stephenson v. Piscataqua etc. Ins. Co., 54 Me. 55; Newson v. Douglass, 7 Har. & J. (Md.) 417; Augusta Ins. etc. Co. v. Abbott, 12 Md. 348; Seamens v. Loving, 1 Mass. 127; Shearer v. Louisiana etc. Ins. Co., 14 La. An. 797.

Whether or not an insurable interest exists always depends upon the circumstances of the particular case, but the decisions have established the existence of such interest in certain classes of cases.

Owner.—The owner of property, of course, has an insurable interest in it. Marsh v. Robinson, 4 Esp. 98; Hutchinson v. Wright, 25 Beav. 444; 27 L. J., ch. 834; Provincial Ins. Co. of Canada v. Le Duc, L. R. 6, P. C. 224; Gray v. Buck, 78 Me. 477; The Sydney, 27 Fed. Rep. 119; International Mar. Ins. Co. v. Winsmore, 124 Pa. St. 61; Walls v. Helfenstein, 28 Wis. 632; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77. Though he owns only as trustee. Rhind v. Wilkinson, 2 Taunt. 237; *Ex parte* Houghton, 17 Ves. 253, 258; Hughes v. Mercantile Ins. Co., 44 How. (N. Y.) Pr. 351; Sleeper v. Union Ins. Co., 65 Me. 385; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Johnson v. Campbell, 120 Mass. 449.

This interest remains although he has conveyed the property as security. Smith v. Lascelles, 2 T. R. 187; Carr v. Providence Washington Ins. Co., 109 N. Y. 504; Oliver v. Greene, 3 Mass. 133; Bartlet v. Walter, 13 Mass. 267; Gordon v. Mass. Ins. Co., 2 Pick. (Mass.) 249; Locke v. North American Ins. Co., 13 Mass. 61; Higginson v. Dall, 13 Mass. 96, 99; Lazarus v. Commonwealth Ins. Co., 19 Pick. (Mass.) 81; Worthington v. Bearse, 12 Allen (Mass.) 382; Williams v. Cincinnati Ins. Co., Wright (Ohio) 542; Strong v. Manufac. Ins. Co., 10 Pick. (Mass.) 40; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535. Although the conveyance be absolute on its face. Alston

v. Campbell, 4 Bro. P. C. 476; *Hutchinson v. Wright*, 25 Beav. 444; 27 L. J., ch. 834; *Ward v. Beck*, 32 L. J. C. P. 113; *Provincial Ins. Co. of Canada v. Le Duc*, L. R. 6 P. C. 224; 43 L. J., P. C. 49; 31 L. T., N. S. 142; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. (Mass.) 81.

If the owner has chartered the vessel, the charterer to pay its value if lost, he retains an insurable interest. *Hobbs v. Hannam*, 3 Camp. 93.

A vendor who has sold under an agreement to pay £500 if the vessel is lost within three months, and who is liable for six months to contribute to a mutual insurance company for loss, still retains an insurable interest. *Reed v. Cole*, 3 Burr. 1512, and though the only case on the point, *Riley v. Delafield*, 7 Johns. (N. Y.) 522, is *contra*, there can be little doubt that a vendor who retains an interest in a particular voyage can insure that interest. 1 *Parsons Mar. Ins.* 186; 1 *Arnould Mar. Ins.* (6th ed.).

The mortgagor of a vessel covenanting to repay the debt and to insure the vessel has an insurable interest. *Wilke v. People's Fire Ins. Co.*, 19 N. Y. 184.

One who has contracted to purchase a vessel has an insurable interest if the title becomes absolute before loss, or if by the agreement the risk of loss becomes his. 1 *Parsons Mar. Ins.* 166; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Warder v. Horton*, 4 Binn. (Pa.) 529; *Simmes v. Marine Ins. Co.*, 2 Cranch (U. S.) 618; *Williams v. Smith*, 2 Cai. (N. Y.) 13.

As to the interest of the seller, see *Stuart v. Columbian Ins. Co.*, 2 Cranch (U. S.) 442; *Fernandez v. Great Western Ins. Co.*, 3 Rob. (N. Y.) 457. Although the agreement be oral, and so voidable under the statute of frauds. *Amsinck v. American Ins. Co.*, 129 Mass. 185.

The contrary was held in England in the case of an oral sale of cargo. *Stockdale v. Dunlap*, 6 M. & W. 224.

Insurance itself is an insurable interest which may be covered by a re-insurance. *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250.

A person with merely an equitable title has a valid insurable interest. *Hemel v. Providence Washington Ins. Co.*, 23 S. Car. 190.

A stockholder in a company has an insurable interest in a vessel owned by the company. *Riggs v. Commercial Mut. Ins. Co.*, 5 N. Y. Supp. 183.

The purchaser of unspecified goods has no insurable interest before the goods are appropriated to him. *Stock v. Inglis*, 9 Q. B. D. 708; L. R., 7 App. Cas. 345; 47 L. T., N. S. 417; 52 L. J., Q. B. 30; *Anderson v. Morice*, L. R., 10 C. P. 58, 609; L. R., 1 App. Cas. 713.

After the appropriation he has such interest. *Sparkes v. Marshall*, 2 Bing. N. Car. 76; *Colonial Ins. Co. of New Zealand v. Adelaide Mar. Ins. Co.*, L. R., 12 App. Cas. 128.

If the title has passed it is immaterial that the bill of lading has not been endorsed to the purchaser before the loss. *Joyce v. Swann*, 17 C. B., N. S. 84; *Seagrove v. Union Mar. Ins. Co.*, L. R., 1 C. P. 305; 1 H. & R. 302; 35 L. J., C. P. 172.

Although a vessel may be liable to forfeiture, for a cause not connected with the policy, she is nevertheless a subject of lawful insurance. *Polleys v. Ocean Ins. Co.*, 14 Me. 141.

Charterer.—A charterer has an insurable interest in the ship. *Oliver v. Greene*, 3 Mass. 133; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Robbins v. New York Ins. Co.*, 1 Hall (N. Y.) 325.

Lender on Bottomry.—But one who has loaned on bottomry has no such interest in the ship. *Goddard v. Garret*, 2 Vern. 269; 1 Park Ins. (8th ed.) 553.

Mortgagee.—A mortgagee has an insurable interest. *Irving v. Richardson*, 2 B. & Ad. 193; 1 Moo. & R. 153; *Roussel v. St. Nicholas Ins. Co.*, 52 How. Pr. (N. Y.) 495; 9 Jones & T. (N. Y.) 279; *Sclocovich v. Oriental Mut. Ins. Co.*, 13 Daly (N. Y.) 264; *Ins. Co. of Pennsylvania v. Phoenix Ins. Co.*, 71 Pa. 31.

A transferred his title to a vessel to a British subject and took a mortgage for the price. No money passed in the transaction and the transfer was intended to enable the vessel to be run as a British vessel. It was held that A retained, to the extent of the mortgage, an insurable interest in the vessel. *Sclocovich v. Oriental Mut. Ins. Co.*, 13 Daly (N. Y.) 264.

An owner of cargo who has paid money to reclaim cargo, and insured the money so paid, "loss to be paid in case ship does not arrive," has no insurable interest in the ship. *Kulen Kernp v. Vigne*, 1 T. R. 304. See also *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 319.

Consignee.—A consignee of goods has

an insurable interest in them. *Flindt v. Le Mesurier*, 2 Park Ins. 563; *Aldrich v. Equitable etc. Ins. Co.*, 1 Woodb. & M. 272. Especially if he has made advances upon them. *Godin v. London Ass. Co.*, 1 Burr. 489; *Carruthers v. Shedden*, 6 Taunt. 14; *Wolff v. Horncastle*, 1 B. & P. 316; *Robertson v. Hamilton*, 14 East 522. See *Conway v. Gray*, 10 East 536; *Ebbsworth v. Alliance Mar. Ins. Co.*, L. R., 8 C. P. 596.

Or if the consignment is made to secure a debt due him. *Smith v. Lascelles*, 2 T. R. 187.

One for whose benefit the consignment is made has an insurable interest. *Hill v. Secretan*, 1 B. & P. 315.

The consignee has no interest, however, after a stoppage *in transitu*. *Clay v. Harrison*, 10 B. & C. 99; 5 M. & R. 17.

Carrier.—A carrier responsible for the goods under his charge has an insurable interest. *Crowley v. Cohn*, 3 B. & Ad. 478; *Stephens v. Australasian Ins. Co.*, L. R., 8 C. P. 18; *Tate v. Hyslop*, 15 Q. B. Div. 368. See *Joyce v. Kennard*, L. R., 7 Q. B. 78.

Warehouseman.—So also has a warehouseman or wharfinger. *Waters v. Monarch Life & Fire Co.*, 5 E. & B. 870; 25 L. J., Q. B. 102.

Interest in Freight.—An interest in freight gives an insurable interest, but this can arise only when the goods are actually shipped. *Montgomery v. Eginton*, 3 T. R. 362; *Tonze v. Watts*, 2 Stra. 1251; *Michael v. Gillespy*, 2 C. B. (N. S.) 627; 26 L. J., C. P. 306; *Melcher v. Ocean Ins. Co.*, 60 Mo. 77. Or the performance of a binding contract entered upon so that but for the peril insured against the freight would have been earned. *Thompson v. Taylor*, 5 T. R. 478; *Horncastle v. Suart*, 7 East 400; *Moses v. Pratt*, 4 Camp. 297; *Warre v. Miller*, 4 B. & C. 538; *Williamson v. Innes*, 1 M. & Rob. 88; 8 Bing. 80, n.; *Davidson v. Willasey*, 1 M. & S. 313; *Foley v. United F. & M. Ins. Co.*, L. R., 5 C. P. 155; *Barber v. Fleming*, L. R., 5 Q. B. 59; *Mercantile S. S. Co. v. Tyser*, 7 Q. B. Div. 73; *Stone v. National Ins. Co.*, 19 Pick. (Mass.) 34; *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163; *Robinson v. Manufacturers' Ins. Co.*, 1 Met. (Mass.) 143; *Cheviot v. Barker*, 2 Johns. (N. Y.) 346; *Griswold v. New York Ins. Co.*, 3 Johns. (N. Y.) 321; *Livingston v. Columbian Ins. Co.*, 3 Johns. (N. Y.) 49; *De Longuemere v. N. Y. Fire Ins.*

Co., 10 Johns. (N. Y.) 202; *De Longuemere v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 128; *cf. Gordon v. American Ins. Co.*, 4 Denio (N. Y.) 360.

While the vessel is a mere "seeking ship" there is no insurable interest in freight to be earned. *Forbes v. Aspinall*, 13 East 323; *Hart v. Delaware Ins. Co.*, 2 Wash. (U. S.) 346; *Riley v. Hartford Ins. Co.*, 2 Conn. 368.

Where a cargo was partially shipped and no binding contract had been made for the balance, it was *held* that the insurable interest extended only to the freight of that actually on board. *Patrick v. Eames*, 3 Camp. 441.

A shipowner has an insurable interest in "freight" of his own goods. *Flint v. Flemyng*, 1 B. & Ad. 45.

And the interest arises as soon as the goods are ready to be put on board. *Devaux v. l'Anson*, 5 Bing. (N. C.) 519; 7 Scott 507; *Montgomery v. Eggington*, 3 T. R. 362.

One who has made advances in part payment of freight which cannot be recovered if the vessel is lost has an insurable interest in the freight to this extent. *Currie v. Bombay Native Ins. Co.*, L. R., 3 P. C. 72; *Allison v. Bristol Mar. Ins. Co.*, L. R., 1 App. Cas. 209; *Ellis v. Lafoul*, 8 Exch. 546; *Williams v. North China Ins. Co.*, 1 C. P. Div. 757; *Sansom v. Ball*, 4 Dall. (Pa.) 459.

But not so if the advance is a mere loan, and is recoverable although the vessel be lost. *Mansfield v. Matland*, 4 B. & Ald 582.

A shipowner has an insurable interest in advances made for freight which he must return if the freight is not earned. *Hall v. Janson*, 4 E. & B. 500; 24 L. J., Q. B. 97.

A charterer who has agreed to pay a lump sum as dead freight in the event of the voyage being prevented by a peril insured against has an insurable interest in freight. *Puller v. Staniforth*, 11 East 232; *Puller v. Glover*, 12 East 124; *Puller v. Halliday*, 12 East 494.

Interest in Profits.—The owner of goods has an insurable interest in the profit expected on them. *Grant v. Parkinson*, 3 Doug. 16; 3 B. & P. 85, n. *Barclay v. Causius*, 2 East 544; *Eyre v. Glover*, 16 East 218; 3 Camp. 276; *Halhead v. Young*, 6 E. & B. 312; 25 L. J., Q. B. 200; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397.

But not when the cargo has not even been contracted for at the time of loss. *Knox v. Wood*, 1 Camp. 543.

If, however, the goods are ready to be shipped and a legal certainty of profit exists, there is an insurable interest. *McSwinney v. Royal Exch. Assoc.*, 14 Q. B. 634, 646; 18 L. J., Q. B. 193; 19 L. J., Q. B. 222.

Yet not if the contract is voidable under the statute of frauds. *Stockdale v. Dunlop*, 6 M. & W. 224.

Interest in Bottomry or Respondentia.—A lender on bottomry or respondentia has an insurable interest in his loan. *Stainbank v. Fenning*, 11 C. B. 51; *Stainbank v. Shepherd*, 13 C. B. 418. But the borrower on bottomry has not. *Glover v. Black*, 3 Burr. 1394; *Simmons v. Hodgson*, 3 B. & Ad. 50.

Interest in Commissions.—One to whom goods are regularly consigned has an insurable interest in the commissions expected to be received on a consignment, and can insure them even while still not certain that the particular goods at risk will in fact be consigned to him. *Putnam v. Mercantile Mar. Ins. Co.*, 5 Met. (Mass.) 386.

Interest in Prize.—The government has an insurable interest in prizes taken during hostilities. *Lucena v. Crawford*, 2 B. & P., N. R. 269; *Sterling v. Vaughan*, 11 East 619; *Routh v. Thompson*, 13 East 274.

The captors, however, have none. *Lucena v. Crawford*, 2 B. & P., N. R. 269.

Unless in possession under circumstances in which a grant from the crown is an invariable custom. *Le Cros v. Hughes*, 3 Doug. 274; *Boehm v. Bell*, 8 T. R. 154; *Sterling v. Vaughan*, 11 East 617; 2 Camp. 225.

In the United States there is no insurable interest in prizes unless a law gives a share in them or a grant has actually been made. See *The Joseph*, 1 Gall. (U. S.) 545 at 558. per STORY, J.

Interest in Passage Money or Bounty.—A shipowner has an insurable interest in passage money. *Truscott v. Christie*, 2 B. & B. 320; *Gibson v. Bradford*, 4 E. & B. 586; 24 L. J., Q. B. 159.

And in a bounty paid by a government, provided it is the uniform custom to pay the bounty on mere proof of performance. *Devaux v. Steele*, 6 Bing. N. C. 358; 8 Scott 637.

Interest in Master's Earnings and Commissions.—A master has an insurable interest in his own earnings. *King v. Glover*, 2 B. & B., N. R. 206; *Hawkins v. Twizell*, 5 E. & B. 883; 25 L. J., Q. B. 160.

And his commissions. *King v. Glover*, 2 B. & P., N. R. 206.

One who has placed goods upon a vessel to be taken by seamen as needed and paid for out of the share of the catch of such seamen has an insurable interest in such shares. *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 132.

Interest in Insurance.—An underwriter has an insurable interest in his risks. *Bradford v. Symondson*, 7 Q. B. D. 456; 50 L. J., Q. B. 583; 45 L. T., N. S. 364.

Reinsurance is therefore a valid contract. *Merry v. Prince*, 2 Mass. 176; *New York S. & M. Ins. Co. v. Protective Ins. Co.*, 1 Story (U. S.) 458; *Bowery Ins. Co. v. Fire Ins. Co.*, 17 Wend. (N. Y.) 359.

Interest in a Lien.—The fact that one has a lien on either ship or cargo gives an insurable interest. *Briggs v. Merchant Traders' S. L. & A. Assn.*, 13 Q. B. 167; 18 L. J., Q. B. 178.

Part Owners.—A part owner of a vessel and its cargo engaged in a joint venture has an insurable interest in the venture to the extent of his advancements and disbursements made or liabilities incurred before the vessel is destroyed, and for which it would have been liable had the loss not occurred. *Internat. Marine Ins. Co. v. Winsmore*, 124 Pa. St. 81.

Where two of several plaintiffs, in an action on a policy of insurance on a vessel, were owners of the vessel, and all were in copartnership and joint owners of the cargo, it was held that a sufficient interest in the plaintiffs was shown to enable them to sustain the action. *Bulkley v. Derby Fishing Co.*, 1 Conn. 571.

One owning one half of a vessel and hiring the other half with a covenant to pay a fixed sum, in case of loss, may procure insurance on the whole vessel as his own property. *Oliver v. Greene*, 8 Mass. 133.

But one tenant in common of a vessel has no right, merely in virtue of such relation, to cause insurance to be made on property on board for his cotenant. *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 86.

See also as to the interest of part owners *Blanchard v. Waite*, 28 Me. 51; *Finney v. Fairhaven Ins. Co.*, 5 Metc. (Mass.) 192; *Garrel v. Hanna*, 5 Har. & J. (Md.) 412; *Finney v. Warren Ins. Co.*, 1 Metc. (Mass.) 16; *Reed v. Pacific Ins. Co.*, 1 Metc. (Mass.) 166; *Turner v. Burrows*, 5 Wend. (N. Y.)

IV. The Policy.—The contract between the insurer and assured is embodied in the policy. A policy is necessary,¹ and must specify the particular adventure, the names of the underwriters, and the sum insured. If it lacks either it is void.² The English law also requires that it contain the name or firm of one or more persons interested, or of the consignor or consignee, or of the person receiving and effecting the order to insure, or of the person or persons giving the order to effect the insurance.³

In England, it must be stamped,⁴ and cannot be made for a period greater than one year.⁵

An oral contract of insurance is valid.⁶

541; *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302; *Williams v. Ins. Co. etc.*, 1 Hilt. (N. Y.) 345.

Nature of Interest.—The interest must be a pecuniary interest. 1 Phil. Ins. 174; 1 Parsons Mar. Ins. 162, n. 1; *The Aurora*, 4 Ch. Rob. 218; *Warder v. Horton*, 4 Binn. (Pa.) 529.

It must exist at time of loss. *Powles v. Innes*, 11 M. & W. 10. But need not at the time the policy is made. *Rhind v. Wilkinson*, 2 Taunt. 237; 1 Arnould Mar. Ins. (6th ed.) 59.

Change of interest after loss is immaterial. *Sparkes v. Marshall*, 2 Bing. N. C. 774.

It is not necessary that the subject matter be indefeasible. *Stirling v. Vaughan*, 11 East 619, 629.

1. 1 Arnould Mar. Ins. (6th ed.) 227; 30 Vict., ch. 23, §§ 12, 7; *cf. Bhugwandass v. Netherlands etc. Ins. Co., L. R.*, 14 App. Cas. 83.

2. 1 Arnould Mar. Ins. (6th ed.) 227; 30 Vict., ch. 23, § 7; *In re The Arthur Average Assoc., L. R.*, 10 Ch. App. 542; *In re Padstow Total Loss Assoc.*, 20 Ch. Div. 137.

In *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, an agent of a marine insurance company, upon application for a marine insurance, instead of delivering a policy, executed and delivered to the applicant a receipt for a premium, which contained a brief statement of the risk insured. *Held*, that the receipt was simply evidence that the assured was entitled to an insurance in the usual form, and that the policy used by the company was to be looked to to ascertain the limitations and conditions of the contract, and the liability of the company.

Where goods are insured on "memorandum" or open policy entries of shipments, made on the blank book to which the policy is attached, are as valid as if made on the sheet on which

the policy is written. *Edwards v. Mississippi Valley Ins. Co.*, 1 Mo. App. 192.

Plaintiff, wishing to obtain insurance on his interest in the barque *P.* his agents, *L. C. & Co.*, employed *F.*, an insurance broker, who obtained from *W.*, agent of the company, this paper, dated June 20th, 1878: "No. 1002—\$1,200, *D. S. F. & M. Ins. Co.*, Wilmington, Del. This certifies that we have this day entered in the name of *L. C. & Co.*, for whom it may concern, on our open policy No. 1002, with (said company) a risk of \$1,200 on barque *P.*, at and from June 20th, 1878, to June 20th, 1879, loss, if any, payable in current funds, to Messrs. *L. C. & Co.*, or order, according to the terms and conditions of the policy." (Signed) "*J. S. W.*, agent." The paper was delivered to the broker to *L. C. & Co.*, and by them assigned in writing to plaintiff. No policy was ever prepared or issued by the company. In suit on said paper for a loss on said vessel, *held*, that the same did not constitute a valid and binding contract of insurance, nor could an action be maintained on it as such. *Delaware State Fire & Mar. Ins. Co. v. Shaw*, 54 Md. 546.

3. 1 Arnould Mar. Ins. (6th ed.) 229; 28 Geo. III, ch. 56, §§ 1 and 2.

4. For the law and cases in regard to the necessity and amount of stamps see 1 Arnould Mar. Ins. (6th ed.) 228.

This is law only in England. 30 Vict. ch. 23.

5. *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448; *Relief Ins. Co. v. Shaw*, 94 U. S. 574; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Dodd v. Gloucester Mut. Fishing Ins. Co.*, 120 Mass. 408.

6. In the United States it is *held* that the contract may be oral. *Emery v. Boston Mar. Ins. Co.*, 138 Mass. 398;

In the construction of the policy written words are to be given more force than the mere printed words of the form.¹

Any ambiguity in its provisions inserted for the safety of the underwriter will be construed most strictly against him.²

Any alteration in a material part made after the execution of the policy avoids it.³

1. *Interpreted with Reference to Ways of the Trade*.—The policy must always be interpreted with reference to the general, settled and well known usages of the trade.⁴

Phoenix Ins. Co. v. Ryland, 69 Md. 437.

1. 1 Arnould Mar. Ins. (6th ed.) 293; Robertson v. French, 4 East 130; Joyce v. Realm Ins. Co., L. R., 7 Q. B. 580; Dudgeon v. Pembroke, L. R., 9 Q. B. 581; L. R., 1 Q. B. D. 96; L. R., 2 App. Cas. 284; Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; Bert v. Brewers' etc. Ins. Co., 16 N. Y. Sup. Ct. 383; Dole v. New England etc. Ins. Co., 2 Cliff 394; Kratzenstein v. Western Assurance Co., 53 N. Y. Super. Ct. 505; Leeds v. Mechanics' Ins. Co., 8 N. Y. 351.

2. 1 Arnould Mar. Ins. (6th ed.) 295; Blackett v. Royal Exch. Ass. Co., 2 Cr. & J. 244; Carr v. Royal Exch. Ass. Co., 33 L.J. (Q. B.) 63; 5 B. & S. 433; Stewart v. Merchants' Mar. Ins. Co., 14 Q. B. D. 555; Melcher v. Ocean Ins. Co., 59 Me. 217; Palmer v. Warren Ins. Co., 1 Story (U. S.) 360; Seriba v. Ins. Co. of N. America, 2 Wash. (U. S.) 107; Donnell v. Columbian Ins. Co., 2 Sumn. (U. S.) 366; Cross v. Shutcliffe, 2 Bay (S. Car.) 220; cf. Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259.

An endorsement on the back of a policy—in the body of which the vessel was permitted, with certain exceptions, to prosecute voyages anywhere upon the globe—that the "vessel to be employed on the Gulf of California, and captain privileged to act as his own pilot without prejudice to this insurance," *held*, not to restrict the vessel to the Gulf of California. Gulf of California Nav. & Exp. Co. v. State Investment & Ins. Co., 70 Cal. 586.

3. *Alteration*.—1 Arnould Mar. Ins. (6th ed.), 261 and note.

An alteration in the place of destination is material. Laird v. Robertson, 4 Bro. P. C. 488; Campbell v. Christie, 2 Stark. 64; Forshaw v. Chabert, 3 Br. & B. 158.

So in the subject of the insurance. Langhorn v. Cologan, 4 Taunt. 330.

So of the day of sailing, where there

is a warranty to sail before a certain day. Fairlie v. Christie, 7 Taunt. 416.

An alteration made on the back of the policy does not vitiate the policy unless in an endorsement made and assented to by the underwriters; for unless so made and assented to, writing upon the back of the policy is immaterial and does not affect the policy. 1 Duer Ins. 82; 1 Arnould Mar. Ins. (6th ed.) 266. Which refers to Henderson v. Stevenson, L. R., 2 H. L. (Sc.) 470. See also Hounick v. Phoenix Ins. Co., 22 Mo. 52.

An oral promise not to take advantage of the fact of alteration is not binding. Campbell v. Christie, 2 Stark. 64.

Until the full amount of the policy is underwritten it is *in fieri*, and an alteration is immaterial so far as persons underwriting it after the change are concerned. Robinson v. Tobin, 1 Stark. 336.

4. *Usage*.—Very many cases have been decided in regard to the effect of trade usages upon the interpretation of the policy, all supporting the broad statement of the text. The contract of marine insurance is said to be especially open to the influence of usages. 1 Arnould Mar. Ins. (6th ed.) 277, *et seq.*; 1 Parsons Mar. Ins.; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383; Marine Ins. Co. v. Hodgson, 7 Cranch (U. S.) 332; Mobile Marine Dock etc. Ins. Co. v. McMillan, 27 Ala. 77; Rolker v. Great Western Ins. Co., 2 Sweeney (N. Y.) 275; Allen v. St. Louis Ins. Co., 85 N. Y. 473; Coit v. Com. Ins. Co., 7 Johns. (N. Y.) 385; Hancock v. Fishing Co., 3 Sumn. (U. S.) 132; Eyre v. Marine Ins. Co., 5 Watts & Serg. (Pa.) 116.

Thus evidence is admissible to show what place is understood by a particular "port." Constable v. Noble, 2 Taunt. 402; Payne v. Hutchinson, 2 Taunt. 405, note; Cockey v. Atkinson, 2 B. & Ald. 460; Brown v. Tayleur, 4 A. & E. 241.

To show that Mauritius is regarded as an "Indian" Island. *Robertson v. Clarke*, 1 Bing. 445. That the Gulf of Finland is part of the Baltic. *Uhde v. Walters*, 3 Camp. 16. That a vessel loaded at Tigre Island is regarded as loaded at Amelia Island. *Mason v. Atkins*, 3 Camp. 200. That "corn" includes all grains and beans and peas. *Mason v. Skurray*, 1 Park Ins. (8th ed.) 245. And also malt. *Moody v. Surridge*, 1 Park. Ins. (8th ed.) 245. But not rice. *Scott v. Bourdillion*, 2 B. & P., N. R. 213. That "salt" does not include "saltpetre." *Janame v. Bourdieu*, 1 Park. Ins. 245; 1 Arnould Mar. Ins. (6th ed.), note. That "roots" do not include sarsaparilla. *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385. Nor "skins," bear skins which are properly furs. *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202. That insurance on "outfits" covers one quarter of the catch in the whale trade. *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354. And protects the "blubber," or pieces of whale flesh, cut off from the whale and on deck. *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.) 603.

"Underwriters are presumed to know the usages of foreign ports to which vessels are destined; also the usages of trade and the political condition of foreign nations." Per *McLEAN, J.*, in *Hazard v. New England Mar. Ins. Co.*, 8 Pet. (U. S.) 557, 582; *Hartshorne v. Union etc. Ins. Co.*, 36 N. Y. 172; *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 75.

Evidence of a usage of vessels engaged in China trade to place their rigging and furniture upon sand banks and store them there, is admissible to show that while so stored they are still covered by the policy. *Pelly v. Royal Exch. Assoc. Co.*, 1 Burr. 341; *Brough v. Whitmore*, 4 T. R. 206.

So also a usage to stop at certain ports while on a certain voyage to show that touching there is not a deviation. 1 Arnould Mar. Ins. (6th ed.) 282; 1 Marsh. Ins. 186; 1 Phillips Ins. (5th ed.), § 133 *et seq.*

A usage to load outside the bar of the Tagus is admissible to show the meaning of "at and from Oporto." *Kingston v. Knibbs*, 1 Camp. 508. note.

A usage to land goods for Leghorn at Lazaretto is admissible to show that such landing is equivalent to discharge at Leghorn. *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 75.

An insurance company is bound by a

general usage, in the trade between Tuspan and Galveston, to carry honey on deck in the summer. *Orient Mut. Ins. Co. v. Reymershoffer*, 56 Tex. 234.

So usage is admissible to prove that a vessel at the bell buoy outside Port Louis has "arrived at" Mauritius. *Janson v. Lindsay*, 4 H. & N. 699.

As to proof of usage to carry deck cargo, to charge the underwriter for loss of goods laden on deck, see *JETTISON*; *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

Evidence of usage is admissible to show that "liberty to touch" includes liberty to take in salt. *Urquhart v. Bernard*, 1 Taunt. 450.

So usage is admissible to show that vessels in the East India trade remain covered by the policy while engaged on intermediate voyages on which it is customary for the East India Company to send them. *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Doug. 419; *Farquharson v. Hunter*, 1 Park. Ins. 105.

And in Newfoundland trade while on intermediate voyages to American ports. *Vallance v. Dewar*, 1 Camp. 503, *Ougier v. Jennings*, 1 Camp. 505, note.

And to show that outward cargo on vessels engaged in the Newfoundland and Labrador trade is not at once unloaded on arrival, but remains covered by the policy while carried about on the vessel until finally landed or used. *Noble v. Kennaway*, 2 Doug. 510.

The question, said *LORD MANSFIELD*, at page 512, is "not analogous to a question concerning a common law custom." So also a usage to take sea elephants was admitted to show that vessel was still covered by policy while engaged in such taking. *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26.

Evidence of usage as to the method of paying partial losses on valued policies of tobacco is admissible. *Fulton Ins. Co. v. Milner*, 23 Ala. 420.

Proof of usage of "double tripping" in towing barges on the Mississippi is admissible to show policy not avoided. *Pittsburgh Ins. Co. v. Dravo*, 2 W. N. C. 194.

A navigable bayou emptying into a river which empties into the Mississippi is a tributary of the Mississippi within the meaning of a policy of marine insurance. *Miller v. Citizens' etc. Ins. Co.*, 12 W. Va. 116.

The meaning of words in the policy may be a question for the jury, as depending on usage. *Houghton v. Gilbert*,

7 C. & P. 701 (*cargo*); St. Nicholas Ins. Co. v. Merchants' Ins. Co., 18 N. Y. Sup. Ct. 108.

But evidence of usage is not admissible to contradict the plain words of the policy, or to deprive the assured of his apparent rights. Thus the court refused to allow it to be shown by parol that in a particular trade the words "till discharged and safely landed," meant "until the ship was moored twenty-four hours in safety." *Parkinson v. Collier*, 2 Park. Ins. 653. And that "free from average" meant "fore from average unless general." *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385.

Nor was such evidence allowed in these cases to show that a boat hung at a ship's davits was not within a policy on "the body, tackle, apparel, ordnance, munition, boat and other furniture of" a certain ship. *Blackett v. Royal Exch. Assoc. Co.*, 2 Cr. & J. 244.

To show a usage not to pay a general average contribution on a policy "on money advanced on account of freight." *Hall v. Janson*, 4 E. & B. 500.

To show a usage not to pay for a loss by leakage caused by the vessel straining in a cross sea unless the cargo shifted or the casks were damaged. *Crafts v. Marshall*, 7 C. & P. 597.

To show the insurer not liable unless the cargo is inspected by port wardens and the damage ascertained by them. *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619.

To show an open policy to be a valued one. *Williams v. Continental Ins. Co.*, 24 Fed. Rep. 767.

To show goods on the wharf to be regarded as goods on board. *Smith v. Mobile M. & M. Ins. Co.*, 30 Ala. 167.

To show that a policy "to a port in Cuba and at and from thence to a port of advice in Europe" authorized going to two ports on the same island. *Hearne v. Mar. Ins. Co.*, 20 Wall. (U. S.) 488.

Nor will the usage be admitted where it is unreasonable. As a custom in a policy on freight to strike off one third of the gross freight as charges and pay only two-thirds to the assured. *McGregor v. Ins. Co. of Pennsylvania*, 1 Wash. (U. S.) 39.

Or a custom for the captain to sell the cargo without necessity. *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131.

The usage must be general. *Martin*

v. Delaware Ins. Co., 2 Wash. (U. S.) 254.

But it need not be invariably followed without exception. *Vallance v. Dewar*, 1 Camp. 503; 1 *Arnould Mar. Ins.* (6th ed.), 283.

Nor need it have been long in existence if general. *Noble v. Kennoway*, 1 Doug 510.

Usages will not be binding unless the person is actually cognizant of them, or from his mode of dealing, habits of life, or place of business cannot be supposed ignorant of them. 1 *Arnould Mar. Ins.* (6th ed.) 286; *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Irving*, 1 B. & Ad. 605; *Stewart v. Aberdeen*, 4 M. & W. 211; *Sweeting v. Pearce*, 7 C. B., N. S. 449; 9 C. B., N. S. 534; *Gabay v. Lloyd*, 3 B. & C. 793.

The usages of a single port are not admissible to explain a policy made at another where no such usage is proved to exist. Thus a usage of marine underwriters of Boston to except barratry of the master from the risks assumed when the assured is the owner of the vessel does not import such an exception by implication in a policy underwritten at Gloucester. *Parkhurst v. Gloucester etc. Ins. Co.*, 100 Mass. 301. See also *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.) 603; *Hazleton v. Manhattan Ins. Co.*, 11 Biss. (U. S.) 210; *Cobb v. Lime Rock F. & M. Ins. Co.*, 58 Me. 326; *Mason v. Franklin Fire Ins. Co.*, 12 Gill & J. (Md.) 468; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; *Macy v. Whaling Ins. Co.*, 9 Metc. (Mass.) 354; *Natchez Ins. Co. v. Stanton*, 2 Sm. & M. (Miss.) 340; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. (N. Y.) 26.

A policy referring to the usages of a particular port as the standard by which its liabilities are to be fixed, will be construed according to those usages only. *Union Bank v. Union Ins. Co.*, *Dudley* (S. Car.) 171.

Various Terms Construed. — The words "*loading off shore prohibited*," in a policy of marine insurance, are capable of being construed by the court without the aid of extrinsic evidence; and where the plaintiff puts such a policy in evidence in an action thereon, without extrinsic evidence of its meaning, there is no error in denying a nonsuit on that ground. In the absence of extrinsic evidence, the court would construe such words as merely intended to prohibit loading the vessel while lying at anchor away from

the shore, and not to prohibit loading at a bridge pier. *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 88.

"Lying at Anchor."—A vessel was lost while lying beached by the policy holder, with holes opened in her hull to allow the water to run in and out with the tide, and a cable from her bow fastened to a piece of iron sunk in the beach and another cable from her stern attached to an anchor. *Held*, that this was not "lying at anchor" within the meaning of the policy. *Reid v. Lancaster Fire Co.*, 19 Hun (N. Y.) 284.

"Leakage."—A clause in a marine policy providing that the insurer is "not liable for leakage of molasses or other liquids, unless occasioned by stranding or collision with another vessel," comprises leakage caused, by sea perils insured against as well as ordinary leakage, and from whatever receptacle it may occur. *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 433.

"Directly by a Sea."—Where animals are injured by the tossing and rolling of a vessel in a heavy sea, the injuries are not covered by a clause in a policy whereby the insurers become liable only for a loss of animals caused "directly by a sea." *Snowdon v. Guion*, 50 N. Y. Super. Ct. 137.

"Inboard Cargo."—A canal cargo certificate insured certain property, "inboard cargo" of boat *A. Held*, that this did not mean necessarily under deck, but a cargo not projecting over the rail of the vessel; and where the property was stowed on deck and covered with a tarpaulin, in the manner usual and customary with such vessels, *held* to be covered by the policy, especially where the company's agent was called upon to come and look at it, and said he thought it was all right. *Allen v. St. Louis Ins. Co.*, 46 N. Y. Super. Ct. 175.

"Registered Tonnage."—A warranty not to load a vessel more than her "registered tonnage" is a warranty not to load more tons of weight than the ship could carry, as entered upon the official record as the ship's tonnage. *Reck v. Phoenix Ins. Co.*, 7 N. Y. 492.

"Held in Trust."—A policy describing the goods insured as "merchandise held in trust" by warehousemen covers goods entrusted to them for keeping. The phrase "held in trust" is to be understood in its mercantile sense. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

Particular phrases were considered and construed in the following cases: *Pollock v. Donaldson*, 3 Dall. 570; *Insurance Co. v. Mordecai*, 22 How. (U. S.) 111; *Barney v. Ins. Co.*, 5 Har. & J. (Md.) 139; *Hemmenway v. Eaton*, 13 Mass. 108; *Wood v. New England Ins. Co.*, 14 Mass. 31; *Archbald v. Mercantile Ins. Co.*, 3 Pick. (Mass.) 70 ("Capture," "Detention"); *Tudor v. New Eng. etc. Ins. Co.*, 12 Cush. (Mass.) 554 ("Ice melting"); *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343 ("Invoice Price"); *Strong v. Sun Ins. Co.*, 31 N. Y. 103 ("Bursting of the boilers"); *Frichette v. State etc. Ins. Co.*, 3 Bosw. (N. Y.) 190 ("While being safely launched"); *West Ins. Co. v. Cropper* ("Breakage"), 32 Pa. St. 351; *Harris v. Mercantile Ins. Co.*, 17 How. (N. Y.) Pr. 188 ("Thieves," etc.); *Monongahela Ins. Co. v. Chester*, 43 Pa. St. 491 ("Thieves," etc.); *Orient etc. Ins. Co. v. Wright*, 23 How. (U. S.) 401; *Sun etc. Ins. Co. v. Wright*, 23 How. 412; *Ins. Co. v. Wright*, 1 Wall. 456; *Hurlburt v. Ins. Co.*, 2 Sumn. (U. S.) 471; *Andrews v. Essex etc. Ins. Co.*, 3 Mass. 6; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Douville v. Sun Mut. Ins. Co.*, 12 La. An. 259; *Libby v. Gage*, 14 Allen (Mass.) 261; *Roe v. Columbus Ins. Co.*, 17 Mo. 301; *McAllister v. Tennessee etc. Ins. Co.*, 17 Mo. 306; *Mercantile Ins. Co. v. State Ins. Co.*, 25 Barb. (N. Y.) 319; *Savage v. Corn Exchange etc. Ins. Co.*, 4 Bosw. (N. Y.) 1; *Hartshorne v. Union etc. Ins. Co.*, 5 Bosw. (N. Y.) 538; *Rolker v. Western Ins. Co.*, 8 Bosw. (N. Y.) 222; *Ogden v. New York etc. Ins. Co.*, 8 Bosw. (N. Y.) 248; *Mallory v. Commercial Ins. Co.*, 9 Bosw. (N. Y.) 101; *Swinnerton v. Columbian Ins. Co.*, 9 Bosw. (N. Y.) 361; *Hood v. Manhattan Ins. Co.*, 2 Duer (N. Y.) 191; *Ogden v. General Mut. Ins. Co.*, 2 Duer (N. Y.) 204; *Dow v. Whetten*, 8 Wend. (N. Y.) 160; *Holbrook v. Brown* ("Property on board"), 2 Mass. 280; *Faris v. Newburyport Ins. Co.*, 3 Mass. 476; *Haven v. Gray* ("Proceeds"), 12 Mass. 71; *Locke v. North American Ins. Co.*, 13 Mass. 61; ("Property"); *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507 ("Property"); *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429 ("Cargo and freight."); *Wiggin v. Mercantile Ins. Co.*, 7 Pick. (Mass.) 271 ("Cargo"); *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227 ("Cargo"); *Allegre v. Ins. Co.*, 2 Gill & J. (Md.) 136 ("Cargo");

The policy, if on goods, must give the name of the ship and of the master in order to identify the subject matter.¹ A mistake in the name is not important if the minds of the parties contemplate the same vessel.²

The insurance will be valid where the goods are merely stated to be "on board ship or ships," provided the name be declared as soon as known.³

Chesapeake Ins. Co. v. Allegre (Md.) 164 ("Cargo"); Whetton v. Old Colony Ins. Co., 2 Metc. (Mass.) 1 ("Property on board"); Bakewell v. United Ins. Co., 2 Johns. (N. Y.) 246 ("Skins"); Baker v. Ludlow, 2 Johns. (N. Y.) 289 ("Pickled fish"); Lenore v. United States Ins. Co., 3 Johns. (N. Y.) 178 ("The goods and cargo"); Duffanty v. Com. Ins. Co., Anth. (N. Y.) 114 ("Merchandise," "Curricule"); Huth v. New York etc. Ins. Co., 8 Bosw. (N. Y.) 538 ("Freight earned or not earned"); Patrick v. Ins. Co., 11 Johns. (N. Y.) 9 ("No risk in port but sea risk"); Wood v. New England Ins. Co., 14 Mass. 31 ("at sea").

1. 1 Arnould Mar. Ins. (6th ed.) 333.

2. Thus when the policy named "The Leonard," by mistake for "The Leopard." Hall v. Molineux, 6 East 358; or set out "The President" as "The American Ship President." Le Mesurier v. Vaughan, 6 East 382. Or gave "Las Tres Hermanas" as "The Three Sisters." Clapham v. Cologan, 3 Camp. 382.

So when the policy was on goods on "the brig Abeona," evidence was admitted to prove that there were two Abeonas, one a brig, the other a half brig or schooner, and that the latter was the one both parties had in mind. Sea Ins. Co. v. Fowler, 21 Wend. (N. Y.) 600.

The important thing is the meeting of the minds of the parties upon the particular risk. Accordingly a jury was held to be justified in holding that where a slip had been initialed for hides by ship or ships, and subsequently another slip intended to be substituted for the first was made out which ran for hides by "The Socrates," it was the intent of the parties to be bound whatever might be the ship by which the hides were sent. Ionides v. Pacific F. & M. Ins. Co., L. R., 6 Q. B. 674; L. R., 7 Q. B. 517.

If the ship, however, is important as affecting the risk, the mistake may prevent the policy from attaching. Thus

in the case just cited when the name "The Socrates" was given, the underwriter asked whether it was the "Socrates," a new Norwegian vessel, or "Socrate," an old French one. The broker replied he thought it was the former. In fact it was the latter, and the court held that the policy was not binding.

The word "steamship" has been held to import a three masted, square rigged vessel, capable of being propelled by steam or sails. Howard v. Orient Mut. Ins. Co., 2 Rob. (N. Y.) 539.

The fact that by law the particular vessel in the minds of the parties is not entitled to her register is immaterial. Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157.

3. **Ship or ships.**—This has long been the law. 1 Arnould Mar. Ins. Co. (6th ed.) 337; Kewley v. Ryan, 2 H Bl. 343.

It is not essential that the declaration be made before the loss. Harmon v. Kingston, 3 Camp. 150; Gledstanes v. Royal Exch. Ass. Co., 34 L. J. (Q. B.) 30; Ionides v. Pacific F. & M. Ins. Co., L. R., 6 Q. B. 674; L. R., 7 Q. B. 517; E. Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.) 214.

Nor is it necessary that it be in writing. 1 Arnould Mar. Ins. (6th ed.) 337, or signed by the underwriter. Robinson v. Touray, 3 Camp. 158; 1 M. & S. 217.

Where, however, the declaration is essential to the existence of the contract, declaration made after the loss does not bind the underwriter. Thus where the policy provided for insurance on shipments by vessel or steamboats during a period of six months, "endorsements to be evidence of the property at risk of the company," it was held that the assured could not endorse a shipment when he learned of the shipment and of its loss at the same time. Edwards v. St. Louis Perpetual Ins. Co., 7 Mo. 382; Douville v. Sun Mut. Ins. Co., 12 La. An. 259; 1 Phillips Ins. (5th ed.), § 227.

Where the policy was on goods

Where there are more than one such policy, the assured, in the event of a loss, may declare the ship on any policy he pleases, if it be fairly within the terms of the policy. The underwriter cannot defend by proving the arrival of a ship or ships in safety.¹ In the absence of a declaration, the policy applies to all subjects included in the description.²

2. *Voyage and Time Policies*.—A "voyage" policy is one in which the duration of the risk is limited by local termini; a "time" policy, one in which it is limited by time.³

The voyage policy must designate a terminus *a quo* and a terminus *ad quem*.⁴

The time policy simply designates fixed dates between which the risk shall continue and has no necessary reference to any voyage.⁵

Under a time policy the risk continues whether the property is at sea or in port.⁶

Such a policy may be retrospective.⁷ It may cover freight not due until after the expiration of the policy.⁸

"shipped on board of the Great Western Steamship Company" but no vessel was named, it was held that goods shipped on a steamer chartered by the company and placed regularly on the line, though not owned by it, were covered. *Croswell v. Mercantile Mut. Ins. Co.*, 19 Fed. Rep. 24.

But when the shipment was to be by the "State Line," it was held that the policy did not cover goods sent on a steamer chartered by the line for one trip, and left in possession of her owners. *Red Wing Mills v. Merchants' Mut. Ins. Co.*, 19 Fed. Rep. 115.

1. 1 *Arnould Mar. Ins.* (6th ed.) 340; *Kewley v. Ryan*, 2 H. Bl. 343; *Henchman v. Offley*, 2 H. Bl. 345 n.; 3 Doug. 135.

2. 1 *Phillips Ins.* (5th ed.), § 439.

3. 1 *Arnould Mar. Ins.* (6th ed.) 365. As to voyage policies see *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Patapasco Ins. Co. v. Briscoe*, 7 Gill & J. (Md.) 293; *Perkins v. Augusta etc. Ins. Co.*, 10 Gray (Mass.) 312; *Sea Ins. Co. v. Fowler*, 21 Wend. (N.Y.) 600; *Ferguson v. Phoenix Ins. Co.*, 5 Binn. (Pa.) 544; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408; *Steinbach v. Col. Ins. Co.*, 2 Cai. (N.Y.) 129; *De Longuemere v. N. Y. Ins. Co.*, 10 Johns. (N.Y.) 120; *Bell v. Marine Ins. Co.*, 8 Serg. & Rawle (Pa.) 98; *Ritchie v. Ins. Co.*, 5 Serg. & Rawle (Pa.) 501; *May v. S. C. Ins. Co.*, 3 Brev. (So. C.) 329.

4. 1 *Arnould Mar. Ins.* (6th ed.) 365; *Uhde v. Walters*, 3 Camp. 16.

It may, of course, include a voyage

out and home as a single risk. *Berm n v. Woodbridge*, 2 Doug. 781.

5. 1 *Parsons Mar. Ins.* 304; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378.

Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283; *Grausset v. Sea Ins. Co.*, 24 Wend. (N. Y.) 209; *Henshaw v. Mutual Safety Ins. Co.*, 2 Blatchf. (U. S.) 99.

In *Gamble v. Ocean Mar. Ins. Co.*, 1 Ex. Div. 141, reversing 1 Ex. Div. 8, a policy read at and from Bomarron to Newcastle-on-Tyne, and for fifteen days while there after arrival. The vessel arrived, discharged, took a new cargo and dropped to a new loading point within the port of Newcastle, and was injured there, all within the fifteen days after arrival. It was held to be a time policy, and the company to be liable.

Of course, geographical limits can be prescribed in a time policy and the insurance cease if the limits are transgressed. *Birrell v. Dryer*, 9 App. Cas. 345.

6. *Syers v. Bridge*, 2 Doug. 527; *North Amer. Ins. Co. v. Rogers*, 78 Me. 191; *Manly v. United Ins. Co.*, 9 Mass. 85.

7. *Hucks v. Thornton*, Holt N. P. 30. *Mead v. Davidson*, 4 H. & N. 701; 3 A. & E. 303; 1 H. & W. 156; *Folsom v. Mercantile etc. Ins. Co.*, 8 Blatchf. (U. S.) 170.

Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227.

8. *Michael v. Gillespie*, 2 C. B., N. S. 627.

It is enough to entitle the assured to recover that the damage took place during the time limited, although the extent of the damage was not ascertained until after the time has expired.¹

The day stated as the termination of the time is not included within the period covered.²

In computing the time, the meridian of the place of contract governs.³

In England, risks are limited to one year.⁴

"Mixed" policies set out termini but limit the risk by time.⁵

Some policies contain a provision that they shall continue in force after the date of expiration until notice is given of discontinuance.⁶

V. The Amount of the Insurable Interest.—The value of the interest, the amount recoverable in case of loss, depends upon the form of the policy; if "open," one set of principles govern; if "valued," another.

1. *Under Open Policies.*—An "open" policy is one in which the parties have stated no sum as the value of the interest, but have left the amount to be proved in the event of a loss.

1 Knight v. Faith, 15 Q. B. 649; Hoit v. Smith, 3 Johns. Cas. (N. Y.) 15; Howell v. Protection Ins. Co., 7 Ohio 384; Peters v. Phoenix Ins. Co., 3 S. & R. (Pa.) 25.

The jury may decide whether the loss did or did not occur within the time. Brown v. Neilson, 1 Cal. (N. Y.) 525.

2. Thus on coffee to be shipped between February 1st and July 15th, it was held that coffee shipped on July 15th was not protected. Atkins v. Boylston F. & M. Ins. Co., 5 Metc. (Mass.) 439.

3. In Walker v. Protection Ins. Co., 29 Me. 317, where a policy for one year was made on December 17th, to end at 12 o'clock noon, the loss occurred on December 17th of the following year. The defendant contended that it took place after noon at the place of loss, but the court ruled that the time of the place of contract governed, and as the loss took place before noon there, upheld a verdict for the plaintiff.

4. 30 Vict., ch. 23, § 8.

5. 1 Arnold Mar. Ins. (6th ed.) 373. A policy insured a vessel for a specified time for a particular voyage outward. After the voyage was made, but before the time had expired, the same underwriters insured the vessel for the return voyage, by a certificate made "under and subject to the conditions" of the existing policy. It was held that no liability accrued for a loss occurring after the time specified in the original

policy. Pitt v. Phoenix Ins. Co., 10 Dalv. (N. Y.) 281.

Such a policy does not attach unless the vessel is on the voyage set out. May v. Modigliani, 2 T. R. 30.

But if on that voyage the policy attaches wherever the vessel may be at the date set for beginning, it is not essential that she be at one terminus. 1 Phillips Ins. (5th ed.), § 928; Manly v. United M. & F. Ins. Co., 9 Mass. 85; Kent v. Manufacturers' Ins. Co., 18 Pick. (Mass.) 19; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

6. Thus a marine policy provided that it should "continue in force from the date of expiration until notice is given to this company of its discontinuance, the assured to pay for such privilege pro rata for the time used." The term of the policy expired October 5th. The assured sent on October 9th a month's premium, stating that it was "one monthly premium from October 5th to November 5th," on the insurance "as specified in the policy." Held, for the loss occurring November 6th the company was liable. Greenwich Ins. Co. v. Provident & Stonington S. S. Co., 119 U. S. 481. In this case MR. JUSTICE BRADLEY criticised policies of this kind as follows: "We cannot say that such a contract is a desirable one for insurers to make. Ordinarily, on an insurance for a specified time or adventure, such as a year, for example, or a voyage, they get their premium in ad-

On such a policy the value of the ship is its worth to the owner at the port where the voyage commences, including stores, provisions, outfit and wages paid in advance, together with the premium of insurance and the premiums on that premium, as well as stamp duty, if any, and commissions for effecting the insurance.¹

The value of freight is the sum payable to the owner for freight with premiums and commissions.²

The value of goods is the amount of the prime cost with the charges of shipping on board, stamp duty, if any, commissions and premiums, including premium on premium.³

vance for the risk of the whole period of adventure; and if a loss happen ever so soon after the insurance is effected, no abatement of the premium is made. This gives them the benefit of average losses in determinate times or adventures, which is the solid basis on which all insurance rests. But the insurance company saw fit to make the contract in the form it did; and having made it, it is bound by its terms. And according to that contract, we think that it continued to be liable for a loss, although it happened after the time covered by the premiums already paid, the assured being only liable to pay pro rata for the time used and not yet paid for." See also *North American Ins. Co. v. Rogers* (Me.) 1 N. E. 792.

1. Open Policies—The Ship.—1 Arnould Mar. Ins. (6th ed.) 320; *Parsons Mar. Ins.* 243.

Snell v. Delaware Ins. Co., 4 Dall. (U. S.) 430. Where the blanks in the "value" clause in a marine insurance policy are not filled up, the policy is an open and not a valued policy. *Snowden v. Guion*, 101 N. Y. 458. See also *Williams v. Continental Ins. Co.*, 24 Fed. Rep. 767.

That the value includes premiums is well established. *Carson v. Marine Ins. Co.*, 2 Wash. (U. S.) 468; *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436.

2. Freight.—1 Arnould Mar. Ins. (6th ed.) 321; 2 Phillips Mar. Ins. (5th ed.), § 1238, note; *Forbes v. Aspinall*, 13 East 323; *Palmer v. Blackburn*, 1 Bing. 61; *McGregor v. Ins. Co. of Pennsylvania*, 1 Wash. (U. S.) 39; *Stevens v. Columbian Ins. Co.*, 3 Cal. (N. Y.) 43.

If the insurance is on freight, part of which is payable on the passage out and part on the passage home, the whole is recoverable if a loss occurs before any is due. *Meech v. Philadelphia F. & In-*

land Ins. Co., 3 Whart. (Pa.) 473. But if part has become due and been paid, that amount is to be deducted. *Hughes v. Union Ins. Co. of Baltimore*, 8 Wheat. (U. S.) 294.

3. Goods.—1 Arnould Mar. Ins. (6th ed.) 321; 1 *Parsons Mar. Ins.* 251; *Usher v. Noble*, 12 East 646; *Tuite v. Royal Exch. Co.*, 1 Park Ins. (8th ed.) 224; *Gahn v. Broome*, 1 Johns. Cas. (N. Y.) 120; *Stevens v. Columbian Ins. Co.*, 3 Cal. (N. Y.) 43; *Anon.*, 1 Johns. (N. Y.) 312; *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343; *Fontaine v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 29; *E. Carver Co. v. Manuf. Ins. Co.*, 6 Gray (Mass.) 214; *Hartshorn v. Shoe etc. Ins. Co.*, 15 Gray (Mass.) 240.

In *England*, the prime cost is settled generally, but not conclusively, by the invoices. 1 Arnould Mar. Ins. (6th ed.) 321; 2 Phillips Ins., § 1229.

In the *United States*, the rule varies. 1 *Parsons Mar. Ins.* 246.

In *New York*, the actual cost has been held to determine the prime cost. *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343.

In *Massachusetts*, the invoice price. *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436.

In the *United States* courts, the actual market value. *Snell v. Delaware Ins. Co.*, 4 Dall. (U. S.) 430; 1 Wash. (U. S.) 509; *Carson v. Marine Ins. Co.*, 2 Wash. (U. S.) 468.

In *Warren v. Franklin Ins. Co.*, 104 Mass. 518, it was held that, in estimating a loss under an open policy of marine insurance, evidence of the usage of a particular port is inadmissible to vary the rule that the damages are to be based on the market value of the goods at the inception of the risk, and not on the invoice price. In that case

Of course, the amount recoverable is limited to the amount of the interest at the time of the loss.¹

2. *Under Valued Policies.*—A “valued” policy is one in which the parties have stated a particular sum as the value of the interest insured.²

a policy of insurance provided that, in case of the loss, all sums due to the insurers when the loss became due should be first deducted, and all sums coming due should be paid or satisfactorily secured before payment of the loss. It was *held* that, in making up judgment in an action on the policy for the amount of the loss, the defendants could deduct the amounts of the notes due to them from the insured although they were not due at the beginning of the action; and the loss being payable in gold and the notes in currency, that the value of the notes in gold at the time they fell due should be ascertained, and such value deducted from the amount of the loss.

Where the price of the goods is expressed in foreign currency, and there is no current rate of exchange, Mr. Arnould, citing 1 *Magens Ins.* 41, § 40, and *Benecke Prin. of Indem.* 119, says the rule is to estimate the value of specie to the amount stated in the foreign currency, and value as though the cargo had been specie. 1 *Arnould Mar. Ins.* (6th ed.) 322.

If there is a current rate of exchange the value is the value at the port of the invoice price at the rate of exchange current at the beginning of the risk. 1 *Arnould Mar. Ins.* (6th ed.) 322; 2 *Phillips Ins.* (5th ed.), § 1231; 1 *Parsons Mar. Ins.* 249.

The case of *Shellusson v. Bewick*, 1 *Esp.* 77, *contra*, where the rate of exchange current at the time of adjustment was taken, is condemned by all the writers cited.

Where a policy of marine insurance provided that a loss, if any, should be payable to the Bank of Montreal, in funds current in the city of New York, it was *held* that in estimating the liability of the insurers upon the occurrence of a loss the premium upon gold should not be allowed in favor of the assured. *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513.

Where a drawback is paid on goods exported, it is not to be deducted from the invoice or actual price. 2 *Phillips Ins.* (5th ed.), § 1235; 1 *Arnould Mar. Ins.* (6th ed.) 323; *Gahn v. Broome*, 1

Johns. Cas. (N. Y.) 120; *Minturn v. Columbian Ins. Co.*, 1 *Johns. Cas.* (N. Y.) 122; 10 *Johns.* (N. Y.) 75.

Continuing Policy.—Where the policy is a continuing policy, covering various shipments made at various times, the amount payable in case of any particular loss is such proportion of the actual loss as the whole sum assured bears to the whole amount of insurable interest at risk at the time of this loss. *Crowley v. Cohen*, 3 B. & A. 478; *Joyce v. Kennard*, L. R., 7 Q. B. 78; 1 *Arnould Mar. Ins.* (6th ed.) 327; *Columbian Ins. Co. v. Catlett*, 12 *Wheat.* (U. S.) 383; 2 *Phillips Ins.* (5th ed.), § 1228.

1. *Carroll v. Boston Mar. Ins. Co.*, 8 *Mass.* 515; *Copeland v. Mercantile Ins. Co.*, 6 *Pick.* (Mass.) 108.

2. **Valued Policies.**—The valuation is properly stated in the blank left in the printed form after the words “valued at ———.”

It must clearly appear from the policy that the parties agreed on the amount stated as the value of the interest.

Thus where no sum was inserted in the space after the words “valued at,” but the words “as under” were written in, and further down the figures £1,300 were written in the margin, it was *held* not to be a valued policy. *Wilson v. Nelson*, 5 B. & S. 354. In full accord are *Williams v. Continental Ins. Co.* of New York City, 4 *Fed. Rep.* 767; *Snowden v. Guion*, 101 N. Y. 458.

Where the policy was for \$10,000 on vessel and freight, the vessel valued at \$8,000, it was held an open policy as to the freight. *Riley v. Hartford Ins. Co.*, 2 *Conn.* 368.

Where the policy in the margin was stated to be “on profits,” and the blank following the description of the cargo was filled in with “valued at \$2,500,” parol evidence was not allowed to show that it had been the intent to value the profits at \$2,500. *Munford v. Hallett*, 1 *Johns.* (N. Y.) 434.

A running policy of marine insurance contained a stipulation that no shipments should be considered as insured until approved and endorsed on

Under such a policy the valuation stated is conclusive, except in case of fraud, and the assured may recover the full sum in the event of a loss, although in truth his actual interest was much less valuable.¹

The court may, however, enquire whether the assured had any

the policy, the valuation to be fixed by the endorsement. It was held that the policy was not an open but a valued one; that endorsement of a shipment and the valuation thereof constituted a separate and distinct contract of insurance; and that the contract was not complete as to any specific shipment until the valuation thereof was endorsed on the policy. *Schaefer v. Baltimore etc. Ins. Co.*, 33 Md. 109.

The provision "no proof of property shall be required in case of loss" does not amount to a valuation. *Hemmenway v. Eaton*, 13 Mass. 108.

As to the form see also *Howes v. Union Ins. Co.*, 16 La. An. 235.

The valuation is presumed to be the valuation of the assured's interest in the property, not that of the property itself. Thus where the policy was on one-fourth of a vessel valued at \$5,000 it was held that the valuation applied to the one-fourth interest, not to the whole vessel. *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79; *Feise v. Aquilar*, 3 Taunt. 506; *Allison v. Bristol Mar. Ins. Co.*, 1 App. Cas. 209.

"This agreement is in general conclusive between the parties to the policy, not of the value of the property at risk, but of the interest which that valuation is sufficient to cover." Per WASHINGTON, J., in *Watson v. Ins. Co. of North America*, 3 Wash. (U. S.) 1.

An agreement between the parties to reduce foreign currency to domestic at certain fixed rates has been held not to render the policy valued. *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273. But see *Benecke Prin. of Indem.* 159.

1. 1 *Arnould Mar. Ins.* (6th ed.) 299; 3 *Kent Com.* 274; 2 *Phillips Ins.* (5th ed.), § 1189 *et seq.*; *Kidd v. Greenwich Ins. Co.*, 35 Fed. Rep. 351; *Lewis v. Rucker*, 2 Burr. 1167; *Shaws v. Fenton*, 2 East 109; *Marshall v. Parker*, 2 Camp. 69; *Barker v. Janson*, L. R., 3 C. P. 303; *North of England Ins. Assoc. v. Armstrong*, L. R., 5 Q. B. 244; *Lidgett v. Secretan*, L. R., 6 C.

P. 616; *MacNair v. Caulter*, 4 Bro. P. C. (S. Car.) 450; *Aubert v. Jacobs*, *Wightwick* 118; *Wilson v. Wordil*, *Fac. Dec.* (1781-1789), p. 207; *Young v. Dear*, *Fac. Dec.* (1796-1801), p. 140; *Rhand v. Robb*, *Fac. Dec.* (1801-1807), p. 433; *Smith v. Flemming*, 12 C. C. S. 138; 22 *Scot. Jur.* 7; *Cole v. Louisiana Ins. Co.*, 2 *Martin (La.) N. S.* 165; *Brook v. Louisiana State Ins. Co.*, 4 *Martin (La.) N. S.* 640, 681; *Akin v. Mississippi M. & F. Ins. Co.*, 4 *Martin (La.) N. S.* 661; *Hinck v. Home Ins. Co.*, 19 La. An. 527; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *Patapsco Ins. Co. v. Briscoe*, 7 G. & J. (Md.) 293; *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Lovering v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Forbes v. Manufacturers' Ins. Co.*, 1 *Gray (Mass.)* 371; *Mutual Mar. Ins. Co. v. Munro*, 7 *Gray (Mass.)* 246; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Boardman v. Boston Ins. Co.*, 146 Mass. 442; *Lockwood v. Sangamo Ins. Co.*, 46 Mo. 71; *Dumas v. United States Ins. Co.*, 12 S. & R. (Pa.) 437; *Pritchett v. Ins. Co. of North America*, 3 *Yeates (Pa.)* 458.

"The very object of putting the contract into the form of a valued instead of an open policy is to prevent disputes as to the amount to be recovered by the assured in case of a total loss by the perils insured against, and the premium paid to the insurers is regulated accordingly." GRAY, J., in *Phoenix Ins. Co. v. McCoon*, 100 Mass. 475. In this case the excess of the *bona fide* valuation of the ship was \$10,000, and the excess of that of the freight and outfit proportionate.

The fact that the valuation is very greatly in excess of the actual value may be evidence of fraud. 1 *Arnould Mar. Ins.* (5th ed.) 302; *Ionides v. Pender*, L. R., 9 Q. B. 531.

Overvaluation is simply presumptive evidence of fraudulent intent strong in proportion to the excess, which presumption may be repelled by proof. *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Catron v. Tennessee Ins. Co.*, 6 *Humph. (Tenn.)* 176.

interest in the property valued,¹ or whether the true subject matter is properly insured under the subject insured;² or whether all the property valued has ever been at risk.³

The valuation is not to be opened in case of a partial loss.⁴

Where there is prior insurance, the assured, although his policy be valued, cannot recover upon it more than will, with what has been received on the prior policies, make up his whole loss.⁵

1. *Williams v. N. China Ins. Co.*, 1 C. P. D. 757.

2. *Denoon v. Home & Colonial Ass. Co.*, L. R., 7 C. P. 341.

Here the policy was on valued freight, and the court enquired whether passage money for coolies, which had been considered in fixing the valuation, could properly be insured as freight.

3. The assured can recover only for what has been at risk, and if, in fact, part of the property has not been at risk he cannot recover the full valuation. The court can always enquire on this point. The valuation is conclusive only when all has been at risk. *Le Pyre v. Farr*, 2 Vern. 716; *Amery v. Rogers*, 1 Esp. 207; *Patrick v. Eames*, 3 Camp. 441; *Forbes v. Aspinall*, 13 East 327; *Rickman v. Carstairs*, 5 B. & Ad. 651; *Tobin v. Harford*, 13 C. B., N. S. 791; 17 C. B., N. S. 528; *Brooke v. Louisiana State Ins. Co.*, 4 Martin (La.) N. S. 640; *Cooledge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Atlantic Ins. Co. v. Lunar*, 1 Sandf. Ch. (N. Y.) 91.

4. The law in England is well settled in accord with the text. 1 *Arnould Mar. Ins.* (5th ed.) 299; *Lewis v. Rucker*, 2 Burr. 1167; *Usher v. Noble*, 12 East 639; *Tunno v. Edwards*, 12 East 438; *Forbes v. Aspinall*, 13 East 323; *Goldsmid v. Gillies*, 4 Taunt. 803; *Irving v. Manning*, 1 H. L. C. 817; 6 C. B. 391; 2 C. B. 784; 1 C. B. 168.

In the *United States* the law is not so well settled. The general rule is in accord with the English law. *Bentaloe v. Pratt, Wall*, (C. C.) 58; *Griswold v. Union Mut. Ins. Co.*, 3 Blatchf. (U. S.) 231; 2 *Phillips Ins.* (5th ed.), § 1203.

The rule in *Massachusetts* is otherwise. In case of partial loss the valuation is opened. *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365; *Bedford Commercial Ins. Co. v. Parker*, 2 Pick. (Mass.) 1; *Brewer v. American Ins. Co.*, 123 Mass. 78; *cf. Forbes v. Manufacturers' Ins. Co.*, 1 Gray (Mass.) 371.

In *Natchez Ins. Co. v. Buckner*, 5

Miss. 63, and *Stanton v. Natchez Ins. Co.*, 6 Miss. 744, the valuation was held to open.

5. Thus in *Craig v. Murgatroyd*, 4 Yeates (Pa.) 161, where there had been a total loss of a cargo of coffee insured by one policy for \$12,000, and in a subsequent policy at a valuation of twenty cents per pound, it was held that on the subsequent policy only the value of as many pounds at twenty cents per pound could be recovered as the amount received on the first policy did not pay for at the actual price of the coffee.

The same rule was followed in similar circumstances in *McKim v. Phoenix Ins. Co.*, 2 Wash. (U. S.) 189.

The law is clear as stated in the text. *Watson v. Ins. Co. of North America*, 3 Wash. (U. S.) 1; *Murray v. Ins. Co. of Pennsylvania*, 2 Wash. (U. S.) 186; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55 at 71.

The valuation stated in the policy has been held conclusive of the true value of the property in *Kenny v. Union Mar. Ins. Co.*, 1 Russ. & G. (N. S.) 313, where in a suit on a policy on a vessel valued at \$16,000, it was held that no recovery could be had, since that sum had already been received from prior insurance; and no enquiry into the true value, and consequently into the actual loss, was made.

The *contra* was held in *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, where the true value, \$5,000, was shown, and the valuation in the policy, \$2,000, was limited to the remainder after the amount received on another policy, \$3,000, had been deducted.

In *Pleasants v. Maryland Ins. Co.*, 8 Cranch (U. S.) 55, nine policies had been made in Philadelphia on a cargo from Cronstadt or St. Petersburg. In seven no value had been set upon the ruble in which the cargo was valued; in the eighth it was valued at forty cents, and in the ninth, that in suit, at forty-six cents. It was held that the full value of the cargo in rubles at forty-six cents, less the amount of insurance

The valuation is not conclusive in determining the value to settle a constructive total loss. The actual and not the stated value is to govern in that case.¹

In estimating the value for the purpose of the valuation, the same rules hold as in the case of open policies.

Policies on the ship are now generally valued, and the amount is determined by estimating the worth to the owner at the outset of the risk, including stores, outfit, advance wages, premiums of insurance and commissions.²

So in the case of cargo, the valuation may include the first cost, freight, premiums, expected profit, duty and landing charges.³ The valuation is generally distributed among the articles constituting the cargo, a specific value being assigned each class of articles.⁴

already received, was the amount recoverable.

In *England*, the law is well settled that the valuation is conclusive between the parties, and only the difference between the agreed value and the amount paid under other policies can be recovered. The true value is not to be considered. *Bruce v. Jones*, 1 H. & C. 769; *Irving v. Richardson*, 1 Moo. & R. 153; *Morgan v. Price*, 4 Exch. 615.

Bonsfield v. Barnes, 4 Camp. 228, *contra*, is overruled.

1. This is the English law. *Irving v. Manning*, 6 C. B. 422; *Manning v. Irving*, 1 C. B. 168; *Cambridge v. Anderson*, 2 B. & C. 691; *Allen v. Sugrue*, 8 B. & C. 561; *Young v. Turing*, 2 Man. & Gr. 593.

And generally that of the United States. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Boardman v. Boston Mar. Ins. Co.*, 146 Mass. 442.

The law in *Massachusetts* is otherwise. There the valuation stated in the policy is held to govern. *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Crook v. Com. Ins. Co.*, 21 Pick. (Mass.) 456; *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.) 154; *Heebner v. Eagle Ins. Co. of Cincinnati*, 10 Gray (Mass.) 131.

These cases related to a total loss of the vessel, but in a late case the court, while recognising the rule, refused to apply it in the case of valued freight, and held the actual value to govern. *Boardman v. Boston Mar. Ins. Co.*, 146 Mass. 442.

The early rule will not be extended. Per HOLMES, J., at p. 452: "We have no disposition to depart from the rule so far as it is settled, but in the existing

state of the decisions elsewhere it should not be extended."

The valuation was held conclusive in *Sherlock v. Globe Ins. Co.*, 1 Cin. Sup. Ct. Rep. 193.

2. 1 Arnould Mar. Ins. (6th ed.) 311; *Stevens Ave.* 190; *Star of Hope*, 9 Wall. (U. S.) 203.

The value cannot be diminished by proof of wear and tear, and of the consumption of stores, etc., since the beginning of the risk. *Shawe v. Felton*, 2 East 109.

3. 1 Arnould Mar. Ins. (6th ed.) 303; *Usher v. Noble*, 12 East 639 at 647; *Forbes v. Aspinall*, 13 East 323 at 327.

4. 1 Arnould Mar. Ins. (6th ed.) 314. This is not essential, for if the kinds of goods are unknown a policy may be taken out on "goods thereafter to be declared and valued." 1 Arnould Mar. Ins. (6th ed.) 315. But it will be regarded as an open policy unless a declaration and valuation is made before the loss. *Harman v. Kingston*, 3 Camp. 150; *Craufurd v. Hunter*, 8 T. R. 13, 15, n.

Where the proceeds of the outward cargo are to purchase the homeward, and the insurance is for the voyage out and home, the valuation of the outward cargo is presumed to be the valuation of its whole proceeds for the return voyage or for subsequent passages. 2 Phillips Ins. (5th ed.), §§ 1197, 1198; 1 Arnould Mar. Ins. (6th ed.) 316; *McKim v. Phoenix Ins. Co.*, 2 Wash. (U. S.) 89; *Haven v. Gray*, 12 Mass. 71; *Whitney v. American Ins. Co.*, 3 Cow. (N. Y.) 610; 5 Cow. (N. Y.) 712.

The value is to be taken with reference to the port of shipment, and so cannot include the amount of freight

Where freight is insured by a valued policy, the assured can recover the full valuation if the risk has ever attached.¹

A valuation at a round sum is presumed to include premiums of insurance.²

Where the valuation is a round sum on more than one subject, as on ship and freight, or ship, cargo and freight, it seems that the valuation may be distributed among them in the proportion which the actual value of each bears to their combined actual value.³

VI Double Insurance and Priority.—Double insurance exists whenever the same risk, interest and subject matter are covered by more than one policy.⁴

payable on delivery. *Tamvaco v. Lucas*, 1 B. & S. 185, 3 B. & S. 89.

Where a number of boxes of lemons, composing the cargo of a ship, were insured by a single contract of insurance on the whole number of boxes, *held*, that the valuation of the lemons in the policy of insurance, at so much per box, did not make the insurance an insurance on each box. *Hernandez v. Sun etc. Ins. Co.*, 6 Blatchf. (U. S.) 317.

1. **Freight.**—1 *Arnould Mar. Ins.* (6th ed.) 312; *Hart v. Delaware Ins. Co.*, 2 Wash. (U. S.) 346; *Williams v. London Ass. Co.*, 1 M. & S. 318; *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Davy v. Hallett*, 3 Cai. (N. Y.) 16.

There can be no deduction from the valuation although all the expense of earning the freight was prevented by the loss. 1 *Arnould Mar. Ins.* (6th ed.) 311.

Where the voyage consists of successive stages, the valuation is to be taken as that of each successive freight. It may, however, be shown to be the aggregate of the successive freight. 2 *Phillips Ins.* (5th ed.), § 1208; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443.

In the event that the insured has received any freight before the loss this amount must be deducted from the valuation. *Robertson v. Majoribanks*, 2 Stark. 573.

In *Davy v. Hallett*, 3 Cai. (N. Y.) 16, where freight out and back was insured, and a double premium paid, it was *held* that the amount of the outward freight which had been received was not to be deducted from the valuation.

In *Dumas v. United States Ins. Co.*, 12 S. & R. (Pa.) 437, freight was valued at \$7,500. The shipowner also owned

two thirds of the cargo. He abandoned to the underwriters, who claimed of him the difference between the freight of one third and \$7,500. It was *held* that he was bound to pay only the regular rate of freight for his two thirds the cargo, and that the amount of the valuation was immaterial on this point.

2. 1 *Arnould Mar. Ins.* (6th ed.) 316; 2 *Phillips Ins.* (5th ed.), § 1201; *Brooks v. Oriental Ins. Co.*, 7 Pick. (Mass.) 259; but the contrary may be shown, or inferred, from facts appearing in the case. *Mayo v. Maine F. & M. Ins. Co.*, 12 Mass. 259.

3. 1 *Arnould Mar. Ins.* (6th ed.) 317.

In *Stocker v. Harris*, 3 Mass. 409, the court was equally divided whether or not a valuation in a lump sum on ship, freight and cargo was void for uncertainty. But in the subsequent case of *Faris v. Newburyport Mar. Ins. Co.*, 3 Mass. 476, where the insurance was on "cargo or freight or both or either," the court distributed the valuation.

4. **Double Insurance.**—1 *Arnould Mar. Ins.* (6th ed.) 327; *Perkins v. N. England Ins. Co.*, 12 Mass. 214.

A mere difference in the date of the policies does not prevent the insurance from being double. *Peters v. Delaware Ins. Co.*, 5 S. & R. (Pa.) 479.

Nor does a mere difference as to the extent of the liability in the several policies.

Thus in *Bank of British North America v. Western Ass. Co.*, 7 Ont. 166, two policies on a shipment of cattle were made which covered the same risk, the same interest and the same subject, but one excepted twenty-five per cent. mortality from the protection of the policy, while the other was against all perils. It was *held* that the insurance was double, nevertheless.

The insurance is not double where

If the double insurance is fraudulent there can be no recovery, but if without fraud the underwriters are liable.¹

In England, every underwriter, without regard to the time of the execution of his contract, is liable to the full amount insured, and if compelled to pay in full can recover contribution from the other underwriters. This is law in the United States in the absence of special agreement, but American policies generally provide that the subsequent underwriter shall be liable only to the extent that prior policies do not cover.²

the risks are different. *Lidgett v. Secreten*, L. R., 6 C. P. 616.

Although they overlap. *Godin v. London Ass. Co.*, 1 W. Bl. 103; *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668; *Kent v. Manufacturers' Ins. Co.*, 18 Pick. (Mass.) 19.

As if made by different persons and for the benefit of different persons. *Wells v. Philadelphia Ins. Co.*, 9 S. & R. (Pa.) 103; *Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47.

Or where the interests differ, as of owner and of carrier. *Royster v. Roanoke N. & B. S. B. Co.*, 26 Fed. Rep. 492.

A covenant limiting other insurance or interests in a vessel, or any other insurable interest in said interest, is not broken by insurance on freight to be earned by the voyage. *Merchants' Mut. Ins. Co. v. Allen*, 30 U. S. L. Ed. 1209.

Where owners of cotton ship it by a carrier and obtain an insurance on it, and the carrier, at the time, has annual policies covering the cargoes of its steamer, which policies contain a clause limiting the insurance to the interest of the insured, and a fire occurs, this does not constitute double insurance, and the shipper's insurers cannot make the carrier's insurers contribute to their loss. *Royster v. Roanoke etc. Steamboat Co.*, 26 Fed. Rep. 492. In this case *BOND, J.*, said: "The complainants had insured, as owners, the cotton in their own names, to the extent of their estimate of its value to them. The defendant company had a policy for a year covering all cargoes on board, limiting the liability of insurers to the extent of the interest of the insured in the cargo. The steamboat company had no interest in the complainant's cotton, and, when it was consumed was paid nothing on account of its loss. The company was under no obligation to insure its cargoes, and did

not do so further than to protect its interest for freight, charges, and loss accruing from the negligence of its employees. This is not double insurance which makes a proper case of contribution between the several insurance companies. To make such a case the property insured and the interest insured must be identical." See also *Williams v. Crescent Mut. Ins. Co.*, 15 La. An. 651.

1. 1 *Arnould Mar. Ins.* (6th ed.) 331; *Hogan v. Del. Ins. Co.*, 1 Wash. (U. S.) 419; *Murray v. Ins. Co.*, 2 Wash. (U. S.) 186; *Kane v. Com. Ins. Co.*, 8 Johns. (N. Y.) 229; *Mentum v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 75; *Pratt v. Union Ins. Co.*, 9 Bosw. (N. Y.) 97.

2. The English law was at first held to be that the underwriters were liable only in the order of the execution of their policies. *African Co. v. Bull*, 1 Shaw. 132. But this rule was overthrown by *LORD MANSFIELD* in *Godin v. London Ass. Co.*, 1 Burr. 492; *Newby v. Reid*, 1 W. Bl. 416; *Rogers v. Davis*, and *Davis v. Gildart*, 1 Marshall Ins. 140, 141; 2 Park. Ins. 600, 607. And the law established that all the policies are to be regarded as one assurance for the full extent of the value, and each underwriter is to be held liable to the full amount of the loss, or of his risk if less than that amount; but in case of payment by him he is entitled to contribution from the others.

The American common law was declared to be in accord with that laid down by *LORD MANSFIELD* in the leading case of *Thurston v. Koch*, 4 Dall. (U. S.) 348. And this decision has been followed. 3 *Kent Com.* 280, 281; *Cromil v. Kentucky & Louisville Ins. Co.*, 15 B. Mon. (Ky.) 432; *Millandon v. Western M. & F. Ins. Co.*, 9 La. 27; *Combat v. Barrell*, 2 Dane Abr. 144; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. (Mass.) 145; *American Ins. Co. v. Griswold*, 14 Wend. (N.

VII. Duration of Risk—1. *Upon the Ship*.—Insurance “from” a port does not begin until the vessel breaks ground ready for sea upon the voyage insured.¹

Where the words are “at and from” the port, the risk begins

Y.) 399 at 461; *Craig v. Murgatroyd*, 4 Yeates (Pa.) 161.

It seems also to be the law of Canada. *Bank of British North America v. Western Ass. Co.*, 7 Ont. 166.

In practice the common law has been neutralized by the “American clause” in the policy, which provides substantially: “It is further agreed that if the assured shall have made any other assurance upon the premises prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property at risk.” See *e.g. Lewis v. Manufacturers’ F. & M. Ins. Co.*, 131 Mass. 364.

Where the American clause is inserted and the several policies are dated on the same day, the court must determine the order in which in fact the underwriters executed them. *Potter v. Marine Ins. Co.*, 2 Mason (U. S.) 475; *Brown v. Hartford Ins. Co.*, 3 Day (Conn.) 58.

In an action for the premium due upon a marine insurance policy in the name of a part owner, for the benefit of whom it may concern, the defendant offered evidence to show other insurance which would make an overinsurance upon his part of the vessel, and claimed to be liable for only a ratable proportion of the premium. *Held*, that if this proposition is sound in law, the burden is upon the defendant to show that the policies were simultaneous, and not intended to cover the interests of some other owners. *North America Ins. Co. v. Rogers (Me.)*, 1 N. E. Rep. 792.

The second underwriter is liable only to the extent of the value above the first policy, and this although the first underwriter, a corporation, is dissolved insolvent before the loss. *Ryder v. Phoenix Ins. Co.*, 98 Mass. 185.

Where, however, the prior policy has expired of its own limitation before the loss, the second is liable for the full amount. *Kent v. Manufacturers’ Ins. Co.*, 18 Pick. (Mass.) 19.

The assured cannot cancel a prior insurance so as to render the subsequent liable as though the first had not

existed, without the assent of the subsequent underwriter. *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354.

Where the total insurance does not exceed the total value, the American clause does not relieve subsequent insurers from liability for contribution to a partial loss less than the amount of the prior insurance.

Thus where three policies for \$7,300, \$7,400 and \$7,300 respectively on an interest valued in each at \$22,000 had been made, all with the American clause, and a partial loss had occurred; it was *held* that the second and third were not exonerated, but were liable for $\frac{1}{3}$ of the loss. *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297.

For the rules which obtain where the subsequent policy is valued, see *ante* under VALUED POLICIES. See also, as to the general subject of double insurance, *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Seamans v. Loring*, 1 Mass. 127; *Stephenson v. Piscataqua Ins. Co.*, 54 Me. 55; *Davis v. Boardman*, 12 Mass. 80; *Jackson v. Mass. Ins. Co.*, 23 Pick. (Mass.) 418; *Traders’ Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Harris v. Ohio Ins. Co.*, 5 Ohio 466; *Craig v. Murgatroyd*, 4 Yeates (Pa.) 161; *Wells v. Phila. Ins. Co.*, 9 Serg. & Rawle (Pa.) 103.

1. **Duration—Ship**.—1 *Arnould Mar. Ins.* (6th ed.) 404; *Pittigrew v. Pringle*, 3 B. & Ad. 514; *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. (Md.) 121.

It must be upon the voyage insured. *Haselton v. Allnutt*, 1 M. & S. 46; *Tasker v. Cunningham*, 1 Bli. 87; *Lord v. Robinson*, 6 L. J. (K. B.) 212; *Murray v. Columbian Ins. Co.*, 4 Johns. (N. Y.) 443.

The fact that a deviation in the course of the voyage is intended will not prevent the voyage from being the voyage insured. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357.

Nor will the fact that the vessel clears for a port other than the one she in fact intends to visit. *Planché v. Fletcher*, 1 Doug. 251; *McFee v. South Carolina Ins. Co.*, 2 McCord (S. Car.) 503.

the moment the policy is executed, if the vessel is then at the port named; if not, then from the moment of her arrival at the port in good safety.¹

Any special terms of the policy must, of course, be complied with before it will attach.²

The risk on the vessel terminates when she is moored at the port of discharge in such a state of physical safety that she can

1. *Matteux v. London Ass. Co.*, 1 Atk. 548; *Palmer v. Marshall*, 8 Bing. 79; *Patrick v. Ludlow*, 3 Johns. (N. Y.) 10; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Cobb v. New England Mut. Ins. Co.*, 6 Gray (Mass.) 192.

These words do not imply that the vessel is at the moment of insuring at the port named. *Hull v. Cooper*, 14 East 479. But they do imply that she is shortly to be there, if not there already. Per LORD ELLENBOROUGH, C. J.: "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there." *Hull v. Cooper*, 14 East 479.

If there is such delay in reaching the port as to change the risk, the policy does not attach, whether the delay be voluntary. *Mount v. Larkins*, 8 Bing. 108. Or involuntary. *DeWolf v. Archangel Marit. Bk. & Ins. Co.*, L. R., 9 Q. B. 451.

The words "at and from" imply the words "first arrival." *Matteux v. London Ass. Co.*, 1 Atk. 548; *Forbes v. Wilson*, 1 Marshall Ins. 148; *Smith v. Surridge*, 4 Esp. 25; but see *Vallance v. Dewar*, 1 Camp. 503, when, in the Newfoundland trade, it was the usage to run in and out of a port several times.

The vessel must at least once have been at the port in good safety. *Parmenter v. Cousins*, 2 Camp. 235. But in the case of a time policy this may be immaterial. *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389.

The vessel must arrive at the port in safety; that is, "in such condition as to enable her to lie there in reasonable security till she is properly repaired and equipped for her voyage." Per LORD ELLENBOROUGH, C. J., in *Parmenter v. Cousins*, 2 Camp. 235 at 237.

It is enough that she can keep afloat until repaired. *Annen v. Woodman*, 3 Taunt. 299.

If she arrives safely it is immaterial that she is injured while being moved about the harbor. *Haughton v. Mar. Ins. Co.*, L. R., 1 Ex. 206.

Safety means physical safety. The fact that the vessel is liable to seizure will not prevent the policy from attaching. *Bell v. Bell*, 2 Camp. 475.

Delay in the port from necessity or for the purposes of the voyage will not prevent attaching. *Matteux v. London Ass. Co.*, 1 Atk. 548; *Smith v. Surridge*, 4 Esp. 25; *Grant v. King*, 4 Esp. 174; *Langhorn v. Allnutt*, 4 Taunt. 511; *Raine v. Bell*, 9 East 195; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Seamans v. Loring*, 1 Mason (U. S.) 427; *Taylor v. Lowell*, 3 Mass. 331.

If the vessel is already at the port stated, her departure must be shortly commenced, or in near contemplation. 1 Arnould Mar. Ins. (6th ed.) 408, citing *TINDAL*, C. J., in *Palmer v. Marshall*, 8 Bing. 317 at 318; *PARK J.*, in *Palmer v. Fenning*, 9 Bing. 462.

If lying in port without reference to any voyage, the policy attaches only from the time preparation for the voyage insured begins. *Seamans v. Loring*, 1 Mason (U. S.) 127, per STORY.

A policy "at and from" a West Indian island attaches from the moment of arrival in any harbor of the island. *Camden v. Cowley*, 1 W. Bl. 417; *Cruickshank v. Janson*, 2 Taunt. 301; *Wayne v. Miller*, 4 B. & C. 538.

Where a policy on a vessel cruising in the South Atlantic was to begin "on preparing for her voyage to London" at and from Pernambuco, it was held it attached on the vessel's putting into Pernambuco for a homeward cargo and sailing thence on her failure to seek one at St. Salvador. *Lambert v. Liddard*, 5 Taunt. 479.

2. Thus, where the policy provided that the vessel was "to go out in tow," it was held not to attach unless the vessel was towed out of the harbor limits. *Provincial Ins. Co. v. Connolly*, 3 Can. Sup. Ct. 258. And so where the policy gave liberty to sail not later than December 15th, but the vessel did not sail until December 17th, it was held that the risk had not attached. *Duncan v. British American Ins. Co.*, 1 Prince Edward Is. 370.

keep afloat while her cargo is being unloaded; in such political safety as not within the time allowed to have been subjected to embargo, seizure or capture, and under such circumstances as to have had an opportunity of unloading and discharging.¹

Where the policy gave leave to sail "when clear of ice," it was held to mean when the course between the termini was almost free from ice, not when the vessel was clear where it was lying. *Hyndman v. Montreal Ins. Co.*, 2 Prince Edward Is. 132.

Courts cannot extend a risk beyond what is plainly written in the policy, as, for instance, where an open policy provides that the property shall be at a certain place or shall belong to a certain person. *Waxahachie Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

A policy of marine insurance on a boat provided that the insurance was to commence "whenever she was in safety on the 26th day of March, 1868, . . . with permission to navigate the Mississippi from the city of St. Louis to Helena," etc. *Held*, that the permission to navigate was not a provision for the commencement of the risk, but a limitation on the assured. It was an exception in favor of the insurance company, to be construed most strongly against it, and not applicable to contradict the express agreement as to the time of the commencement of the risk. *Schröder v. Stock etc. Ins. Co.*, 46 Mo. 174.

1. *1 Arnould Mar. Ins.* (6th ed.) 413.

Physical Safety.—Thus, where a vessel arrived in port a wreck, only kept afloat by being lashed to a hulk, and sank a few days after when an attempt was made to move her, it was held she had never been moored in good safety. *Shawe v. Felton*, 2 East 109. But when she arrived much shattered, but discharged cargo, and, more than thirty days after, was burned in dry dock, it was held she had been safely moored. *Lidgett v. Secretan, L. R.*, 5 C. P. 190.

Political Safety.—When, on the day after arrival, the vessel was laid under an embargo then existing, and the captain and crew treated as prisoners of war, it was held the vessel had not been moved twenty-four hours in good safety. *Minett v. Anderson, Peake* 211.

So where immediately on arrival the hatches were sealed and papers taken, and later the vessel was seized and condemned. *Horney v. Lushington*, 15 East 46.

But when, although liable to seizure for a breach of law, the vessel was not in fact taken till she had lain safely in port for some days, it was held she had been moored in good safety and the risk was at an end. *Lockyer v. Offley*, 1 T. R. 252; *Mariatique v. Louisiana Ins. Co.*, 8 La. (O. S.) 65.

Opportunity to Unload.—Where a vessel arrived in port but was ordered back to quarantine, which she did not reach for more than twenty days, and was burned more than a month later while still at quarantine, it was held the policy had not terminated, since the vessel had not been so moored that she had a chance to unload. *Waples v. Eames*, 2 Stra. 1243.

So when shallow water prevents reaching the intended wharf and the vessel is injured while lightering, she is not moored in good safety. *Whitwell v. Harrison*, 2 Exch. 127; *Meigs v. Mutual M. Ins. Co.*, 2 Cush. (Mass.) 439; *Simpson v. Pacific Mut. Ins. Co.*, 1 Holmes (U. S.) 126. Or when for any reason she cannot enter her dock. *Samuel v. Royal Exch. Ass. Co.*, 8 B. & C. 119. Or is lost before she can unload. *Dickey v. United Ins. Co.*, 11 Johns. (N. Y.) 358.

If, however, she is moored, and her only duty is to await her turn in unloading, she is moored in good safety. *Angerstein v. Bell*, 1 Park Ins. 54; 1 *Marshall Ins.* 263.

Arrival.—Whether or not the vessel has arrived is for the jury. *Lindsay v. Janson*, 4 H. & N. 699.

Where the vessel had arrived at an anchorage ground outside the bar of the port of destination and had lain at anchor more than twenty-four hours lightering to get over the bar, it was held she had not arrived at her port of discharge and been moored twenty-four hours in good safety. *Simpson v. Pacific Mut. Ins. Co.*, 1 Holmes (U. S.) 136.

Time After Arrival.—Policies generally provide that the risk shall continue for twenty-four hours after mooring in good safety. If nothing is said the risk terminates immediately on mooring. *Anon.*, Skin. 243; *Dickey v. United Ins. Co.*, 11 Johns. (N. Y.) 358.

Cf. *Stone v. Marine Ins. Co.*, 1 Exch. Div. 81, at 85, per BRAMWELL, J.; *cited* 1 *Arnould Mar. Ins.* (6th ed.) 418.

Where the policy provides that the risk shall continue "for thirty days after arrival and until she shall have been moored twenty-four hours in good safety," the twenty-four hours precede the thirty days. *Mercantile Mar. Ins. Co. v. Titherington*, 5 B. & S. 765; *Bell v. Mason*, 6 Mass. 313.

Of course when a loss occurs within the twenty-four hours the underwriter is liable. *Zacherie v. New Orleans Ins. Co.*, 5 Martin (La.) N. S. 637.

Port of Discharge.—If the vessel is insured to "a port of discharge," it means the port at which she originally intended to discharge her cargo. 1 *Arnould Mar. Ins.* (6th ed.) 424; *Clason v. Simmonds*, 6 T. R. 533, n.; *Wales v. China Mutual Ins. Co.*, 8 Allen (Mass.) 380.

In *Coolidge v. Gray*, 8 Mass. 527, it was held that if no definite port was in mind at time of departure, the policy continues while the master is proceeding to that port which promises the best sales.

A policy of insurance on a vessel to a port of discharge and until she be moored twenty-four hours in safety, was held, not to cover a loss occurring after she had lain three weeks at a place to which she was destined as a place of discharge, where she had discharged a substantial part of her cargo, and at which similar vessels uniformly discharged in whole or in part. *Bramhall v. Sun etc. Ins. Co.*, 104 Mass. 510.

A policy of insurance on a vessel, expressed as to terminate on arrival at a certain port, and being twenty-four hours at anchor in safety, is not determined by her arrival and lying at anchor in safety more than twenty-four hours at the anchorage ground outside the harbor of the port, and there, according to the custom of vessels of her draught bound for the port, discharging part of her cargo by lighters, in order to enable her to pass over a bar at the entrance to the harbor. *Simpson v. Pacific Mut. Ins. Co.*, 1 Holmes (U. S.) 136. See also *Upton v. Salem Commercial Ins. Co.*, 8 Metc. (Mass.) 605; *King v. Hartford Ins. Co.*, 1 Conn. 333; *Dodge v. Essex Ins. Co.*, 12 Gray (Mass.) 65.

Where the insurance is to a final port of discharge, it means the port at which she discharges the bulk of her outward cargo, although she proceeds further. *Moffat v. Ward*, 4 Doug. 29, note a, 31, note b.

But if part is discharged at an intermediate port, and the vessel proceeds

with the rest to a port originally contemplated, the risk continues until this is discharged. *Preston v. Greenwood*, 4 Doug. 29.

If the policy reads to "a port or ports of discharge," it terminates at the port where the great bulk is discharged. *Upton v. Salem Commercial Ins. Co.*, 8 Metc. (Mass.) 605; *Moore v. Taylor*, 1 A. & E. 25; *Sage v. Middleton Ins. Co.*, 1 Conn. 239; *King v. Middleton Ins. Co.*, 1 Conn. 184.

The fact that part of the outward cargo is still on board does not continue the risk after the bulk is discharged and she has begun to ship homeward cargo. *Leigh v. Mather*, 1 Marshall Ins. 266; *Inglis v. Naux*, 3 Camp. 437.

Where the insurance is to a specified region and a market, the risk continues from port to port within that region till the cargo is disposed of. *Debloes v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Maxwell v. Robinson*, 1 Johns. (N. Y.) 333.

Merely putting into a port with the intent to discharge there if the market is good, otherwise not, does not render that port the first port of discharge. *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

Where, however, policy was "to Bilbao or a port of discharge," and the vessel discharged part of cargo at Bilbao and then went on to Lisbon, it was held that the risk terminated at Bilbao. *Stephens v. Beverly Ins. Co.*, 1 Phillips Ins. (5th ed.), § 963.

Where the insurance to an island, or a port with several places for discharging, the risk ends on being moored in good safety at the first place at which the vessel stops. 1 *Arnould Mar. Ins.* (6th ed.) 419; *Camden v. Cowley*, 1 W. Bl. 417; *Barras v. London Ass. Co.*, 1 Park. Ins. 74; *Cruickshank v. Janson*, 2 Taunt. 301; *Melville v. Stewart*, 3 Fac. Dec. 254.

If the "last port of discharge" intended cannot be entered owing to an embargo, and part of the cargo is discharged at another port, without, however, abandoning the intention to enter the first if possible, the substituted port is the last port of discharge. *Brown v. Vigne*, 12 East 283.

The "last port" means the last "friendly port of discharge." 1 *Arnould Mar. Ins.* (6th ed.) 426.

Thus in *Neilson v. Delacour*, 2 Esp. 619, a vessel insured to a port in the Windward or Leeward Islands, on

If the intention to proceed to the final destination originally designed is abandoned, the risk ends the moment this abandonment is definitely decided upon.¹

A port risk ends immediately upon a vessel's departure on a voyage.²

The risk may, of course, be made to end at any time or on any event agreed upon.³

reaching D. and learning that one island, held by the French at the time the policy was made, had been taken by the English, proceeded thither, but on arriving was seized by the French, who had recaptured the island. It was *held* that the policy did not cover the voyage to this island, since the parties could not have intended to include it as a port in the islands which the vessel would visit.

Where the assured and the consignees of cargo agreed on an earlier port of delivery than the one at first intended, it was *held* the risk ended on discharge at this port. *Shapley v. Tappan*, 9 Mass. 20.

What constitutes an "arrival" is explained by *GRAY, J.*, in *Bramhall v. Sun Ins. Co.*, 104 Mass. 510, as follows: "A vessel arrives at a port of discharge when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place, a policy insuring her until arrival at a port of discharge terminates, and cannot be extended or revived, after she has discharged part of her cargo there, by her removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo or for any other purpose."

1. 1 Arnould Mar. Ins. (6th ed.) 427; *Blackenhagen v. London Ass. Co.*, 1 Camp. 454; *Stone v. Marine Ins. Co.*, *Ocean Limited of Gothenburg*, 1 Ex. Div. 81.

In *Alexander v. Baltimore Ins. Co.*, 4 Cranch (U. S.) 370, a vessel which was insured from Charleston to Port Republic was taken by a privateer who seized the cargo and promised payment in coffee, which was to be obtained at Cape François. It was *held* the risk terminated the moment she sailed for Cape François for the coffee.

The risk may end for this cause before any voyage is begun. 1 Arnould Mar. Ins. (6th ed.) 408; *Chitty v. Selwyn*, 2 Atk. 539, per LORD HARDWICKE.

If the vessel, deterred for some reason from at once proceeding to the intended destination, merely lies by to wait for a favorable opportunity to go on, the risk continues. *Brown v. Vigne*, 12 East 283, 286.

If the original voyage is abandoned, the risk does not continue while the vessel is on the way to a different port, even though necessity compels her to go there. *Parkin v. Tunno*, 11 East 22.

In *Phillips v. Champion*, 6 Taunt. 3, it was *held* that a fishing voyage was not ended by sending home part of the fare by another vessel.

2. *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453.

In marine insurance policies issued in New York, "port risk" means risk upon the vessel lying in port and before departure upon another voyage. *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56; *Nelson v. Sun Mut. Ins. Co.*, 40 N. Y. Super. Ct. 417.

3. Where the policy provided for the "risk to end at the place and time the voyage is stopped" by ice, it was held that the risk ended only with the actual stopping. The master has a right to push on as far as he can, and the risk continues, even though the loss is caused by the pushing on. *Sherwood v. Mercantile Mut. Ins. Co.*, 66 N. Y. 630.

Where the policy was "to continue in force from the date of expiration until notice is given to this company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used," the term expired October 5th. On October 9th a premium for one month was sent company with a statement that it was "one monthly premium from October 5th to November 5th." It was *held* that the policy continued and covered a loss on November 6th. *Greenwich Ins. Co. v. Providence etc. S. S. Co.*, 119 U. S. 481.

A policy covering the risk of fire on shore for ten days prior to shipment, held to mean that, if the property insured is burned while on shore awaiting shipment, within ten days after the

2. *Upon the Cargo*.—The risk upon the cargo begins when it is loaded on board.¹

Where the policy is stated to be "from the loading thereof on board the said ship," at and from a particular place, the risk attaches only upon goods placed on board at that place.²

insurance is effected, the policy shall cover the loss; but if burned after such ten days, the risk does not attach. *England F. Ins. Assoc. v. Merchants & M. Transp. Co. (Md.)*, 6 Cent. 437.

An open policy on the cargo of a canal boat provided that "if, in consequence of ice, or the closing of navigation, the said voyage cannot be finished the same season, the risk to end at the place and at the time the voyage is stopped, three days being given to discharge." The canal was formally closed to navigation, but by subsequent action of the canal commissioners it was reopened so that the voyage could be continued, and it was continued during the same season. It was *held* that there was no such interference of ice, etc., that the voyage could not be finished the same season. *Delahunt v. Etna Ins. Co.*, 26 Hun (N. Y.) 668. See also *Sherwood v. Mercantile Mut. Ins. Co.*, 66 N. Y. 630.

1. *Cargo*.—1 *Arnould Mar. Ins.* (6th ed.) 378; *Colonial Ins. Co. of New Zealand v. Adelaide Mar. Ins. Co.*, L. R., 12 App. Cas. 128; *Cuttam v. Mechanics' Ins. Co.*, 40 La. An. 259.

It attaches although the vessel at the time of loading needs repairs to render her seaworthy. *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56.

In *Lewis v. Manufacturers' F. & M. Ins. Co.*, 131 Mass. 364, where the insurance was on oil, bone and other takings for the homeward voyage, it was *held* that the risk began immediately on receiving them on board, whether on the outward or homeward course of the vessel.

Where the policy was on cargo "to be shipped to insured during six months from and after the first day of August," it was *held* to cover goods laden on August 1st, when the vessel did not sail until August 6th. *Sorbé v. Merchants' Ins. Co.*, 6 La. (O. S.) 185.

Unless there are special words the policy does not cover the risk of putting on board. *Hurry v. Royal Exchange Ass. Co.*, 2 B. & P. 430.

2. 1 *Arnould Mar. Ins.* (6th ed.) 379. The law was thus established by the early cases in England. *Robertson v.*

French, 4 East 130; *Horneyer v. Lushington*, 15 East 46; *Spitta v. Woodman*, 2 Taunt. 416; 16 East 188, *note*; *Langhorn v. Hardy*, 4 Taunt. 628; *Mellish v. Allnutt*, 2 M. & S. 106; *Rickman v. Carstairs*, 5 B. & Ad. 651.

And it was further held immaterial that the underwriter knew that the goods were already on board at the time of the vessel's arrival at the terminus *a quo*, and were intended to be covered by the assured. *Gladstone v. Clay*, 1 M. & S. at 424, per BAYLEY, J.

Later cases have disapproved these decisions, though not overruling them, and have seized on any point to distinguish the case in hand from them. Thus in *Bell v. Hobson*, 16 East 240, where the policy in suit was stated to be in continuation of five earlier policies which gave the actual port of loading, it was *held* that the goods were covered, although not loaded on board at the terminus named; and LORD ELLENBOROUGH declared the principle was not to be extended.

So also in *Joyce v. Realm Ins. Co.*, L. R., 7 Q. B. 580, where the policy was stated to be "subject to all the clauses and conditions of the original policy."

So where the policy contained the word "wheresoever" loaded, it was *held* that goods loaded at Liverpool and still on board at Pernambuco, were covered by the policy "at and from Pernambuco to Maranham, and at and from thence to Liverpool." *Gladstone v. Clay*, 1 M. & S. 415.

If the goods have been unladen and reladen at the terminus *a quo* it has been *held* sufficient to make the policy attach. *Nonnea v. Kittlewell*, 16 East 176; *Carr v. Monétfiore*, 5 B. & S. 408.

The English rule was disapproved and disregarded in *Creighton v. Union Marine Ins. Co.*, 1 James (Nova Sco.) 195.

In the United States, the English rule has been followed. *Scriba v. Ins. Co. of North America*, 2 Wash. (U. S.) 107; *Graves v. Marine Ins. Co.*, 2 Cal. (N. Y.) 339; *Richards v. Marine Ins. Co.*, 3 Johns. (N. Y.) 307. But in New York the policy is *held* to attach if the underwriter knew that the goods were load-

The policy attaches only to goods shipped on the one voyage designated.¹

The risk continues until the goods are safely landed, that is, placed upon the ordinary wharves, quays or customary landing places.²

ed at a prior port and intended to be covered. *Vredenberg v. Gracie*, 4 Johns. (N. Y.) 444, *note*.

In *Massachusetts*, if the policy contains merely the words "at and from" the terminus *a quo*, it is immaterial that the goods were not loaded on board there. *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Clark v. Higgins*, 132 Mass. 586. See also *Cleveland v. Fettyplace*, 3 Mass. 392.

Merely hoisting the goods on deck for the purpose of loading other goods is not sufficient to constitute such a re-landing that the policy will attach. *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

It has been held that the loading must be at the very terminus *a quo* named, and that goods laden at another place within the legal limits of the port will not be covered. *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, 2 Taunt. 405, *note*; but see *Harrower v. Hutchinson*, L. R., 5 Q. B. 584, and cases cited under "usage" as to limits of port.

The rule does not apply where liberty to touch and trade is given in the policy, the intent being clearly in such case to cover goods wherever laden. 1 *Arnould Mar. Ins.* (6th ed.) 384, *citing* *Violet v. Allnutt*, 3 Taunt. 419; *Grant v. Delacour*, 1 Taunt. 466; *Grant v. Paxton*, 1 Taunt. 463; *Barclay v. Sterling*, 5 M. & S. 6; *Hunter v. Leathley*, 10 P. & C. 858.

1. Thus in *Courtney v. Mississippi M. & F. Ins. Co.*, 12 La. (O. S.) 233, the policy was on 143 hogsheads of sugar at and from New Orleans to Louisville in the steamer *Belfast*. Twenty-six were shipped on one trip and the balance on the next. It was held that only the first 26 were covered by the policy. *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389; *Boylston v. Ins. Co.*, 5 Metc. (Mass.) 439; *Brown v. Neilson*, 1 Cal. (N. Y.) 525; *Richards v. Marine Ins. Co.*, 3 Johns. (N. Y.) 307; *American Ins. Co. v. Hutton*, 24 Wend. (N. Y.) 330; *Union Ins. Co. v. Tyson*, 3 Hill (N. Y.) 118; *Meech v. Phila. Ins. Co.*, 3 Whart. (Pa.) 473; *Eyre v. Marine Ins. Co.*, 6 Whart. (Pa.) 247.

2. *Harrison v. Ellis*, 7 E. & B. 465;

Mansur v. New England Mut. Mar. Ins. Co., 12 Gray (Mass.) 520; *Dodge v. Essex Ins. Co.*, 12 Gray (Mass.) 65; *Gray v. Gardner*, 17 Mass. 188; *Cole v. Union etc. Ins. Co.*, 12 Gray (Mass.) 501; *Gooker v. New England etc. Ins. Co.*, 12 Gray (Mass.) 506; *Fletcher v. St. Louis Mar. Ins. Co.*, 18 Mo. 193; *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *King v. Hartford Ins. Co.*, 1 Conn. 333.

If the ordinary method of unloading is by lighters the goods are protected while in the lighters. *Tiernay v. Etherington*, 1 Burr. 348; *Rucker v. London Ass. Co.*, 2 B. & P. 432, *note*; *Hurry v. Royal Exch. Ass. Co.*, 2 B. & P. 430; *Matthie v. Potts*, 3 B. & P. 23; *Stewart v. Bell*, 5 B. & Ald. 238; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 38; *Osacar v. Louisiana State Ins. Co.*, 5 Martin (La.) N. S. 386.

Where the goods were in lighters simply for transshipment and not for landing, it was held they were not protected under a policy covering all risk of craft until discharged and safely landed. *Houlder v. Merchants' Mar. Ins. Co.*, 17 Q. B. Div. 354.

If the goods are landed the risk is at an end, even though they are not in the consignee's hands, or even if seized and confiscated. *Brown v. Carstairs*, 3 Camp. 161.

If the goods are landed merely for a temporary purpose the risk continues. *Parsons v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 197.

Where opium, part of cargo, was taken ashore for the purpose of trading with it and was seized, yet the underwriter was held liable.

There is no fixed time within which the landing must be completed; it is enough if within a reasonable time. 1 *Arnould Mar. Ins.* (6th ed.) 395; *Parkinson v. Collier*, 2 Park Ins. 653.

Where the power to ship and transship is given the goods are protected during the transshipment. *Tierney v. Etherington*, 1 Burr. 348.

But not if they are landed and held to await transshipment. *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668.

An open cargo policy was issued by

It ceases, however, on delivery to the assured, if he assumes control before the actual landing.¹

The landing must be at the place of destination named as the port of discharge.²

The risk, of course, may be made to terminate on any event agreed upon.³

3. *Upon Freight*.—The risk upon freight attaches only from the moment when such a relation is established between the ship and cargo that but for the perils insured against freight would have been earned; and it continues until the freight is paid or the policy is avoided.⁴

an insurance company, and the assured reported a shipment on a steamboat named, which was accordingly entered upon the book annexed to the policy as insured thereby. During the voyage the property was, without necessity, reshipped and lost. *Held*, that the insurance company not assenting to the reshipment was discharged from liability on the policy. *Malinckrodt v. Jefferson Fire Ins. Co.*, 1 Mo. App. 205.

1. Thus, where the goods were received by the assured in his own lighters, it was held the risk had ended. *Sparrow v. Carruthers*, 2 Stra. 1236. And so where he gave orders to the lightermen and said he would attend to landing the goods, it was held he had taken possession and the risk had ended. *Strong v. Nataly*, 1 B. P. 16.

2. *Barrass v. London Ass. Co.*, 1 Marshall Ins. 266; *Leigh v. Mather*, 1 Esp. 412.

The risk will terminate on a landing at a place which by commercial usage is held equivalent to the place named. *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 75.

The risk ceases on all with the unloading of the bulk at the place intended. 1 *Arnould Mar. Ins.* 397, 398; *Barrass v. London Ass. Co.*, 1 Marshall Ins. 266; *Leigh v. Mather*, 1 Marshall Ins. 266; *Richardson v. London Ass. Co.*, 4 Camp. 94.

The risk may be determined at any intermediate point by agreement. *Ionides v. Hartford*, 29 L. J., Ex. 36. And by similar agreement may be continued to cover an overland transport. *Rodonachi v. Elliott*, L. R., 8 C. P. 649.

If the cargo is insured to its "final port of destination," the risk continues while the vessel is waiting an opportunity to reach its destined port which is

closed by pending hostilities. *Aliverson v. Brightman*, 8 Q. B. 781.

But where the parties anticipated delay from such a cause, and gave liberty to wait two months if needful at an intermediate port, it was held that the risk terminated on the expiration of the two months of waiting. *Doyle v. Powell*, 4 B. & Ad. 267.

Where the voyage was stated to be from Lawrenceburg to New Orleans, the vessel discharged and paid off most of its hands on reaching Freeport, a few miles from New Orleans, and stopped there and exhibited its cargo. It was the custom to do this, obtain a purchaser and then drop down to New Orleans and discharge. It was held the risk continued until the discharge at New Orleans. *Grant v. Lexington F. & M. Ins. Co.*, 5 Ind. 23.

3. Thus in *Delahunt v. Aetna Ins. Co.*, 97 N. Y. 537; 26 Hun (N. Y.) 668, goods on a canal boat were insured the risk to end, if the voyage could not be completed in the season, at the time and place the voyage was stopped, allowing three days for discharging. The boat was stopped by ice for more than three days, but a way was cut through the ice and the boat went on. She sank later. It was held that the risk did not end with this stop.

4. 1 *Arnould Mar. Ins.* (6th ed.) 432, *et seq.* The question when such a relation is established is identical with the enquiry when an insurable interest in freight exists, and the cases cited upon that subject are in point here, and to them reference is made.

This relation may exist and the policy attach before any goods are actually shipped if the cargo is contracted for and the vessel is preparing to load it but is prevented by the perils insured against. *Williamson v. Innis*, cited 8 Bing. 81, note.

VIII Matters Avoiding the Policy.—A policy is rendered voidable by a misrepresentation as to a material fact connected with the risk; by a concealment of a material fact; by a breach of an express or implied warranty; by a deviation or change of voyage; by illegality.

1. *Misrepresentation.*—"A misrepresentation, whether from mistake, ignorance or accident, of any material fact, however innocently made, avoids the policy."¹

Thus if she is lost while going from place to place completing her lading. *Parke v. Hibson*, 2 B. & B. 329.

Or while being put in order to receive the cargo. *Touscott v. Christie*, 2 B. & B. 320.

In *Devaux v. J'Anson*, 5 Bing. N. C. 519, it was held the policy had attached although the vessel was injured in getting her out of a dry dock and the cargo was several miles inland awaiting the vessel.

It will not attach, however, if the vessel is not ready to receive the cargo or not in process of being specially prepared to take it. *Tongue v. Watts*, 2 Stra. 1251.

If the cargo is not contracted for the risk does not attach until the cargo is actually on board. *Patrick v. Eames*, 3 Camp. 441.

If the vessel freight is the chartered hire of the vessel, the risk attaches from the moment the ship breaks ground to perform the charter party. *Thompson v. Taylor*, 6 T. R. 478; *Horncastle v. Suart*, 7 East 400; *Davidson v. Willaer*, 1 M. & S. 313; *Atty v. Lindo*, 1 B. & P. N. R. 236; *Ellis v. Lafone*, 8 Exch. 546.

It is immaterial that the vessel at the time is at another port than that named in the policy. *Barker v. Fleming*, L. R., 5 Q. B. 59; *Potter v. Rankin*, L. R., 6 H. L. 83.

Or that she is at the time engaged in another voyage, if the agreement for hire contemplated that she should complete this. *Foley v. United F. & M. Ins. Co. of Sydney*, L. R., 5 Ch. 155.

Of course the risk will not attach under such circumstances, if the language of the policy prevents. Thus, where the risk was stated to begin "from the loading of the goods on board at" the terminus *a quo*, it was held it did not attach before any goods were loaded, although the vessel was at the port and preparing to load. *Beckett v. West of England Ins. Co.*, 25 L. T., N. S. 739.

And where the risk was to begin

"from the loading of the vessel," it was held to mean from the time she was completely loaded. *Jones v. Neptune Ins. Co.*, L. R., 7 Q. B. 702; *Hopper v. Wear Mar. Ins. Co.*, 46 L. T., N. S. 107.

In *Barnes v. Akers, Peake, Add. Cas.* 22, the policy read, "at and from all or any of the Windward and Leeward Islands to London on freight from the time that any part of the whale cargo should be put on board." Certain wine was laden on the outward voyage to be taken to London. The vessel was captured after the arrival at the islands before any cargo was laden there. It was held that the policy did not attach to the wine, as it was intended to apply only to cargo laden at the islands.

1. *Misrepresentation.*—A misrepresentation is a false statement of a fact made in regard to a proposed insurance. 1 Arnould Mar. Ins. (6th ed.) 520. It is enough to avoid a policy that a representation, if material, is false. The law is settled by many cases. *Fillis v. Bruton*, 1 Park Ins. 414; *Fitzherbert v. Mather*, 1 T. R. 12; *M'Dowell v. Fraser*, 1 Doug. 260; *Steele v. Lacy*, 3 Taunt. 285; *Feise v. Parkinson*, 4 Taunt. 640; *Darby v. Newton*, 6 Taunt. 544; *Edwards v. Footner*, 1 Camp. 530; *Dennistown v. Lillie*, 3 Bligh P. C. 202; *Price v. Dupeau*, 1 Brev. 452; *Chaurand v. Angerstein, Peake N. P.* 4; *Arnot v. Steward*, 5 Dow 274; *Kinloch v. Duguid*, Fac. Dec. (1812-1814) 108; *Hazard v. New England Ins. Co.*, 8 Pet. (U. S.) 557; 1 Sumn. (U. S.) 211; *Higgie v. National Lloyds*, 14 Fed. Rep. 143; 11 Biss. (U. S.) 395; *Carpenter v. American Ins. Co.*, 1 Story (U. S.) 57; *Bulkley v. Protection Ins. Co.*, 2 Paine (U. S.) 82; *Folsom v. Mercantile Ins. Co.*, 9 Blatchf. (U. S.) 201; *Livingstone v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *King v. Del. Ins. Co.*, 6 Cranch (U. S.) 71; *Clason v. Smith*, 3 Wash. (U. S.) 156; *Alsop v. Coit*, 12 Mass. 40; *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray (Mass.) 221; *Ohl v. Eagle Ins. Co.*, 4 Mass. 390; *Martin v. Fishing*

Ins. Co., 20 Pick. (Mass.) 389; Fosdick v. Norwich Ins. Co., 3 Day (Conn.) 108; Kemble v. Bowne, 1 Cai. (N. Y.) 75; Ely v. Hallett, 2 Cai. (N. Y.) 57; Suckley v. Delafield, 2 Cai. (N. Y.) 222; Vandenheuvel v. United Ins. Co., 2 Johns. Cas. (N. Y.) 127; Murray v. Alsop, 3 Johns. Cas. (N. Y.) 47; Callaghan v. Atlantic Ins. Co., 1 Edw. Ch. (N. Y.) 64.

It is immaterial that though false it is not fraudulent. *Anderson v. Thornton*, 8 Exch. 420; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508.

Where the statement is false to the knowledge of the assured, this has been held evidence that it is fraudulent. *Stewart v. Morrison*, Miller Ins. 39; *Roberts v. Fonnereau*, 1 Park Ins. (8th ed.) 405.

And so where the policy is affected after knowledge of the loss. *Tyler v. Horne*, 1 Park Ins. 455; *Chapman v. Fraser*, 1 Park Ins. 455.

Although the policy is made to read "lost or not lost." *People v. Dimick*, 41 Hun (N. Y.) 616.

Future Condition.—It has been held that a representation as to a future condition of things, though false, does not vitiate the policy. *Flinn v. Tobin*, 1 Mood. & Malk. 367; *Augusta Ins. & Bank Co. v. Abbott*, 12 Md. 348; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill (N. Y.) 329, 330.

But Mr. Arnould, 1 Arnould Mar. Ins. (6th ed.) 523, declares this irreconcilable with authority, and refers to the facts in the cases of *Steele v. Lacy*, 3 Taunt. 285; *Feise v. Parkinson*, 4 Taunt. 639; *Edwards v. Footner*, 1 Camp. 530; *Dennistown v. Lillie*, 3 Bligh P. C. 102. In all of these a representation as to a future condition of things which proved to be false was held to vitiate the policy. JUDGE DUER, 2 Duer Ins. 741, 743, 749-769, is strongly of the same opinion.

Expectation or Belief.—A representation as to expectation or belief is immaterial unless fraudulent. *Barber v. Fletcher*, 1 Doug. 306; *Hubbard v. Glover*, 3 Camp. 313; *Bowden v. Vaughan*, 10 East 415; *Brine v. Featherstone*, 4 Taunt. 867; *Anderson v. Pacific F. & M. Ins. Co.*, L. R., 7 C. P. 65; *Rice v. New England Mar. Ins. Co.*, 4 Pick. (Mass.) 439; *Hubbard v. Coolidge*, 2 Gall. (U. S.) 353; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 36.

Intention.—And so is a statement of intention. *Bryant v. Ocean Ins. Co.*, 22

Pick. (Mass.) 200; *Irvin v. Sea Ins. Co.*, 22 Wend. (N. Y.) 380.

Information.—Where the statement is given merely as information which the assured has received, or where he gives all the information he has and leaves the underwriter to act on it as he thinks best, the policy is not avoided even if the statements prove untrue. *Rice v. New England Ins. Co.*, 4 Pick. (Mass.) 439; 1 Arnould Mar. Ins. (6th ed.) 530; 2 Duer Ins. 707.

Intent to Deceive.—Of course if the statement is made with intent to deceive the policy is avoided by the fraud. 1 Arnould Mar. Ins. (6th ed.) 520, and authorities cited.

Construction.—The language used must be given the meaning the words would have in their ordinary sense to a person acquainted with the subject matter. *Ratcliffe v. Schoalbred*, 1 Park Ins. (8th ed.) 413; *Kirby v. Smith*, 1 B. & Ald. 672.

Thus in *Hazard v. New England Mar. Ins. Co.*, 8 Pet. (U. S.) 557, where the statement was made that a vessel was "coppered," it was held that the word must be given the meaning it had in New York where it was used, and not in Boston, in which place it had a different implication.

In *Lyon v. Stadacona Ins. Co.*, 44 Up. Can., Q. B. 472, in answer to the underwriter's question whether "stoves, funnels, flues, etc., employed for heating and using fire were properly secured," the word "none" was written. It was held not to mean that there was no galley stove on the vessel.

If ambiguous or such as to provoke further enquiry, the underwriter cannot set up as a defense that the statement was not true in the sense in which he understood it. 1 Arnould Mar. Ins. (6th ed.) 540; *Brine v. Featherstone*, 4 Taunt. 867; *Freeland v. Glover*, 7 East 462; *Livingstone v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506.

A representation may be gathered from the language of the policy. Thus in *Hodgson v. Richardson*, 1 W. Bl. 463, in a policy at and from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage," these words were held to imply a loading at Genoa. In fact the vessel loaded at Leghorn, which changed the risk, and the policy was declared avoided. So the words "to return five per cent. for convoy and arrival" were held to amount to a representation that probably the vessel would sail with con-

The misrepresentation, to avoid the policy, must be in regard to a material fact.¹

Where a representation material to the risk is not exactly true, but is substantially so, the policy will not be avoided.²

voy, when in fact the assured knew she had already sailed without convoy. *Reid v. Harvey*, 4 Dow's Rep. 97.

So a policy on goods on "ship or ships" is a representation that the assured does not know what ship. If he does, the policy is void. *Lynch v. Hamilton*, 3 Taunt. 37. See *Fowler v. Graves*, 13 L. T., N. S. 476.

Although the truth could be learned from Lloyd's list, the presumption will be that the underwriter relied on the representation, unless it is proved that he inspected the list. *Mackintosh v. Marshall*, 11 M. & W. 116; *cf. Foley v. Tabor*, 2 F. & F. 662, per EARL, C. J., *semble contra*.

The statements may be withdrawn at any time before the policy is actually executed. 1 Arnould Mar. Ins. (6th ed.) 538; *Carter v. Boehm*, 3 Burr. 1905; *Edwards v. Footner*, 1 Camp. 530; *Dawson v. Atty.* 7 East 366.

1. Material Facts.—Every representation is to be presumed material which would be likely to induce a fair and reasonable underwriter to take the risk or lower the premium. 1 Arnould Mar. Ins. (6th ed.) 530; *Hodgson v. Marine Ins. Co.*, 5 Cranch (U. S.) 100; *Alsop v. Ins. Co.*, 1 Sumn. 458.

"Every misrepresentation is fatal to a contract which is made under such circumstances and in such a way as to gain the confidence of the other party, and induce him to act when otherwise he would not." Per LORD ELDON, in *Sibbald v. Hill*, 2 Dow. P. C. 263; *Stetson v. Mass. Ins. Co.*, 4 Mass. 330.

Thus a false statement as to the rate at which other underwriters were willing to insure. *Sibbald v. Hill*, 2 Dow. P. C. 263; *Clason v. Smjth*, 3 Wash. (U. S.) 156.

As to the nature of the cargo. *Flinn v. Headlam*, 9 B. & C. 690; *Vasse v. Ball*, 2 Yeates (Pa.) 178.

As to the date of sailing. *Dennistown v. Lillie*, 3 Bligh P. C. 202.

As to the presence of a French bill of sale on board. *Murray v. Alsop*, 3 Johns. Cas. (N. Y.) 47.

The exact time of sailing has been held immaterial in *Williams v. Delafield*, 2 Cai. (N. Y.) 329; *Mackay v. Rhineland*, 1 Johns. Cas. (N. Y.) 408.

In time policies a mistaken statement as to the position of the ship on a particular day, and a false description of the voyage to be taken have been held immaterial. *Vigoreaux v. Lime Rock Ins. Co.*, 59 Me. 457; *Harvey v. Seligman*, 10 Sc. Sess. Cas. (4th ed.) 680.

So a statement as to the value of the vessel is immaterial. *Hodgson v. Marine Ins. Co.*, 5 Cranch (U. S.) 100.

For other cases see *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151.

Whether the statement is material or not is always for the jury. *M'Dowell v. Fraser*, 1 Doug. 260; *Shirley v. Wilkinson*, 1 Doug. 306, *note*; *Willes v. Glover*, 1 B. & P. N. R. 14; *Hull v. Cooper*, 14 East 479; *Mackintosh v. Marshall*, 11 M. & W. 116; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Schroeder v. Stock & Mut. Ins. Co.*, 46 Mo. 174.

2. Substantial Compliance.—Herein the effect of a representation differs from that of a warranty, which must be exactly complied with. Thus where a vessel was stated to be at Limerick when in fact she was at Grass Island. *Bell v. Marine Ins. Co.*, 8 S. & R. (Pa.) 98.

Where the vessel was stated to mount twelve guns and carry twenty men, when in fact the number of men was less and of guns was more. *Pawson v. Watson*, 1 Cowp. 785.

Where the statement made was that the vessel was last metalled in 1867, and the truth was that she was only overhauled then and new metal put on where it seemed necessary. *Alexander v. Campbell*, 41 L. J. (Ch.) 478.

So it was held that the fact that a vessel stated to sail in ballast actually took a very small amount of cargo did not avoid the policy. *Suckley v. Delafield*, 2 Cai. (N. Y.) 222.

A statement that no spirits were on board was held sufficiently complied with if, although there was some liquor on board, it was not for the use of the officers and crew. *Irvin v. Sea Ins. Co.*, 22 Wend. (N. Y.) 380.

So where a vessel was stated to carry her registered tonnage of coal, but in

By an old rule, statements made to a prior underwriter relating to the risk as it appears in the policy may be taken advantage of by subsequent underwriters.¹

It is immaterial that the loss does not arise from any cause connected with the fact in regard to which the misrepresentation was made.²

2. *Concealment*.—Concealment is the suppression, at the time of making the contract, of a material fact within the knowledge of one party, which the other has not the means of knowing or is not presumed to know.³

A concealment, although not fraudulent, renders the contract wholly void. The insured is bound to communicate every fact within his own knowledge or that of agents whose duty it is to inform him, and who have had opportunity to do so, which would lead a reasonable underwriter to refuse the risk or to demand a higher premium.⁴

fact carried more. *Hearn v. Equitable Safety Ins. Co.*, 4 Cliff. (U. S.) 192.

So where it was represented that the vessel would be repaired at Y, it was held that this was sufficiently complied with if she was examined at Y and pronounced seaworthy, and accordingly not repaired there. *Lunt v. Boston Mar. Ins. Co.*, 17 Fed. Rep. 411; 6 Fed. Rep. 562; 19 Blatchf. (U. S.) 151. See also *Driscoll v. Passmore*, 1 B. & P. 200; *Von Tugelu v. Dubois*, 2 Camp. 151; *Nonneu v. Kettlewell*, 16 East 176; *Christian v. Ditchell*, Peake Add. Cas. 141.

1. *Statements to Prior Underwriters*.—1 Arnould Mar. Ins. (6th ed.) 544.

The law is so stated in a series of early cases. *Pawson v. Watson*, 2 Cowp. 785; *Barber v. Fletcher*, 1 Doug. 305; *Marsden v. Reid*, 3 East 572; *Feise v. Parkinson*, 4 Taunt. 640; *Forrester v. Pigon*, 1 M. & S. 13; *Bell v. Carstairs*, 2 Camp. 543.

The representation must be one that affects the risk as it appears in the policy. *Pawson v. Watson*, 2 Cowp. 785.

The rule is not favored, and, probably, would not be upheld today. Per LORD ELLENBOROUGH, in *Bell v. Carstairs*, 2 Camp. 543: "It is difficult to see on what principle of law a representation to the first underwriter is considered as made to all who afterwards underwrite the policy. The rule being established, I will abide by it; but I will by no means allow it to be extended."

And in *Forrester v. Pigon*, 1 M. & S. at 13, he says: "Whenever the ques-

tion comes distinctly before the court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification." See also *Robertson v. Majoribanks*, 2 Stark. N. P. 503.

And per HEATH, J., in *Brine v. Featherstone*, 4 Taunt. at 871: "The evidence of representations made to the first underwriter had been admitted; but that was rather on precedent than reason."

If the first underwriter signs under a secret agreement that he shall be excused from liability in case of loss, this constitutes a distinct fraud on subsequent underwriters, and they are not bound. *Whittingham v. Thornburgh*, 2 Vern. 206; *Wilson v. Duckett*, 3 Burr. 1361.

2. 1 Arnould Mar. Ins. (6th ed.); *Lynch v. Hamilton*, 3 Taunt. 36; *Lynch v. Dunsford*, 14 East 494.

3. *Concealment*.—1 Arnould Mar. Ins. (6th ed.) 548, citing *Ionides v. Pender*, L. R., 9 Q. B. 531; *Rivaz v. Gerussi*, 6 Q. B. D. 222; 1 *Parsons Mar. Ins.* 495; 1 *Phillips Ins.* (5th ed.), § 531; *Hart v. British etc. F. & M. Ins. Co.*, 22 Pac. Rep. 302; *People v. Demick*, 107 N. Y. 13; *Locke v. North American Ins. Co.*, 13 Mass. 61.

4. This is established by a multitude of cases in which a failure to disclose such a material fact has been held to avoid the policy. A failure to disclose the presence of enemy's vessels. *Beckwith v. Nalgrove*, Holt N. P. 288, note; *Durrell v. Bederley*, Holt N. P. 283.

The fact a belligerent was interested in the cargo or the vessel. *Campbell*

v. Innes, 4 B. & Ald. 423; *Baudery v. Union Ins. Co.*, 2 Wash. (U. S.) 391. See *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151; *Maryland Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338.

Or the former belligerent character of the vessel. *Bates v. Hewitt*, L. R., 2 Q. B. 595; 4 F. & F. 1023.

Any fact showing property liable to seizure. *Moyne v. Walter*, 1 Park Ins. 431; *Kohne v. Ins. Co. of North America*, 6 Binn. (Pa.) 219; 1 Wash. (U. S.) 93, 158; *Cunningham v. Craigie*, Bell's Sel. Cas. 268; *Stocker v. Merrimack M. & F. Ins. Co.*, 6 Mass. 220; *Archibald v. Mercantile Ins. Co.*, 3 Pick. (Mass.) 701.

The fact that the vessel containing the cargo or freight insured was a prize returning for condemnation. *Reid v. McMillan*, Fac. Dec. (1812-1814) 407; *Reid v. Harvey*, 4 Dow 97.

The fact of a peril from a severe storm unknown to the underwriter. *Mahoney v. Provincial Ins. Co.*, 1 Han. (N. B.) 633; *Moses v. Delaware Ins. Co.*, 1 Wash. (U. S.) 385; *Ely v. Hallett*, 2 Cai. (N. Y.) 57.

The fact that the vessel is a wreck at the time the policy is effected. *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 188; cf. *Rosenheim v. American Ins. Co.*, 33 Mo. 230.

Or has put into the port where the insurance is to begin, for repairs. *Boak v. Merchants' Marine Ins. Co.*, 1 Russ. & C. (Nova Sc.) 288.

Or has put in to an intermediate port for repairs. *Uzielli v. Commercial Union Ins. Co.*, 12 L. T. 399.

The existence of any special contract, agreement, or orders by which the usual risk is varied or affected. *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 8 Ben. (U. S.) 272.

Thus where after reaching a certain point on the voyage insured it was usual for the master to take that one of three possible courses which seemed at that moment safest; but the master sailed under instructions to take one particular course, and was left no option. *Middlewood v. Blakes*, 7 T. R. 162; cf. *Houston v. New England Ins. Co.*, 5 Pick. (Mass.) 89.

Where by a special agreement with a lighterman he was relieved of liability as a carrier, and the underwriter's recourse to him by subrogation was thus impaired. *Tate v. Hyslop*, 15 Q. B. Div. 368.

Where the charter party contained an agreement that it might be cancelled

if the vessel failed to reach a specified point in a fixed time, the policy being on freight. *Mercantile Steamship Co. v. Tyser*, 7 Q. B. Div. 73.

Where there was an agreement to carry cotton from Smyrna to Leghorn under false papers stating it to be the property of the owners of the ship, when in fact it belonged to a belligerent. *Stocker v. Merrimack M. & F. Ins. Co.*, 6 Mass. 220.

Where an insurance company knew that A was insured on his interest in a vessel, and for double the amount of its possible earnings, held that it was bound to disclose that fact to another company from which it sought reinsurance. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485.

The fact that the vessel has sailed, or will sail without convoy, where convoy is usual, or is required by a fair construction of the policy. *Reid v. Harvey*, 4 Dow 97; *Sawtell v. London*, 5 Taunt. 359.

The insured is bound to communicate any facts which lead him to fear a loss has occurred; and policies have been held void for failure to communicate such facts in the following cases: *Durell v. Bederley*, Holt N. P. 283; *De Costa v. Scandret*, 2 P. Wms. 170; *Murrison v. Gibbon*, Fac. Dec. (1810-1812) 148; *Kinloch v. Campbell*, Fac. Dec. (1814-1815) 421; *Nicholson v. Power*, 20 L. T. (N. S.) 580. See *Symers v. Glasgow Ins. Co.*, 19 Scot. Jur. 49; *Mechanics' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664; *Vale v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 283; *Johnson v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 378; *Snow v. Mercantile Ins. Co.*, 61 N. Y. 160; *Hart v. British etc. F. & M. Ins. Co.*, 80 Cal. 440; *Horter v. Merchants' Mut. Ins. Co.*, 28 La. An. 730; *Graham v. General Mut. Ins. Co.*, 6 La. An. 432; *Burr v. Foster*, 2 Dane Abr. 122; *Vasse v. Ball*, 2 Dall. (U. S.) 270; *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274; *Murgatroyd v. Crawford*, 3 Dall. (Pa.) 491; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 185; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 408; *Kohne v. Ins. Co.*, 1 Wash. (U. S.) 93; *Mar. Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338; *Biays v. Union Ins. Co.*, 1 Wash. (U. S.) 506; *Oliver v. Green*, 3 Mass. 133; *Hoyt v. Gilman*, 8 Mass. 336; *Stocker v. Merrimack Ins. Co.*, 6 Mass. 220; *Fiske v. New England Ins. Co.*, 15 Pick. (Mass.) 310; *Watson v. Delafield*, 2 Cai. (N. Y.)

224; *Livingston v. Delafield*, 3 Cai. (N. Y.) 49; *Burrett v. Saratoga Ins. Co.*, 5 Hill (N. Y.) 189; *Howell v. Cincinnati Ins. Co.*, 7 Ohio 276; *Ingraham v. S. C. Ins. Co.*, *Treadw. (S. Car.) Const.* 707; *Graham v. Gen. Ins. Co.*, 6 La. An. 432; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402. *Dickenson v. Commercial Ins. Co. of New York*, *Anthon' N. P. (N. Y.)* 92; *cf.* on this case, 2 *Duer. Ins.* 486, note a; *People v. Dimick*, 41 Hun (N. Y.) 616. *Cf.* *Rosenheim v. Amer. Ins. Co.*, 33 Mo. 230, where, although the assured knew the vessel on which his goods were laden was aground and in danger of loss at the time he effected the insurance, it was left to the jury to say whether the failure to disclose the facts was material. Clearly the underwriter was entitled to know the facts which were concealed here. See also *Graham v. General Ins. Co.*, 6 La. An. 432; *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37.

It is immaterial that the information received by the assured be in fact untrue, the policy will be void if he has suppressed it. *Seaman v. Fonereau*, 2 Stra. 1183; *Lynch v. Dunsford*, 14 East 494; *Lynch v. Hamilton*, 3 Taunt. 37; *Murrison v. Gibbon*, *Fac. Div. (1810-1812)* 148; *Hoyt v. Gilman*, 8 Mass. 336, 339; *Union Ins. Co. v. Stoney*, *Harp. (S. Car.)* 235.

The policy will be void, although the assured has sought to verify the information and has concluded it to be untrue. *Morrison v. Universal Mar. Ins. Co.*, *L. R.*, 8 Ex. 197.

A failure to communicate the port of loading and the fact that other underwriters had refused to take the risk from that port has been held fatal. *Harrower v. Hutchinson*, *L. R.*, 5 Q. B. 584.

That the agent of the underwriter was a part owner in the vessel insured. *Ritt v. Washington M. & F. Ins. Co.*, 41 Barb. (N. Y.) 353.

A change of the vessel's nationality. *Hutchinson v. Aberdeen Sea Ins. Co.*, 3 Sc. Sess. Cas., 4th ser., 682.

That trade to the port of destination is prohibited by proclamation, if unknown to the underwriter. *Marsh v. Muir*, 1 Brev. (S. Car.) 134; *Hoyte v. Gilman*, 8 Mass. 336.

That the people of the coast of Africa had promised to cut off the master if he came to the coast again. *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. Car.) 522.

That by an anonymous letter it had been stated that the owners of the vessel on which the goods insured were laden intended to sink her. *Leigh v. Adams*, 25 L. T., N. S. 566.

Where goods declared on earlier policies had been fraudulently undervalued in order that more goods might be declared on later ones, this was held a concealment which vitiated the policies. *Rivaz, v. Gerussi*, 6 Q. B. Div. 222.

And so where a cargo was very greatly overvalued, it was held a fatal concealment not to disclose that the difference between the actual and stated value was expected profits from traffic with a port in Russia not within the Russian custom house jurisdiction at that time. *Ionides v. Pender*, *L. R.*, 9 Q. B. 531.

Where the policy is made on goods by "ship or ships," or "on any steamer," it is a fatal concealment if the assured knows at the time the particular vessel. and fails to disclose it. *Fowler v. Graves*, 13 L. T. 476.

But not if he only expects them to be on a particular vessel. *Knight v. Catesworth*, 1 Cababé & Ellis 48.

If the assured knows of a loss, or is aware of facts which render a loss probable, he is not relieved from the necessity of communicating his knowledge by making the policy "lost or not lost." *Kinlock v. Campbell*, *Fac. Dec. (1814-1815)* 421; *People v. Dimick*, 41 Hun (N. Y.) 616.

Where a party obtained from the agent of an insurance company a marine policy on goods, "lost or not lost," it appeared that the vessel on which they had been shipped was lost two days prior to the date of the policy, and the party procuring the insurance knew of the loss at the time, but did not inform the agent, *held*, that the fact that the daily papers at the place where the policy was issued, announcing the loss of the vessel, were received at the office of the company on the morning of the day the policy was issued, did not show necessarily that the information was received by the company. The particular agent effecting the insurance should have had the information; and as his business was outside of the office, information there was not the same as information to him, or to the company. Nor would notice to one of the agents of the company necessarily import notice to another. *Merchants' Ins. Co. v. Paine*, 60 Ill. 448.

The assured is not bound to disclose anything which the underwriter either in fact knows or is in law presumed to know, or which is implied in the statement of the risk or which is immaterial to the risk.¹ Nor need he disclose mere apprehen-

The owner of a vessel, knowing that his vessel had been lost on the 8th of January, 1870, but concealing his knowledge of the fact, applied for, on the 15th following, and got a written policy of insurance dated on that day, on her, "lost or not lost," from the 1st of January, 1870, to the 1st of April following. The insurance company discovering afterwards that when he applied for this policy he knew of the loss, refused to pay; he brought suit, setting out his written policy, but declaring on it in such a way as was meant to show that the execution of it was but "a compliance with and a formal statement" of an agreement to make the insurance, which he alleged had been entered into between himself and the insurers on the 31st of December, 1869, and before the loss. *Held*, that the company was not liable on the policy. MR. JUSTICE MILLER, in delivering the opinion of the court, said: "Counsel for the defendants in error here relies on two propositions, namely, that the policy, though executed January 5th, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to be assured and kept secret from the insurers; and secondly, that they can abandon the written contract altogether and recover on the parol contract. We do not think that either of these propositions are sound. Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company. When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel. If they had made the policy it would have bound them, and no question would have been raised of the validity of the instrument or of fraud practiced by the insured. On the other hand, if they had refused to make the policy, no injury would have been done to the plaintiffs, and they would have stood on their parol contract if they had one,

and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid. To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law."

1. **What Need Not be Disclosed.**—The underwriter is presumed to know the usages of trade. 1 Arnould Mar. Ins. (6th ed.) 579, *et seq.*, and cases cited; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343.

To know the political state of the world. *Hoyt v. Gilman*, 8 Mass. 336; *Blagge v. New York Ins. Co.*, 1 Cal. (N. Y.) 549; 2 Duer 516, 561; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 160; *Kohne v. Ins. Co.*, 1 Wash. (U. S.) 158; *Martin v. Del. Ins. Co.*, 2 Wash. (U. S.) 254; *De Longuemere v. N. Y. Ins. Co.*, 10 Johns. (N. Y.) 120; *Marsh v. Muir*, 1 Brev. (S. Car.) 134.

And the physical characteristics of the ports of the world. Thus it is not necessary to disclose that *Sisal* is an open roadstead. *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. (N. Y.) 120, 126.

Or the depth of the water over the bar of a particular harbor. *Patterson v. Duguid*, Bell's Sel. Cas. 281.

Whether or not the underwriter is affected with knowledge of what is contained in Lloyd's List, or similar publications, is not fully decided, but the law seems to be as stated in 1 Arnould Mar. Ins. (6th ed.) 584, and cases cited.

That there is no presumption of his knowledge of particular facts as to particular ships, merely on the ground that such facts have appeared in Lloyd's List, the London Gazette, or in a newspaper. *Friese v. Woodhouse*, 1 Holt N. P. 572; *Elton v. Larkins*, 5 C. & P. 85; *Foley v. Tabor*, 5 F. & F. 662; *Mackintosh v. Marshall*, 11 M. & W. 116; *Bates v. Hewitt*, L. R., 2 Q. B.

595; Symers v. Glasgow Ins. Co., 19 Scot. Jur. 49.

The American decisions require the fact of knowledge to be proved. Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; Dickenson v. Commercial Ins. Co. of New York, Anth. (N. Y.) 92. See on this case also 2 Duer Ins. 486. *note a*; 1 Phillips Ins. (5th ed.), §606; Union Ins. Co. v. Stoney, Harp. (S. Car.) 235; 3 McCord (S. Car.) 387; 4 McCord (S. Car.) 511.

Against extraordinary hazards to be apprehended from the description of the risk the underwriter can protect himself by enquiry. The law is well stated by SEWALL, J., in Stocker v. Merrimack M. & F. Ins. Co., 6 Mass. 220 at 224.

"The employment in which a vessel is to be engaged when attended with any extraordinary hazard must always be material to the risk; and if this is known to the assured, and the extraordinary circumstances are not suggested by the description of the voyage, the concealment will avoid the policy.

"When the circumstance from which an extraordinary risk may be apprehended was not known to the assured, or he knew only what was sufficiently suggested by the description of the risk insured, and there has been no misrepresentation respecting it, the underwriter cannot avoid his contract upon the objection of a material concealment. Against circumstances within the risk described, which may or may not happen, but which, happening, are attended with an extraordinary degree of hazard, the underwriter may guard himself by his enquiries, or by stipulations restricting the risk he undertakes, and when he neglects these precautions he must be understood to waive his right to further information, and to undertake against all events and accidents of the voyage insured."

So where an ordinance declared neutral ships liable to seizure if the supercargo was the subject of a belligerent, it was held that if this ordinance was known to the underwriter he should enquire as to the nationality of the supercargo, and the assured was not bound to disclose it unasked. Mayne v. Walter, 1 Park Ins. 431.

And so where a vessel was not within a "convoy act" because she was foreign built, it was held that the assured, having disclosed the name of the vessel, was not bound to disclose her build, or the fact she was not within

the act. On these points the underwriter should inform himself by enquiry. Long v. Duff, 2 B. & P. 209; Long v. Bolton, 2 B. & P. 209.

It is not essential to disclose the nature of the cargo, if not specially hazardous, nor, in a time policy, the place of destination unless known to be specially dangerous. Harvey v. Seligman, 10 Sc. Sess. Cas., 4th series 680; Chesapeake Ins. Co. v. Allegre, 2 G. & J. (Md.) 164; Dufanty v. Commercial Ins. Co., Anth. (N. Y.) 114.

Nor the method of loading. Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; Da Costa v. Edmunds, 4 Camp. 142; 2 Chitty 227; Clarkson v. Young, 22 L. T., N. S. 41.

Nor directions to master as to his proceedings, if he is allowed the usual discretion as to the safe conduct of the voyage. Houston v. New England Ins. Co., 5 Pick. (Mass.) 89; Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 136.

Nor the age of the vessel. Poppleston v. Kitchen, 3 Wash. (U. S.) 138.

Nor the method of building it. Lexington Ins. Co. v. Paver, 16 Ohio 324.

The assured need not disclose title unless enquiries are made. Russ v. Waldo Mut. Ins. Co., 52 Me. 187; Locke v. North American Ins. Co., 13 Mass. 61; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Bixby v. Franklin Ins. Co., 8 Pick. (Mass.) 86; Bartlett v. Walter, 13 Mass. 267; Turner v. Burrows, 8 Wend. (N. Y.) 144; 5 Wend. (N. Y.) 541; Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Lawrence v. Van Horne, 1 Cai. (N. Y.) 276.

If goods insured are in their nature perishable, the assured need not disclose that they are damaged at the time of insuring, provided they were in good condition when they were loaded on board. Boyd v. Dubois, 3 Camp. 133.

Where correspondence is shown which refers to statements in earlier letters the assured need not disclose the contents of the latter unless asked. Thompson v. Buchanan, 4 Bro. P. C. 482; Freeland v. Glover, 7 East 457. See also Livingston v. Maryland Ins. Co., 7 Cranch (U. S.) 506; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348.

Where all the facts essential for forming a judgment as to the seaworthiness of a vessel were disclosed, it was held no concealment not to have stated what her structure showed, that she was

sions.¹ Nor any facts in regard to which there is a warranty, express or implied.²

The date of sailing, or any fact connected with the sailing, material to the risk, should be communicated, *e. g.*, that another vessel that sailed at the same time has arrived safely.³

The person desiring insurance is bound to use ordinary diligence to communicate any material fact coming to his knowledge after negotiations have been begun, and failure so to do will be a fatal concealment.⁴

built for river, not for ocean use. *Clapham v. Langton*, 2 Asp. 54; 10 L. T. N. S. 875.

Concealment of immaterial circumstances by the assured will not vitiate the policy. *Pine v. Vanurem*, 3 Yeates (Pa.) 30; *Russ v. Waldo & Ins. Co.*, 52 Me. 187; *Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Money v. Union Ins. Co.*, 4 McCord (S. C.) 511; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73.

For other cases on the general subject see *Court v. Martineau*, 3 Doug. 161; *Beckwith v. Sidebotham*, 1 Camp. 116; *Haywood v. Rodgers*, 14 East 590; *Adams v. Murray*, Fac. Dec. (1801-1807) 360; *Smith v. Bissett*, Fac. Dec. (1808-1810) 617; *Lambe v. Smith*, Fac. Dec. (1814-1815) 220; *Gandy v. Adelaide Mut. Ins. Co.*, L. R., 6 Q. B. 746; *Sperry v. Delaware Ins. Co.*, 2 Wash. (U. S.) 243; *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 357; *Hubbard v. Coolidge*, 2 Gall. 353; *Kemble v. Bowne*, 1 Cai. (N. Y.) 75.

1. Thus where a recent order of the Russian government requiring the papers of all vessels to be sent to St. Petersburg for examination created general alarm in Riga for the safety of vessels there, it was held that it was not essential for the assured to communicate information of this apprehension. *Bell v. Bell*, 2 Camp. 475.

2. *Haywood v. Rodgers*, 4 East 590; *Augusta Ins. Co. v. Abbott*, 12 Md. 348; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Elling v. Scott*, 2 Johns. (N. Y.) 157; *Walden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 128; *De Wolf v. New York Firemen's Ins. Co.*, 20 Johns. (N. Y.) 214.

3. **Time of sailing.**—This is the rule laid down in 1 Arnould Mar. Ins. (6th ed.), and it is fully supported by the cases. In the absence of facts making the date important it is not necessary to communicate the time of sailing. *Fort v.*

Lee, 3 Taunt. 381; *Foley v. Moline*, 5 Taunt. 430; *Fiske v. New England M. Ins. Co.*, 15 Pick. (Mass.) 310; *M¹-Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188. And it has been held that the date of sailing need not be communicated unless the vessel is at the time the policy is made a missing vessel. *Per TINDAL, C. J.*, in *Elton v. Larkins*, 5 C. & P. 385. But the latter rule is not law to-day in England, and probably not in the United States.

A failure to disclose the time of sailing has been held fatal in the following cases: *Bridges v. Hunter*, 1 M. & S. 14; *Shirley v. Wilkinson*, 3 Doug. 41; 1 Doug. 306, *note*; *Willes v. Glover*, 4 B. & P. 14; *Ratcliffe v. Shoalbred*, 1 Marsh. Ins. 466; *Mackintosh v. Marshall*, 11 M. & W. 116; *Elkin v. Jansen*, 13 M. & W. 655; *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. D. 507; *Stewart v. Morrison*, Fac. Dec. (1778-1781) 102; *Gillespie v. Douglass*, Fac. Dec. (1801-1807) 251; *Livingston v. Delafield*, 3 Cai. (N. Y.) 49; *Himely v. South Carolina Ins. Co.*, 1 Mill (S. Car.) Const. 154.

A failure to communicate the arrival of another vessel which sailed at the same time as that insured has been held a fatal concealment in the following cases: *McAndrews v. Bell*, 1 Esp. 373; *Webster v. Forster*, 1 Esp. 407; *Rickards v. Murdock*, 10 B. & C. 527; *Kirby v. Smith*, 1 B. & A. 672; *Westbury v. Aberdeen*, 2 M. & W. 267; *Allan v. Young*, Fac. Dec. (1801-1807) 248.

When the assured stated that another vessel which sailed two days before his had arrived, but added that she was coppered and a fast sailer, it was left to the jury to decide whether it was a fatal concealment to fail to communicate that another vessel, also coppered and fast, that left three days after the date he had assumed for the sailing of his own had arrived. *Liddedale v. Dixon*, 4 B. & P. 151.

4. **Information Pending Negotiation.**—

Thus, where, after a letter had been sent

The principal, though himself ignorant, is affected with knowledge of all which is known by his agents authorized to effect the insurance.¹

directing insurance, the applicant learned of loss and neglected to send this information by the next mail, which would have arrived before the policy was made, it was held a fatal concealment. *Bowker v. Smith*, Fac. Dec. (1808-1810) 571.

And so when an owner while abroad sent orders to procure insurance, but sailed homeward by the same vessel that carried one of the orders and learned of the loss while he knew that the policy had not yet been effected, it was held a fatal concealment not to send notice of the loss by the same conveyance as the order. *Watson v. Delafield*, 2 Cai. (N. Y.) 224; 2 Johns. (N. Y.) 526.

The assured need not make unusual exertions or resort to uncommon means of communication in order to inform the underwriter. *Grieve v. Young*, *Millar Ins. Co.*, 65; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Batchelder v. Jones*, 2 Dane Abr. 123; *Burr v. Foster*, 2 Dane Abr. 122; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Andrews v. Mar. Ins. Co.*, 9 Johns. (N. Y.) 32.

The law is well stated and illustrated in the case of *Snow v. Mercantile Mut. Ins. Co.*, 61 N. Y. 60. There a policy was made in November, 1866, on an order from Liverpool. The owner at that time knew of the loss, and sent a letter announcing it by the first mail after receiving the information. The Atlantic cable had been in use about three months, averaging twenty-nine messages each way per day. The rates were very high and the cable was not then a usual means of communication. It was held that the assured had used ordinary diligence and that the policy was valid.

1. Knowledge of Agents.—The statement of the text is believed to be the result of the latest cases in England and in this country.

The law in England is settled by *Blackburn v. Vigors*, 12 Ap. Cas. 531, 55 L. J. (Q. B.) 347; *Blackburn v. Haslam*, 21 Q. B. Div. 144.

In these cases the plaintiffs of Glasgow had sought to obtain reinsurance by means of *Murison & Co.* of Glasgow and the London agents of *M. & Co.*, *Thompson & Co.* of London. Be-

fore *T. & Co.* were able to effect the insurance one of the Glasgow brokers learned of a loss, telegraphed the London firm in the name of the plaintiffs, thus putting them in direct communication with the plaintiffs, and took no further part in the negotiations. He did not, however, communicate what he had learned. Insurance with defendant Haslam was effected by *T. & Co.*, but that with defendant Vigors was made the next day by the other brokers wholly distinct from *T. & Co.*, and after all negotiations through them had ceased.

In *Blackburn v. Haslam* it was held that the failure to impart the knowledge of the agent was fatal to the policy.

In *Blackburn v. Vigors*, after a decision in the lower court for the plaintiffs had been set aside by the court of appeals, the house of lords upheld the first decision, holding that the plaintiffs could not be affected with the knowledge of agents not in fact employed in obtaining the policy in question.

The earlier English cases did not hold so strict a rule.

In *Fitzherbert v. Mather*, 1 T. R. 12, it was held that the failure of a master to inform the owner of a loss before the insurance was obtained vitiated the policy, the owner being affected with the knowledge of his agent; and a similar decision was made in *Stewart v. Dunlap*, 4 Bro. P. C. 483, *note*, where a clerk had been informed of the loss.

So in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, where A, employed to purchase and ship madder at Smyrna to Liverpool, advised the plaintiff of the shipment January 12th, and sent shipping documents January 19th. The vessel sailed on January 23rd and was wrecked the same day. A purposely refrained from telegraphing and only advised the plaintiff by mail on January 26th. This was held a fatal concealment.

The law as laid down in the latter case was regarded as the law in England until the decision of the house of lords. Per *COCKBURN*, C. J., p. 521.

"If an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo omits to discharge such duty, and the owner, in

the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter has communicated to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

These cases established the law to be that the principal was affected by the knowledge of all agents whose duty it was in the ordinary course of business to keep him informed of the condition of the vessel or goods.

Two other English cases are authority for a rule of very doubtful validity. In *Gladstone v. King*, 1 M. & S. 35, a vessel had been driven upon a rock, but got off safely and, as was supposed, without damage. The master neglected to give any information of this mishap, and the policy was made in ignorance of it. After the vessel's arrival it was found that some damage had resulted from the accident. It was held that, while the policy was not void for the concealment, there could be no recovery for the damage resulting from or connected with the accident. It must be regarded as excepted from the policy.

A similar decision was made in *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. Div. 507, where the master neglected to report the loss of an anchor and chain.

The earlier case has been many times disapproved, both in England and America, and is probably not law, though not distinctly overruled.

See cases already cited on the topic of the knowledge of agents, and *Ruggles v. General Interest Ins. Co.*, 4 Mason (U. S.) 74; 12 Wheat. (U. S.) 408.

In the United States it was early decided in *Ruggles v. General Interest*

Ins. Co., 4 Mason (U. S.) 74, where the master not only did not inform the owner of the loss in time but deliberately prevented knowledge from getting to him in order that he might insure, that the policy was not void, JUDGE STORY stating the law thus, at p. 79: "My opinion is that in the present case, where there has been an abandonment in due time for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith in procuring the insurance, he is not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and with the fraudulent design to enable the owner to make insurance after the total loss, the owner not being conscious of any such act or design at the time of such insurance."

This decision was upheld by the supreme court of the United States. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 408, on the distinct ground that the master was not an agent to procure insurance and that the principal was not to be affected by the knowledge of any other agent, the court also intimating that after the loss the master was the agent of the underwriters.

This decision is supported by *Clement v. Phoenix Ins. Co.*, 6 Blatchf. (U. S.) 481.

It is opposed by the decision in *Byrnes v. Alexander*, 1 Brev. (S. Cal.) 213, where the knowledge of a merchant's clerk was imputed to himself. See also 2 Duer Ins. 418, and 1 Arnould Mar. Ins. (6th ed.) 555.

See also, on the general topic, *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118; *Continental Ins. Co. v. Allen*, 26 Ill. App. (Ill.) 576.

The principal is not affected with knowledge of what he might have known had he taken from the post office or received from others letters ready to be delivered to him. *Ware v. Atty.*, 4 Taunt. 493; *Stone v. Aberdeen Mut. Ins. Co.*, 11 C. C. Sc. 1041; *Neptune Ins. Co. v. Robinson*, 11 G. & J. (Md.) 256; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402.

In *Tate v. Hyslop*, 15 Q. B. Div. 368, the defendant was held to know facts which had been communicated to his solicitor, and a policy was declared void for the concealment of these facts.

Nothing need be communicated that is learned after the contract is once completed, although before the policy is actually delivered.¹

It seems that the failure to communicate may be waived by the underwriter and the contract be binding upon him.²

3. *Breach of Warranties—Express Warranty.*—An express warranty is a stipulation in writing inserted in the policy alleging the existence of some fact or state of things at the time or previous to the time of making the policy or undertaking for the happening of future events, or the performance of future acts.³

The warranty must be strictly and exactly complied with; any failure will invalidate the policy.⁴

1. 1 Arnould Mar. Ins. (6th ed.) 549; Cory v. Paton, L. R., 7 Q. B. 304; L. R., 9 Q. B. 577; Ionides v. Pender, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517; Lishman v. Northern Marit. Ins. Co., L. R., 8 C. P. 216; L. R., 10 C. P. 179; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. (U. S.) 664.

2. 1 Arnould Mar. Ins. (6th ed.) 594, and cases cited. Russell v. Thornton, 4 H. & N. 788; 6 H. & N. 140; Morrison v. Universal Mar. Ins. Co., L. R., 8 Ex. 40, 197.

The *contra* has been held in *Canada*. Royal Canadian Ins. Co. v. Smith, Cassell's Dig. of Can. Sup. Ct. 216, 217, cited in Berryman, Digest of the Law of Insurance, 278, *overruling* Smith v. Royal Canadian Insurance Co., 5 Russ. & I. (Nova Sc.) 322.

3. 2 Arnould Mar. Ins. (6th ed.) 599.

4. *Express Warranties.*—The cases cited hereafter fully confirm this statement of the law. The strictness with which the law is enforced appears best from the case of *DeHaka v. Hartley*, 1 T. R. 343; 2 T. R. 186. Here the ship was warranted to sail from London with, *inter alia*, 50 hands. In fact on leaving London there were only 46, but enough were taken on board six hours later to make the number more than 50. The court held that the warranty was not complied with and the policy was void.

The fact that the performance of the warranty is prevented by a peril insured against is immaterial. *Hore v. Whitmore*, 2 Camp. 784.

Compliance with the letter of the warranty is sufficient. Thus where it was warranted that the vessel had 20 guns, it was held sufficient if she in fact carried that number, though she had but 25 men and could not man the 20

guns with less than 60 men. *Hide v. Bruce*, 3 Doug. 213.

Compliance with the warranty is dispensed with if it be subsequently made unlawful. *Brewster v. Kitchell*, *Ld. Raym.* 371.

If broken, the policy is void though the loss is not connected with the breach of the warranty. *Woolmer v. Muilman*, 1 W. Bl. 427.

See also, on strict compliance, *Kemble v. Rhineland*, 3 Johns. Cas. (N. Y.) 130; *Swain v. Boylston Ins. Co.*, 37 Fed. Rep. 766; *Murgalroyd v. Crawford*, 2 Yeates (Pa.) 420.

The following cases support the statement of the text, and merely determine the construction of particular warranties and whether or not they have been complied with. *Muller v. Thompson*, 2 Camp. 610; *Havilock v. Haverill*, 3 T. R. 277; *Hutchinson v. Read*, 19 L. J. Exch. 222; 4 Exch. 760; *Grant v. Aetna Ins. Co.*, 15 Moo. P. C. 516; s. c., 11 Low. Can. 128, 380; 12 Low. Can. 386; *Provincial Ins. Co. of Canada v. Leduc*, L. R., 6 P. C. 224; *Birrell v. Dryer*, L. R., 9 App. Cas. 345; *Grant v. Equitable Fire Ins. Co.*, 14 Low. Can. 493; *Levy v. New Orleans Mut. Ins. Ass'n*, 2 Woods (U. S.) 63; *Ogden v. Ash*, 1 Dall. (U. S.) 162; *Merchants' Ins. Co. v. Allen*, 121 U. S. 67; 122 U. S. 376; *Bayard v. Mass. F. & M. Ins. Co.*, 4 Mason U. S. 256; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *Grant v. Lexington F. & M. Ins. Co.*, 5 Ind. 23; *Weinberger v. Merchants' Ins. Co.*, 41 La. An. 31; *Davis v. Boardman*, 12 Mass. 80; *Thatcher v. Bellows*, 13 Mass. 111; *Thwing v. Great Western Ins. Co.*, 103 Mass. 401; *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray (Mass.) 221; *Odiorne v. New*

The warranty, to be express, must be in the body of the policy or incorporated in it by reference.¹

The warranty need not use the word "warrant."²

Where the warranty relates to a circumstance necessarily subsequent to the commencement of the risk, the assured is entitled to recover for an antecedent loss although the warranty is never complied with.³

England etc. Ins. Co., 101 Mass. 551; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389; *McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472; *Wilkins v. Tobacco Fire & M. Ins. Co.*, 2 Cen. (Ohio) 204; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Gaty v. Phoenix Ins. Co.*, 30 Mo. 56; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488; *Mark v. National Fire Ins. Co.*, 24 Hun (N. Y.) 565; *Dickey v. U. S. Ins. Co.*, 11 Johns. (N. Y.) 358; *Vandervoort v. Smith*, 2 Cal. (N. Y.) 155; *Murray v. Harmony etc. Ins. Co.*, 58 Barb. (N. Y.) 19; *Ogden v. Ash*, 1 Dall. (Pa.) 162; *Stacey v. Franklin Ins. Co.*, 2 W. & S. (Pa.) 506; *Merchants' Ins. Co. v. Algeo*, 31 Pa. St. 446; *Murden v. South Carolina Ins. Co.*, 1 Mill (S. Car.) Const. 200; *Cobb v. Lime Rock Ins. Co.*, 58 Me. 326.

1. Thus where a written statement was wrapped up in the policy it was held not a warranty. *Pawson v. Barnevelt*, 1 Doug. 12, note. And so where it was wafered on. *Bean v. Stupert*, 1 Doug. 11. But written proposals referred to in the policy, and made part of it will constitute an express warranty. *Worsley v. Wood*, 6 T. R. 710. It is enough if they appear anywhere on the face of the policy. *Kenyon v. Berthon*, 1 Doug. 12, note; *Blackhurst v. Cockell*, 3 T. R. 360.

2. It is enough that the intention to warrant appears. Thus an insurance describing the vessel as "the American ship—" is a warranty that she is American. *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 168. So on cargo on the "Spanish brig *New Constitution*." *Atherton v. Brown*, 14 Mass. 152. And on the "Swedish brig *Sophia*." *Higgins v. Livermore*, 14 Mass. 106; *Lewis v. Thatcher*, 15 Mass. 431. And the "British brig." *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404.

Where, however, the policy was "on the good British brig called the *John*," and the risk was to cease on capture, it was held that since the fact recited could have no relation to the risk, the

words did not amount to a warranty. *Mackie v. Pleasants*, 2 Binn. (Pa.) 363; cf. on this 1 Phillips Ins. (5th ed.), § 758, and 2 Arnould Mar. Ins. (6th ed.) 602.

In *Le Mesurier v. Vaughan*, 6 East 382, the words on the ship called "the American ship *President*" were held to be a statement of the name and not a warranty of the national character.

The mere use of a national language in the name does not constitute a warranty that the vessel is of that nation. *Clapham v. Cologan*, 3 Camp. 382; *Dent v. Smith*, L. R., 4 Q. B. 414.

A description of the voyage to "port Sisal" is no warranty that a port or harbor exists at Sisal. *De Longuemere v. N. Y. Firemen's Ins. Co.*, 10 Johns. (N. Y.) 120. So a stipulation that the underwriter is "not to be liable for any damages to or from her sheathing" is not a warranty that she is sheathed. *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389.

For other cases of construction see *Hyde v. Mississippi Ins. Co.*, 10 La. (O. S.) 543; *Harrison v. Douglas*, 3 Ad. & E. 396; and the cases cited *passim*.

3. 1 Phillips Ins. Co. (5th ed.), § 771.

Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1, where the policy was on goods at and from Bristol with a warranty that the vessel should sail between October 20th and December 1st. She did not sail until after December 1st. The action was for a return of premium, but it was held that the policy attached to the goods while at Bristol and before the sailing, and was not void for the subsequent breach of warranty.

Baines v. Holland, 10 Exch. 802, where a vessel insured on a time policy at and from New York to Quebec, while there and thence to the United Kingdom, was warranted to sail from Q. before November 1st. She was lost after November 1st, before reaching Q. en route from N. Y. The underwriter was held liable. Cf. *Taylor v. Lowell*, 3 Mass. 331.

A warranty that a vessel is safe on a given day is satisfied if she was safe at any time on that day.¹

If warranted in port and the insurance is at and from a particular port, the warranty will not be satisfied unless she is in that port.²

The ordinary cases of express warranties have related to the time of sailing, to convoy, to neutrality, and to national character.

A failure to sail as warranted is fatal.³

Where the warranty is to sail with convoy, it will be complied with only if the vessel sails with a legally appointed convoy for the whole voyage insured, with proper sailing orders, and remains with the convoy during the voyage unless driven away from it.⁴

1. *Blackhouse v. Cockell*, 3 T. R. 360.

2. *Colby v. Hunter*, 3 C. & P. 7.
If from a port "where the vessel now is," this means where she is at the time of making the policy. *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. (N. Y.) 64.

But if the policy states "beginning the adventure (said vessel being warranted to be then in safety) at and from C, *via* C & A to N Y, the warranty refers to the time of" beginning the voyage at C, and not to the time of making the policy. *Anchor Mar. Ins. Co. v. Keith*, 9 Can. Sup. Ct. 483; 3 Russ. & G. (Nova Sc.) 402.

3. *Veizan v. Grant*, 2 Pasto Ins. (8th ed.) 670.

Sailing.—What constitutes a sailing has given rise to numerous decisions. The law is that to constitute a sailing the vessel must be in complete readiness to perform the voyage according to its usual course, and must set forward with the *bona fide* intent to pursue the voyage. Subsequent delays and detentions are thereafter immaterial. In the following cases the vessel was held to have satisfied the warranty: *Bond v. Nutt*, 2 Cowp. 601; *Earle v. Harris*, 1 Doug. 357; *Thelusson v. Ferguson*, 1 Doug. 360; *Cruikshank v. Janson*, 2 Taunt. 301; *Wright v. Shiffrer*, 2 Camp. 247; 11 East 515; *Long v. Anderdon*, 3 B. & C. 495; *Cochrane v. Fisher*, 2 C. & M. 581; 1 C. M. & R. 809; *Bouillon v. Lupton*, 15 C. B., N. S. 113; *Dennis v. Ludlow*, 2 Cai. (N. Y.) 111.

In the following cases it was held she had not. *Ridsdale v. Newnham*, 3 M. & S. 456; 4 Camp. 111; *Moir v. Royal Exch. Assur. Co.*, 6 Taunt. 241; *Nelson v. Salvador*, M. & M. 309; *Pittgrew v.*

Pringle, 3 B. & Ad. 514; *Graham v. Barros*, 5 B. & Ad. 1011; *Colledge v. Harty*, 6 Exch. 205. Cf. with this last *Provincial Ins. Co. of Canada v. Leduc*, L. R., 6 P. C. 224.

Parol evidence of an agreement between the insured and insurer that the vessel insured should sail before a certain day cannot establish a warranty. *Whitney v. Haven*, 13 Mass. 172.

4. **Convoy.**—2 Arnould Mar. Ins. (6th ed.) 620.

The convoy need not be the same vessel for the whole distance. *Smith v. Readshaw*, 1 Park Ins. (8th ed.) 708; *Degarty v. Claggett*, 1 Park Ins. (8th ed.) 708.

Nor need it go to the very place of the vessel's destination. *D'Equino v. Bewicke*, 2 H. Bl. 551.

But it must go substantially the whole voyage. *Lilly v. Ewer*, 1 Doug. 72.

The vessel must leave port with the convoy. *Jeffries v. Legandra*, 2 Salk. 443.

A delay of two hours is fatal. *Taylor v. Woodness*, 2 Park Ins. (8th ed.) 707.

And the vessel has no right to endeavor to overtake the convoy and thus perform the warranty. *Hibbart v. Pigan*, Marshall Ins. (5th ed.) 292.

It is not enough to sail with convoy appointed for another voyage. *Cohen v. Hinckley*, 1 Taunt. 249.

It is a sufficient sailing with convoy if the vessel proceeds from a port of lading where no convoy is placed unprotected to the rendezvous appointed for convoy and sails thence with convoy. *Warwick v. Scott*, 4 Camp. 62.

The vessel must have sailing orders. *Webb v. Thompson*, 1 B. & P. 5; *Anderson v. Pitcher*, 2 B. & P. 164. See *Verdon v. Wilmot*, 2 Park Ins. (8th ed.) 696, *note*.

A warranty of neutrality requires that the ship or cargo be the property of a citizen of a neutral country, navigated in accordance with its laws and accompanied by the due, proper and unequivocal evidence of its national character.¹

If the vessel actually sailed with convoy, but was driven back by stress of weather, and separated from the convoy, she may go on alone without breach of the warranty. *Laing v. Glover*, 5 Taunt. 49.

1. **Neutrality.**—*Baring v. Cluggett*, 3 B. & P. 201; 5 East 298; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404; *Walton v. Bethune*, 2 Brev. (S. Car.) 453; *Schwartz v. Ins. Co. of N. A.*, 3 Wash. (U. S.) 117.

Where the property was that of an American residing in England with his family, it was held he was a British subject, so far that a warranty of his goods as American was improper. *Tabbs v. Bendeleck*, 4 Esp. 108; 3 B. & P. 207, note. See also *Elbers v. United Ins. Co.*, 16 Johns. (N. Y.) 128; *Duguet v. Rhinelander*, 1 Cai. (N. Y.) 25.

The fact that a belligerent is a part owner will not invalidate a warranty of neutrality in an insurance of the interests of neutral part owners. *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274.

Property held in trust by a neutral for the benefit of a belligerent is belligerent. *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 168.

Documents.—The vessel must carry proper documents to prove her neutrality, and a failure to do so will constitute a breach of the warranty. *Rich v. Parker*, 7 T. R. 705; 2 Esp. 615; *Calbreath v. Gracy*, 1 Wash. (U. S.) 219; *Smith v. Del. Ins. Co.*, 3 Wash. (U. S.) 127; *Higgins v. Livermore*, 14 Mass. 106; *Blagge v. New York Ins. Co.*, 1 Cai. (N. Y.) 549; *Goix v. Low*, 1 Johns. Cas. (N. Y.) 341; *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 307; *Coolidge v. New York Firemen's Ins. Co.*, 14 Johns. (N. Y.) 308; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 343; *Murray v. Alsop*, 3 Johns. (N. Y.) 38; *Griffith v. Ins. Co. of North America*, 5 Binn. (Pa.) 464; *Carrere v. Ins. Co.*, 3 Har. & J. (Md.) 324.

The register is not an essential document for this purpose. *Le Cheminant v. Pearson*, 4 Taunt. 367.

Yet in time of peace it is alone sufficient. *Catlet v. Pacific Ins. Co.*, 1 Paine (U. S.) 594.

A sea letter is enough without the register. *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 307.

Evidence is admissible in New York to show what is understood by "sea letter." *Sleight v. Rhinelander*, 2 Johns. (N. Y.) 532; *overruling* 1 Johns. (N. Y.) 193.

Where the warranty calls for the presence of a particular document, it must be on board at all times during the voyage. *Everth v. Tunno*, 1 B. & A. 141.

A compliance with the law of nations as to documents is sufficient to satisfy the warranty; a failure to comply with a municipal regulation of the captor is not a breach. *Siffken v. Lee*, 2 B. & P., N. R. 484; *Pollard v. Bell*, 8 T. R. 434.

Unless assented to by the treaties of the neutral country. *Baring v. Christie*, 5 East 398; *Barzillay v. Lewis*, 2 Park Ins. (8th ed.) 725.

It has been held a sufficient *prima facie* proof of compliance with a warranty of neutrality that the vessel carried a flag of the neutral nation at all times when free from danger of capture, and that the master addressed himself to consuls of that nation whenever in port. *Archangels v. Thompson*, 2 Camp. 620.

In the following cases, acts have been held a breach of the warranty to cover belligerent property. *Schwartz v. Ins. Co. of North America*, 3 Wash. (U. S.) 117, 276; *Pratt v. Philadelphia Ins. Co.*, 1 Brown (Pa.) 152; *Phoenix Ins. Co. v. Pratt*, 2 Binn. (Pa.) 308.

Though it is not such a breach merely to carry belligerent property. *Barrier v. Blakes*, 9 East 283.

To conceal or destroy papers. *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Carrere v. Union Ins. Co.*, 3 Har. & J. (Md.) 324; *Calbreath v. Cracy*, 1 Wash. (219).

To carry simulated papers unless leave is granted. *Oswell v. Vigne*, 15 East 70; *Horneyer v. Lushington*, 15 East 46. See also *Bell v. Bromfield*, 15 East 364.

To resist search. *Robinson v. Jones*, 8 Mass. 536; *Snowdon v. Phoenix Ins. Co.*, 3 Binn. (Pa.) 457.

The warranty of neutrality is satisfied if the vessel or cargo is neutral when the risk begins;¹ a subsequent change of character is immaterial unless the result of the act of the assured or his agents.²

After an abandonment has been accepted with full knowledge of all the facts, the underwriters cannot object to a breach of warranty.³

A warranty of national character is proved by reputation, employment and the domicile of the owner.⁴

Implied Warranties.—In all voyage policies, and, in the United States, generally, in time policies as well, the law implies a warranty that the vessel shall be seaworthy at the commencement of the risk. A breach of this implied warranty is fatal to the policy.⁵

. But not if outrageous. *McLellan v. Maine F. & M. Ins. Co.*, 12 Mass. 246.

To rescue the vessel when seized or detained. *Garrels v. Kensington*, 8 T. R. 230; *Wilcocks v. Union Ins. Co.*, 2 Binn. (Pa.) 574.

Carrying on a coasting or colonial trade in time of war that is forbidden by the belligerent to all nations in time of peace. *Berens v. Rucker*, 1 W. Bl. 314.

Sailing for a blockaded port with intent to enter on arrival there, although still blockaded. *Sperry v. Delaware Ins. Co.*, 2 Wash. (U. S.) 243; *Vos v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 180, 460.

But a mere intent unaccompanied by an act is not enough. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch (U. S.) 185; *Calhoun v. Ins. Co. of Pennsylvania*, 1 Binn. (Pa.) 293. See also on this topic *Williams v. Smith*, 2 Cai. (N. Y.) 13; *Radcliff v. United Ins. Co.*, 7 Johns. (N. Y.) 38; *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.) 29.

Acceptance of an enemy's licence where the voyage is intended for a neutral port does not avoid the policy. *Bulkeley v. Derby Fishing Co.*, 1 Conn. 572; *Hayward v. Blake*, 12 Mass. 176. But see *Colquhoun v. Firemen's Ins. Co.*, 15 Johns. (N. Y.) 352.

On the effect of the judgment of a foreign court condemning the property for breach of neutrality, see 2 *Arnould Mar. Ins.* (6th ed.) 640 *et seq.*; 2 *Phillips Ins.* (5th ed.) 2104 *et seq.*; *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.) 29; *Brown v. Union Ins. Co.*, 4 Day (Conn.) 179.

1. *Eden v. Parkinson*, 2 Doug. 732; *Saloucci v. Johnson*, Park. Ins. (8th ed.) 716, 727; *Tyson v. Gurney*, 3 T. R.

477; *Wilson v. Blackhouse*, Peake Add. Cal. 119; *Sleight v. Rhinelander*, 1 Johns. (N. Y.) 192.

2. *Goold v. United Ins. Co.*, 2 Cai. (N. Y.) 73; *Woolmer v. Muilman*, 1 W. Bl. 427; 3 Burr. 1417; *Cleveland v. Union Ins. Co.*, 8 Mass. 308; *Stockert v. Merrimack Ins. Co.*, 6 Mass. 220.

3. *Provincial Ins. Co. of Canada v. Leduc*, L. R., 6 P. C. 224.

4. *National Character.*—*Peyton v. Hallett*, 1 Cai. (N. Y.) 363; *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 307; *Murgatroyd v. Crawford*, 3 Dall. (U. S.) 491; *Polleys v. Ins. Co.*, 14 Me. 141; *Higgins v. Livermore*, 14 Mass. 106; *Atherton v. Brown*, 14 Mass. 152; *Lewis v. Thatcher*, 15 Mass. 432; *Coolidge v. Firemen's Ins. Co.*, 14 Johns. (N. Y.) 308; *Mackie v. Pleasants*, 2 Binn. (Pa.) 363; *Griffith v. Ins. Co. of N. A.*, 5 Binn. (Pa.) 464; *Ludlow v. Bowne*, 1 Johns. (N. Y.) 1; *New York etc. Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 56.

If a vessel is described in the policy to be a prize vessel, and afterwards her national character is changed so as to increase the risk, the underwriters are discharged. *Seamens v. Loving*, 1 Mass. 127.

A stipulation in a policy warranting the property to be American, proof to be made in America, is not set aside by the sentence of a foreign court against the neutrality. *Sperry v. Del. Ins. Co.*, 2 Wash. (U. S.) 243.

Where a vessel is described in a policy as an American ship, while she is really held in trust to secure the debt of a British subject, the warranty is broken. *Murray v. U. S. Ins. Co.*, 2 Johns. (N. Y.) 168.

5. *Implied Warranties — Seaworthi-*

There will be no such warranty, however, if the underwriters have approved the vessel.¹

In England no such warranty is implied in time policies.²

In the United States generally the law is otherwise.³

ness—No principle of the law of marine insurance is better known and more completely established. 2 Arnould Mar. Ins. (6th ed.) 648; 1 Phillips Ins. (5th ed.), § 695 *et seq.*; 1 Parsons Mar. Ins. 389 *et seq.*; Lee v. Beach, 1 Park. Ins. (8th ed.) 468; Wedderburn v. Bell, 1 Camp. 1; Douglas v. Scougal, 4 Dow 269; Knill v. Hooper, 26 L. J., Ex. 377; Brooking v. Maudsley, 38 Ch. Div. 636; Watson v. Ins. Co., 2 Wash. (U. S.) 480; Seaman v. Enterprise F. & M. Ins. Co., 21 Fed. Rep. 778; Higgin v. National Lloyds, 14 Fed. Rep. 143; 11 Biss. (U. S.) 395; Marcy v. Sun Mut. Ins. Co., 11 La. An. 748; Donnally v. Merchants' Mut. Ins. Co., 28 La. An. 939; Field v. Ins. Co. of N. A., 3 Md. 244; Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Starbuck v. New England Ins. Co., 19 Pick. (Mass.) 108; Talcot v. Com. Ins. Co., 2 Johns. (N. Y.) 124; American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532; Barnwall v. Church, 1 Cal. (N. Y.) 217; Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 232; Van Wickle v. Mechanics and Traders' Ins. Co., 97 N. Y. 350; Rogers v. Sun Mut. Ins. Co., 14 J. & Sp. (N. Y.) 65; Osborne v. New York Mut. Ins. Co., 6 N. Y. Supp. 103; Lemelin v. Montreal Ass. Co., 1 Quebec L. R., 337; Reed v. Philips, 2 Han. (N. B.) 171; Rouse v. Ins. Co., 3 Wall. Jr. (U. S.) 367; Guy v. Citizens' Mut. Ins. Co., D. C. S. D. (Ala.) 30; Phoenix Ins. Co. v. Moog, 81 Ala. 335; Pope v. Swiss Lloyds Ins. Co., 6 Sawy. (U. S.) 533; Hudson v. Williamson, 3 Brev. (S. Car.) 342; Ingraham v. S. C. Ins. Co., Treadw. (S. Car.) Const. 707.

A breach is fatal, although the fact of unseaworthiness is unknown and could not have been known. Rogers v. Sun Mut. Ins. Co., 14 J. & Sp. (N. Y.) 65; Lee v. Beach, 1 Park Ins. 468.

There is no such implied warranty that the cargo shall be seaworthy. Koebel v. Saunders, 17 C. B., N. S. 71.

But in every policy on cargo there is the warranty that the ship shall be seaworthy. 2 Arnould Mar. Ins. (6th ed.) 651; Oliver v. Cowley, 1 Park Ins. 470.

Even though the policy except losses from rottenness, inherent defects and unseaworthiness, the implied warranty as to seaworthiness is not removed, and the policy is void if the vessel is unseaworthy. Quebec Mar. Ins. Co. v. Commercial Bank of Canada, L. R., 3 P. C. 234.

The warranty in case of a policy on goods does not extend to the seaworthiness of lighters. Lane v. Nixon, L. R., 1 C. P. 412.

It is, of course, immaterial that the loss does not result from the unseaworthiness. Forshaw v. Chabert, 3 B. & B. 158.

1. Weir v. Aberdeen, 2 B. & Ald. 320; Marine Fire Ins. Co. v. Burnett, 29 Tex. 433.

2. **In Time Policies.**—This was definitely decided in the case of Gibson v. Small, 16 Q. B. 128, 141; 4 H. L. Cas. 353; and the following English cases are in full accord: Dudgeon v. Pembroke, L. R., 9 Q. B. 581; L. R., 1 Q. B. Div. 96; L. R., 2 App. Cas. 284; Michael v. Tredwin, 17 C. B. 251; Thompson v. Hopper, E. B. & E. 1049; Jenkins v. Heycock, 8 Moo. P. C. 351; Fawcus v. Sacsfield, 6 El. & Bl. 192; Hollingsworth v. Brodrick, 7 A. & E. 40; *cf.* Stewart v. Wilson, 12 M. & W. 11.

The law in Canada is the same. Phoenix Ins. Co. v. Anchor Ins. Co., 4 Ont. 524.

3. In Union Ins. Co. v. Smith, 124 U. S. 405, the court assumes that such a warranty exists in a time policy. Jones v. Ins. Co., 2 Wall. Jr. (U. S.) 278.

In *Connecticut*, the warranty is implied in time policies. Hoxie v. Home Ins. Co., 32 Conn. 21. And so in *Pennsylvania*. Dallam v. Ins. Co., 6 Phila. (Pa.) 15. So also in *Wisconsin*. Merchants' Mut. Ins. Co. v. Sweet, 6 Wis. 670. So also (*semble*) in *Ohio*. Gazzam v. Cincinnati Ins. Co., 6 Ohio 71.

Such also seems the law in *New York*. America Ins. Co. v. Ogden, 15 Wend. (N. Y.) 533; 20 Wend. (N. Y.) 287.

The law of *Illinois* follows the English decisions. Merchants' Ins. Co. v. Morrison, 62 Ill. 242.

In *Massachusetts*, the early cases decided that there was no implied war-

This warranty requires that the vessel be in a fit state as to repairs, equipment and crew to encounter the ordinary perils of the voyage insured.¹

ranty of seaworthiness in any time policy made or to begin while the vessel is at sea or in such a position that the assured cannot fairly be held to know of her condition or bound to have her at that moment in good seaworthy condition. *Copen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Macy v. Mutual Mar. Ins. Co.*, 12 Gray (Mass.) 497; but where the risk is to begin at such time or place that the assured is in position both to know of her condition and to be able to make her seaworthy, there is an implied warranty that she was seaworthy at the beginning of the risk. This was so held in *Hoxie v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.) 211, where a time policy was on a vessel, which at the moment the risk was to attach was in a foreign port where full repairs could be made.

1. **Seaworthiness.**—*Dixon v. Sadler*, 5 M. & W. 405; *Commercial Mar. Co. v. Namaqua Min. Co.*, 5 L. T., N. S. 504; *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Barnwall v. Church*, 1 Cai. (N. Y.) 217; *Warren v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 232; *Palmer v. Great Western Ins. Co. (N. Y.)*, 23 N. E. Rep. 5.

Whether or not the vessel is seaworthy is often a question of degree, and is according to the voyage and the nature of the vessel. Where the full nature of the vessel is disclosed and she is made as seaworthy as her character permits it is sufficient. *Turnbull v. Janson*, 3 C. P. Div. 264; *Clapham v. Langton*, 34 L. J., Q. B. 46; *Burgess v. Wickham*, 33 L. J., Q. B. 17; *Knill v. Hooper*, 2 H. & N. 277; *Batchelder v. North America Ins. Co.*, 30 Fed. Rep. 459.

So the vessel may be seaworthy while in harbor undergoing repairs although she would not be fit for going to sea in that condition. *Forbes v. Wilson*, 1 Park Ins. 472; *Hibbert v. Martin*, 1 Park Ins. 473; *Smith v. Surridge*, 4 Esp. 25; *Parmeter v. Cousins*, 2 Camp. 235; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Hoxie v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.) 211.

In *Abbott v. Broome*, 1 Cai. (N. Y.) 292, it was held the vessel was not seaworthy unless in condition to carry a full cargo.

It is sufficient if the vessel is suf-

ficiently furnished for the service in which she is at the time engaged. *Hucks v. Thornton*, Halt N. P. 30; *Amen v. Woodman*, 3 Taunt. 297. Though not of the most skillful construction. *Seaman v. Enterprise F. & M. Ins. Co.*, 21 Fed. Rep. 778; *Moore v. Louisville Underwriters*, 14 Fed. Rep. 226.

Where a river steamer is insured for an ocean voyage, failure to strengthen the vessel so as to render her as seaworthy as a vessel of that class could reasonably be made is a breach of the implied warranty of seaworthiness and avoids the policy. *Thebaud v. Pœnix Ins. Co.*, 5 N. Y. S. 619; *Thebaud v. Great Western Ins. Co.*, 623.

Where the voyage is of different stages it is enough if the vessel is seaworthy for the stage in which she is at the stated time, though not for some other stage. *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Alverson v. Laughman*, 2 B. & Ald. 322; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Bell v. Reed*, 4 Binn. (Pa.) 127.

Vessels are unseaworthy if improperly built. *Watt v. Morris*, 1 Dow. 32. Worn out. *Douglas v. Scougal*, 4 Dow. 276.

Overloaded or out of trim. *Daniels v. Harris*, L. R., 10 C. P. 1; *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Foley v. Tabor*, 2 F. & F. 662; *Cincinnati Ins. Co. v. May*, 20 Ohio 211. But see *Merchants' Ins. Co. v. Butler*, 20 Md. 41.

Without strong sails. *Wedderburn v. Bell*, 1 Camp. 1.

With defective boiler. *Quebec Mar. Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234.

With insufficient ground tackle. *Wilkie v. Geddes*, 3 Dow. 57; *Pope v. Swiss Lloyds Ins. Co.*, 4 Fed. Rep. 153; *Sawyer (U. S.)*, 533; *Lawton v. Royal Canadian Ins. Co.*, 50 Wis. 163.

With insufficient stores. *Woolf v. Claggett*, 3 Esp. 258; *Stewart v. Wilson*, 12 M. & W. 11; *Fontaine v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 58.

With unadjusted compass. *Richelieu etc. Nav. Co. v. Boston Mar. Ins. Co.*, 26 Fed. Rep. 596; *McCloskie v. Glasgow & Clyde Mar. Ins. Co.*, 6 C. C. Sc. 2. See *Stanwood v. Rich*, cited in *Phillips*, § 701.

The implied warranty is satisfied if the vessel is seaworthy at the beginning of the voyage, although at a later period it may become unseaworthy.¹

So the vessel is unseaworthy if without a capable master. *Tait v. Levi*, 14 East 481; *Clifford v. Hunter*, 3 C. & P. 16; *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Super. Ct. 433; *Draper v. Commercial Ins. Co.*, 21 N. Y. 378. Or a sufficient crew. *Shore v. Bentall*, 7 B. & C. 798, note; *Forshaw v. Chabrot*, 3 Br. & B. 158; *Draper v. Mut. Ins. Co.*, 4 Duer (N. Y.) 234; *Walsh v. Washington etc. Ins. Co.*, 3 Robt. (N. Y.) 202.

The implied warranty of seaworthiness requires from the insured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract. The burden of proof is here upon the underwriter. The presumption is with the insured after proof of the loss. *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 183; *Selva v. Low*, 1 Johns. (N. Y.) 184; *Cruder v. Pa. Ins. Co.*, 2 Wash. (U. S.) 339; *The Gentleman, Olc.* (U. S.) 110.

There are very many decisions turning on the special facts of the particular cases. In the following vessels were held seaworthy. *Stone v. Aberdeen Mar. Ins. Co.*, 11 C. C. Sc. 1041; *Bullard v. Roger Williams Ins. Co.*, 1 Curtis (U. S.) 148; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Marigny v. Home Mut. Ins. Co.*, 13 La. An. 338; *Pointer v. Merchants' Mut. Ins. Co.*, 20 La. An. 100; *Warren v. Manufacturers' Ins. Co.*, 13 Pick. (Mass.) 518; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Deshon v. Merchants' Ins. Co.*, 11 Met. (Mass.) 199; *Cobb v. New England Mut. Mar. Ins. Co.*, 6 Gray (Mass.) 192; *Patrick v. Hallet*, 1 Johns. (N. Y.) 241; *Draper v. Commercial Ins. Co.*, 21 N. Y. 378; *Walsh v. Washington Mar. Ins. Co.*, 32 N. Y. 427; *Sherwood v. Ruggles*, 2 Sandf. (N. Y.) 55; *Sturm v. Atlantic Mut. Ins. Co.*, 6 J. & Sp. (N. Y.) 281; *Cincinnati Ins. Co. v. May*, 20 Ohio 211; *Sherlock v. Globe Ins. Co.*, 1 Cin. Sup. Ct. (Ohio) 193; *Peters v. Phoenix Ins. Co.*, 3 S. & R. (Pa.) 25; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73.

In the following, unseaworthy. *McKellar v. Henderson*, Fac. Dec. (1810-1812) 15; *Coons v. Aetna Ins. Co.*, 18

Up. Can. C. P. 305; *Myles v. Montreal Ins. Co.*, 20 Up. Can. C. P. 283; *Magdeburg Gen. Ins. Co. v. Paulson*, 29 Fed. Rep. 530; *Richelieu etc. Nav. Co. v. Boston Mar. Ins. Co.*, 26 Fed. Rep. 596; *Cunningham v. Switzerland Mar. Ins. Co.*, 26 Fed. Rep. 46; *The Planter*, 2 Woods (U. S.) 490; *Rouse v. Ins. Co.*, 3 Wall. Jr. (U. S.) 367; *Rugely v. Sun Mut. Ins. Co.*, 7 La. An. 279; *Dupeyre v. Western F. & M. Ins. Co.*, 2 Rob. (La.) 457; *Field v. Ins. Co. of North America*, 3 Md. 244; *Gartside v. Orphans' Benefit Ins. Co.*, 62 Mo. 322; *Van Wickel v. Mechanics and Traders' Ins. Co.*, 97 N. Y. 350; *Borland v. Mercantile Mut. Ins. Co.*, 14 J. & Sp. (N. Y.) 433; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Fontaine v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 58; *Silva v. Low*, 1 Johns. Cas. (N. Y.) 184; *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Dallam v. Ins. Co.*, 6 Phila. (Pa.) 15; *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399; *Miller v. South Carolina Ins. Co.*, 2 McCord (S. Car.) 336; *Hudson v. Williamson*, 3 Brev. (S. Car.) 342; *Wallace v. De Pau*, 1 Brev. (S. Car.) 252. See also *The Orient*, 4 Woods (U. S.) 255; *Batchelder v. Ins. Co. of North America*, 30 Fed. Rep. 459.

Whether the warranty is satisfied if the vessel is seaworthy according to the usage of the country to which it belongs, or whether it must be seaworthy according to the usage of the place of contract, has been differently decided.

The former was decided to be the law in *Tidmarsh v. Washington Ins. Co.*, 4 Mason (U. S.) 439, and is approved by 1 Parsons Mar. Ins. 134, 386, and by 2 Arnould Mar. Ins. (6th ed.) 670.

The latter view was held in *Cook v. Greenock Mut. Ins. Co.*, 5 C. C. Sc. 246.

1. No prior condition of seaworthiness is sufficient if the vessel is not seaworthy at the time of sailing from the port of loading from which she is insured. *Cohn v. Davidson*, 2 Q. B. Div. 455.

It does not satisfy the warranty that by a jettison the vessel can be made seaworthy. *Daniels v. Harris*, L. R., 10 C. P. 1.

If seaworthy at the outset it is sufficient. There is no implied warranty

she shall continue so. This is clearly the law in England. 1 Arnould Mar. Ins. (6th ed.) 652; *Bermon v. Woodbridge*, 2 Doug. at 788, per LORD MANSFIELD; *Eden v. Parkinson*, 2 Doug. 735, per LORD MANSFIELD; *Walson v. Clark*, 1 Dow P. C. 344, per LORD ELDON; *Dixon v. Sadler*, 5 M. & W. at 415, per PARKE, B.; *Union Ins. Co. v. Smith*, 124 U. S. 405; *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Co. v. Clapp*, 11 Pick. (Mass.) 56; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

It is immaterial that the subsequent unseaworthiness is the result of the negligence of the master or crew. 2 Arnould Mar. Ins. (6th ed.) 654; *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Bishop v. Pentland*, 7 B. & C. 219; *Holdsworth v. Wise*, 7 B. & C. 794; *Phillips v. Headlam*, 2 B. & Ad. 380; *Dixon v. Sadler*, 5 M. & W. 405; 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Phillips v. Nairne*, 4 C. B. 343; *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Dudgeon v. Pembroke*, 2 App. Cas. 284.

In an action on a marine insurance policy, the vessel having been abandoned during the voyage on account of alleged damage by perils of the sea, the captain testified that the vessel was in good condition when she started, and he was corroborated by the official surveyor, who reported her seaworthy shortly before the voyage. She was fourteen years old at the time of the voyage, and one witness testified that when a vessel had had her rating five years and it was extended one year, she was "pretty near her end." The captain testified that cross seas were encountered on the voyage. *Held*, that the court properly left it to the jury to say whether the vessel was seaworthy. *Osborne v. New York Mut. Ins. Co.*, 6 N. Y. S. 103.

Where subsequent intermediate ports are named in the policy there is no implied warranty that the vessel shall be seaworthy on sailing thence. *Bermon v. Woodbridge*, 2 Doug. 788; *Holdsworth v. Wise*, 7 B. & C. 794; *Redman v. Wilson*, 14 M. & W. 476.

It is also the law of Canada that it is enough if the vessel be seaworthy at the beginning of the voyage. *Woodhouse v. Provincial Ins. Co.*, 31 Up. Can. Q. B. 176; *Eward v. Merchants' Mar. Ins. Co.*, 1 Russ. & G. (Nova Sco.) 168; *cf. Irvine v. Nova Scotia Mar. Co.*, 2 Nova Sco. Dec. 510; *Leduc*

v. Western Ass. Co., 1 Dorion Q. B. 273; *Cross v. Brit. America Ins. Co.*, 22 Low. Can. J. 10; *Leroux v. Merchants' Ins. Co.*, Ramsay's App. Cas. (Low. Can.) 374.

The law of the United States is in full accord. Various statements of judges have intimated that there is a further implied warranty that the vessel shall be kept seaworthy, but this is not law. For a loss due to the unseaworthiness of the vessel there can be no recovery if the assured could, before the loss, have made proper repairs and had neglected to do so; but if the vessel was seaworthy when she sailed, subsequent unseaworthiness due to the negligence of the assured will not discharge the underwriter if the loss results from the perils insured against and was not the proximate result of the unseaworthiness.

This is fully sustained by the following cases: *Union Ins. Co. v. Smith*, 124 U. S. 405; *Adderly v. American Mut. Ins. Co.*, Taney (U. S.) 126; *Jones v. Ins. Co.*, 2 Wall. Jr. (U. S.) 278; *Seaman v. Enterprise F. & M. Ins. Co.*, 21 Fed. Rep. 778; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Starbuck v. New England Mar. Ins. Co.*, 19 Pick. (Mass.) 198; *Copeland v. New England Mar. Ins. Co.*, 2 Met. (Mass.) 432; *Hoxie v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.) 211; *American Ins. Co. v. Ogden*, 15 Wend. (N. Y.) 532; 20 Wend. (N. Y.) 287; *Howard v. Orient Mut. Ins. Co.*, 2 Robt. (N. Y.) 539; *Hathaway v. Sun Mut. Ins. Co.*, 8 Bosw. (N. Y.) 33; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246; *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio 71; *Franklin Ins. Co. v. Cobb*, 2 Cin. Sup. Ct. (Ohio) 87 (*cf. Western Ins. Co. v. Tobin*, 32 Ohio St. 77); *Peters v. Phoenix Ins. Co.*, 3 S. & R. (Pa.) 25; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. (S. Car.) 416; *Merchants' Mut. Ins. Co. v. Sweet*, 6 Wis. 670.

That seaworthiness at outset is sufficient see also *Lockwood v. Sangamo Ins. Co.*, 46 Mo. 71; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Miller v. Russell*, 1 Bay (S. Car.) 309; *cf. Lapene v. Sun Mut. Ins. Co.*, 8 La. An. 1.

Where the voyage insured is made up of distinct voyages, unseaworthiness at the beginning of each distinct voyage is fatal. *Van Valkenburg v. Astor Mut. Ins. Co.*, 1 Bosw. (N. Y.) 61; *cf. Howard v. Orient Mut. Ins. Co.*, 2 Robt. (N. Y.) 539.

Presumptions.—In *Treat v. Union*

A failure to take a pilot in navigating waters where it is usual and customary to take one does not render the vessel unseaworthy.¹

There is also an implied warranty that the vessel shall have ready all the papers and documents required by the laws of the nation to which it belongs and by its treaties with other nations.²

This warranty is not implied in a policy on goods.³

There is no presumption that a vessel is seaworthy.⁴

Ins. Co., 56 Me. 231, it was held that in an action on a policy of insurance upon a vessel the burden of proof is not upon the plaintiff to show in the first instance the seaworthiness of the vessel at the inception of the voyage; that the presumption is that all things are as they should be in this respect. The court suggested, however, that the burden of proof would be changed if it appeared that the vessel, without being subject to any stress of weather or to any unusual buffeting of the seas, or other extraordinary peril, had suddenly foundered and gone down with all sails set shortly after leaving port. See also *Adderly v. American etc. Ins. Co.* 126.

1. **Pilot.**—The earlier English cases are apparently *contra*. See 2 Arnould Mar. Ins. (6th ed.) 656.

But the law is established as stated in the text. 2 Arnould Mar. Ins. (6th ed.) 658; *Phillips v. Headlam*, 2 B. & Ad. 380.

The law of the United States is in accord with that of English. *Hathaway v. St. Paul F. & M. Ins. Co.*, 1 Fed. Rep. 197; 1 McCrary (U. S.) 25; *Domingo v. Merchants' Mut. Ins. Co.*, 19 La. An. 479; *Keeler v. Firemen's Ins. Co.* (N. Y.) 250; *Old Dominion Ins. Co. v. Frank* (Ohio), 2 Cent. L. Bul. 93; *Flanigan v. Washington Ins. Co.*, 7 Pa. St. 306; *McMillan v. Union Ins. Co.*, 1 Rice (S. Car.) 248; *Cox v. Charleston F. & M. Ins. Co.*, 3 Rich. (S. Car.) 331; *cf. De Pau v. Jones*, 1 Brev. (S. Car.) 437.

In *New York*, a statute declares the vessel unseaworthy if without a licensed pilot. *Borland v. Mercantile Mut. Ins. Co.*, 14 J. & Sp. (N. Y.) 433.

Where positive law requires a pilot, the vessel is unseaworthy if without one. *Law v. Hollingsworth*, 7 T. R. 160; *cf. on this case Hollingsworth v. Brodrick*, 7 A. & E. at 48; *Sadler v. Dixon*, 8 M. & W. 900; *Whitney v. Ocean Ins. Co.*, 14 La. (O. S.) 485; *McDowell v. General Mut. Ins. Co.*, 7

La. An. 684; *Lapene v. Sun Ins. Co.*, 8 La. An. 1.

The mere fact that the officers navigating a government vessel are not licensed pilots does not *prima facie* render the vessel unseaworthy under the warranties of marine insurance. *Hathaway v. St. Paul etc. Ins. Co.*, 1 McCrary (U. S.) 25.

2. *Christie v. Secretan*, 8 T. R. 192; *Elting v. Scott*, 2 Johns. (N. Y.) 157.

The documents must be required by law. *Price v. Bell*, 1 East 663; *Bell v. Bromfield*, 15 East 364; *Le Cheminant v. Allnutt*, 4 Taunt. 367.

3. *Carruthers v. Gray*, 15 East 35; *Dawson v. Atty.*, 7 East 367; *Hobbs v. Huming*, 17 C. B., N. S. 791.

4. **Presumption.**—It need not be alleged in the declaration. *Gay v. Citizens' Mut. Ins. Co.*, 30 Fed. Rep. 695.

But the assured must produce some evidence that the vessel was seaworthy at the outset of her voyage. *Lunt v. Boston Mar. Ins. Co.*, 19 Blatchf. (U. S.) 151; 6 Fed. Rep. 562; *Moses v. Sun Mut. Ins. Co.*, 1 Duer (N. Y.) 159; *Borland v. Mercantile Mut. Ins. Co.*, 14 J. & Sp. (N. Y.) 433; *Rogers v. Sun Mut. Ins. Co.*, 14 J. & Sp. (N. Y.) 65. *Cf. Treat v. Union Ins. Co.*, 56 Me. 231; *McCloskie v. Glasgow & Clyde Mar. Ins. Co.*, 6 C. C. Sc. 2.

The sinking of a boat at port raises a violent presumption of unseaworthiness. *Gartside v. Orphans' Benefit Ins. Co.*, 62 Mo. 322.

Where a canal boat, properly loaded, after a forty-eight hours' voyage, without apparent cause, sank in fair weather and smooth water, a presumption of her unseaworthiness at the time of her starting is properly created. *Van Wickle v. Mechanics' etc. Ins. Co.*, 48 N. Y. Super. Ct. 95.

The underwriter has the burden after a *prima facie* case has been made out by the assured. *The Orient*, 4 Woods (U. S.) 255; *Batchelder v. Ins. Co. of North America*, 30 Fed. Rep. 459; *Guy*

There is an implied agreement that goods will be stowed in the usual and customary place for the storage of such goods.¹

There is no warranty implied of the diligence of a carrier or of any other person than the agents of the assured.²

4. *Violation of Covenants.*—The violation of a covenant will avoid the policy. Thus where a policy provides that the assured shall not assign the policy or the interest insured by it without the consent of the insurers, and the assured sells the ship or assigns the policy, the insurers will not be liable.³

v. Citizens' Mut. Ins. Co., 30 Fed. Rep. 695.

If the vessel becomes leaky and founders or puts back after a short period, during which she is subjected to no extraordinary strain, she will be presumed to be unseaworthy when the voyage began. *Munro v. Vandam*, 1 Park Ins. 469; *Watson v. Clark*, 1 Dow 344; *Parker v. Potts*, 3 Dow 23; *Pickup v. Thames Ins. Co.*, 3 Q. B. Div. 594; *Pointer v. Ins. Co.*, 20 La. An. 100; *Rugely v. Sun Ins. Co.*, 7 La. An. 279; *Parker v. Union Ins. Co.*, 15 La. An. 688; *Patrick v. Hallett*, 3 Johns. (N. Y.) 76; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124; *Walsh v. Washington Ins. Co.*, 32 N. Y. 427; *Wallace v. De Pau*, 1 Brev. (S. Car.) 252; *Miller v. S. Car. Ins. Co.*, 2 McCord (S. Car.) 336.

And so, generally, when no adequate reason for the loss is shown. *Coons v. Aetna Ins. Co.*, 18 Up. Can. C. P. 305; *Parker v. Union Ins. Co.*, 15 La. An. 688; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124-467.

But where the vessel sails in apparently good condition and is never heard of again she will be held seaworthy. *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

Or is exposed to gales. *Watson v. Ins. Co. of North America*, 2 Wash. (U. S.) 480; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389.

A vessel was sunk by a violent cyclone. It was shown, in an action on the insurance policy, that for two years before the loss she was seaworthy. The court held that the burden of showing unseaworthiness at the time of the loss was upon the insurer. *The Orient*, 16 Fed. Rep. 916.

The fact that no explanation can be given for the loss will not be enough to establish unseaworthiness if evidence is given that she was seaworthy at the outset. *Smith v. Bissett*, Fac. Dec. (1808-1810) 617; *Snethen v. Memphis Ins. Co.*, 3 La. An. 474.

If found rotten after a considerable period, this will not be necessarily enough to establish that she was unseaworthy when she sailed. *Trimbles' Syndics v. New Orleans Ins. Co.*, 3 Martin (La.) O. S. 374.

The necessity to repair mere wear and tear creates no presumption that the vessel was unseaworthy. *Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 366.

Whether or not the vessel was seaworthy is for the jury. *Foster v. Steele*, 3 Bing. N. C. 892; *Foster v. Alvez*, 3 Bing. N. C. 896; *Foley v. Tabor*, 2 F. & F. 662; *Dawson v. Home Ins. Co.*, 21 Up. Can. C. P. 20; *Rosenheim v. American Ins. Co.*, 33 Mo. 230; *Sherwood v. Ruggles*, 2 Sandf. (N. Y.) 55; *Fuller v. Alexander*, 1 Brev. (S. Car.) 149; *McFee v. Ins. Co.*, 2 McCord (S. Car.) 503; *Patrick v. Hallett*, 1 Johns. (N. Y.) 241; *Union Ins. Co. v. Caldwell*, *Dudley* (S. Car.) 263.

If the facts are controverted the question is for the court. *Myles v. Montreal Ins. Co.*, 20 Up. Can. C. P. 283; *Thebaud v. Phenix Ins. Co.*, 5 N. Y. S. 619; *Thebaud v. Great Western Ins. Co.*, 5 N. Y. S. 623; *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399.

In *Wright v. Orient Mut. Ins. Co.*, 5 Bosw. (N. Y.) 269, the court held a vessel unseaworthy though the jury distinctly found to the contrary. See also *Hudson v. Williamson*, 3 Brev. (S. Car.) 342.

1. *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100.

2. *Underwriters' Agency v. Sutherlin*, 55 Ga. 266.

So where the policy was on ice in boats "to be towed from Pittsburgh by steamboat L, or by some other good boat equal to her," it was held there was no implied warranty the tow boat should be of sufficient capacity to manage and tow the ice boats. *Merchants' Ins. Co. v. Algeo*, 31 Pa. St. 446.

3. *Ins. Co. of Pennsylvania v. Trask*,

5. *Deviation and Change of Voyage.*—A policy is avoided by a deviation or by a change in the voyage insured.

To constitute a deviation the vessel must have entered on a voyage to an unauthorized port; a mere intention formed before reaching a port of call is not sufficient to constitute a deviation.¹

8 Phila. (Pa.) 32; *Atherton v. Phoenix Ins. Co.*, 109 Mass. 32.

Such a clause, however, does not apply to a transfer of the policy, or of the claim arising under it, after the happening of a loss. *Mellen v. The Franklin Fire Insurance Co.*, 17 N. Y. 609.

As to other covenants see *Morse v. Buffalo etc. Ins. Co.*, 30 Wis. 534; *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508.

1. As to what constitutes a deviation or change of voyage, see under title **DEVIATION**. That a deviation or change of voyage avoids the policy is well established. 1 *Arnould Mar. Ins.* (6th ed.) 449 *et seq.*; 1 *Phillips Ins.* (5th ed.), § 977 *et seq.*

In case of deviation the policy is avoided only from the time of reaching the dividing point in the courses. 1 *Arnould Mar. Ins.* (6th ed.) 451; *Hare v. Travis*, 7 B. & Cr. 14; *Thellusson v. Fergusson*, 1 Doug. 361; *Kewley v. Ryan*, 2 H. Bl. 343; *Wheeler v. N. Y. Mut. Ins. Co.*, 35 N. Y. Super. Ct. 247.

But in case of change of voyage, it is void from the time the change is finally determined upon. 1 *Arnould Mar. Ins.* (6th ed.) 453; *Woolbridge v. Baydell*, 1 Doug. 16a; 1 *Phillips Ins.* (5th ed.), § 990.

Examples.—An open policy of marine insurance was issued on goods consigned to A upon vessels from Santos "to New York, Baltimore, or Boston direct, or via Hampton Roads for orders." A's agent shipped a cargo of coffee at Santos on a barque chartered accordingly, except the word "Philadelphia" instead of "Boston," but by mistake reported the risk to the insurance company as from Santos to New York direct, and it was so entered upon the policy. The barque arrived at Hampton Roads, and, after lying at anchor there for eighteen days, was sunk, and the cargo was lost. *Held*, that in the absence of any showing of damage to the company from the mistake, the case was to be treated as if a proper endorsement had been made; and there was no deviation in going into Hampton Roads for orders. *Ar-*

nould v. Pacific Mut. Ins. Co., 78 N. Y. 7.

A vessel was insured against perils of the seas "at and from Plymouth to Banks, cod fishing, and at and thence back to Plymouth." The premium was to be at a certain rate per month, and the policy was to end with the voyage. The vessel sailed with the usual quantity of bait, but not with a full supply for the trip, it being customary to rely on catching live bait on the Banks. Such bait had been plenty in previous years, but this year was scarce, and the master, after exhausting the bait on hand, and being unable to catch any, went to the nearest practicable port for bait, returned to the fishing grounds, and the vessel was afterwards lost by a peril insured against. *Held*, that in the absence of evidence of usage to put into port for bait, under such circumstances, the doing so was a deviation which discharged the insurer. *Sylvanus W. Burgess v. Equitable Mar. Ins. Co.*, 126 Mass. 70.

Defendants insured plaintiff's vessel, then lying in port at New York undergoing repairs, "at and from New York to Havana," and after the repairs were completed the vessel went on a trip to a port sixteen miles distant, to test her engines and take in coal, and after returning to New York sailed for Havana, and while prosecuting her voyage was destroyed by fire. *Held*, that the trial trip was in violation of the terms and conditions of the policy, and defendants were not liable thereon. *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 511.

The loss of a vessel wrecked in the Gulf of Mexico is covered by a policy containing a special clause by which the vessel is limited "to navigate the Atlantic Ocean between Europe and America," the Gulf of Mexico being part of the Atlantic Ocean. The *Orient*, 16 Fed. Rep. 916; *Merchants' Ins. Co. v. Allen*, 121 U. S. 67; s. c., 30 U. S. (L. ed.) 858.

In the printed part of a marine policy, the assured warranted not to use certain ports and places and certain waters, and among them ports and

6. *Illegality*.—The policy is avoided by illegality in the voyage or trade insured. "No species of property or interest at risk on a sea venture can be the subject of a valid contract of marine insurance if the course of trade or the voyage in the prosecution of which it is so exposed to risk be in contravention either of the laws or the war policy of the country of the insurer."¹

places in Texas, except Galveston, and foreign ports and places in the Gulf of Mexico. On the margin of the policy was written, "To be employed in the coasting trade on the United States Atlantic coast," and "to use Gulf ports not west of New Orleans." The vessel was lost west of New Orleans, while on a voyage from Maine to a port in the Gulf of Mexico west of New Orleans. *Held*, that the loss was not covered by the policy. *New Haven Steam Mill Co. v. Security Ins. Co.*, 20 Blatchf. C. Ct. 192. See also in general *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505; *Wilkins v. Tobacco Ins. Co.*, 30 Ohio 317; *Stillwell v. Home Ins. Co.*, 3 Dillon 80; *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196; *New Jersey Lighterage Co. v. New York Mut. Ins. Co.*, 49 N. Y. Super. Ct. 165; *Nicholson v. Mercantile etc. Ins. Co.*, 106 Mass. 399; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Hearn v. N. E. Mut. Ins. Co.*, 4 Cliff. (U. S.) 200; *Lloyd Transport Versicherungs Gesellschaft, s. c.*, 66 Cal. 294; *Gulf of California Nav. Co. v. State Investment etc. Ins. Co.*, 70 Cal. 586.

1. *Illegality*.—2 Arnould Mar. Ins. (6th ed.) 687. The principle is established beyond all question. The principal difficulty has arisen in deciding whether or not a particular act or trade were in fact illegal.

A policy on a voyage forbidden by the law of the underwriter's country is void. *Johnson v. Sutton*, 1 Doug. 254; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S.) 6.

But it is not void if the voyage be merely forbidden by the laws of another country. *Lever v. Fletcher*, 1 Park Ins. 506; *Planche v. Fletcher*, 1 Park Ins. 428; 1 Doug. 251; *Skidmore v. Desdoity*, 2 Johns. Cas. (N. Y.) 77; *Livingstone v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Decrow v. Waldo Mut. Ins. Co.*, 43 Me. 460.

A violation of customs acts, or of special statutes, by the master without the knowledge and authority of the owner, does not render the voyage illegal. *Wilson v. Rankin*, 34 L. J.

Q. B. 62; 35 L. J., Q. B. 203; *Cunard v. Hyde*, 27 L. J., Q. B. 408; *Redmond v. Smith*, 7 M. & G. 449, 474; *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Sherlock v. Globe Ins. Co.*, 1 Cin. (Ohio) 193.

Nor does the act of carrying particular goods in a manner contrary to the provisions of an act of congress. *Sherlock v. Globe Ins. Co.*, 1 Cin. L. Bul. (Ohio) 26.

If the intent at the outset of the voyage was to violate the law the policy is void and the underwriter is discharged, although the vessel is seized before an illegal act has been committed. *Seymour v. London & Provincial Mar. Ins. Co.*, 27 L. J. 417; 41 L. J. (C. P.) 193; *Wilson v. Backhouse*, Peake Add. Cas. 119; *Wilson v. Marryat*, 8 T. R. 31. But see *Sewall v. Royal Exch. Ass. Co.*, 4 Taunt. 856.

The illegality to vitiate the policy must be in the particular voyage insured. *Bird v. Appleton*, 8 T. R. 562.

For a full discussion of what voyages and what traffics are illegal by the English law, see 2 Arnould Mar. Ins. (6th ed.) 687 *et seq.*

In the United States, the cases have arisen chiefly upon warranties against illegal traffic. Voyages and traffics have been held illegal so as to avoid the policy in the following cases. *Craig v. United States Ins. Co.*, Pet. (C. C.) 410; *Corrington v. Merchants Ins. Co.*, 8 Pet. (U. S.) 495; *Gray v. Sims*, 3 Wash. (U. S.) 276; *Sturges v. Bush*, 5 Day (Conn.) 452; *Pond v. Smith*, 4 Conn. 297; *Cucullu v. Louisiana State Ins. Co.*, 5 Mart. (La.) N. S. 464; *Tucker v. De Longuamare*, 1 Johns. (N. Y.) 20; *Colquhoun v. New York Firemen's Ins. Co.*, 15 Johns. (N. Y.) 352; *Mumford v. Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310; *Fandel v. Phoenix Ins. Co.*, 4 Ser. & R. (Pa.) 29.

In the following cases the policy was held not to be avoided. *Carrington v. Merch. Ins. Co.*, 8 Pet. (U. S.) 495; *Church v. Hubbard*, 2 Cranch (U. S.) 187; *Hallet v. Jenks*, 3 Cranch (U. S.) 210; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. (U. S.) 600; *Williams v. Suffolk*

IX. Perils Insured Against.—The perils insured against are “of the seas; men of war; fire, enemies, pirates, rovers, thieves, jettisons; letters of mart and countermart; surprisals; takings at sea; arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever; barratry of the masters and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise, and ship, etc., at any port thereof.¹

Ins. Co., 13 Pet. (U. S.) 415; 3 Sumn. (U. S.) 270; Clark v. Protection Ins. Co., 1 Story (U. S.) 109; Graham v. Pennsylvania Ins. Co., 2 Wash. (U. S.) 113; Warren v. Ocean Ins. Co., 16 Me. 439. Bulkley v. Derby Fishing Co., 1 Conn. 571; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Kimble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130; Merchants Ins. Co. v. Edmond, 17 Gratt. (Va.) 138. See also on the general topic Smith v. Delaware Ins. Co., 3 Wash. (U. S.) 127; Fontaine v. Phoenix Ins. Co., 11 Johns. (N. Y.) 293.

The burden is on the underwriter to prove the trade illicit and a seizure justified. Thompson v. Mississippi M. & F. Ins. Co., 2 La. (O. S.) 228.

Where the warranty is against seizure for illicit trade, proof of illicit trade is not enough to vitiate the policy, there must also be a seizure. 1 Phillips Ins. (5th ed.), § 1153 *et seq.*; De Peyster v. Gardner, 1 Cai. (N. Y.) 492.

Seizure and condemnation are not enough to vitiate the warranty, the trade must be proved illicit. Frances v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; 2 Wend. (N. Y.) 64; Johnston v. Ludlow, 1 Cai. Cas. (N. Y.) 29; Smith v. Delaware Ins. Co., 3 S. & R. (Pa.) 74.

The warranty is not broken if the master barratrously carry on an illicit trade. Suckley v. Delafield, 2 Cai. (N. Y.) 222.

Trade by a neutral in goods contraband of war is not illegal. Seton v. Law, 1 Johns. Cas. (N. Y.) 1; Skidmore v. Desdoity, 2 Johns. Cas. (N. Y.) 77.

The warranty against illicit trade is limited to the goods of the assured. Bowne v. Shaw, 1 Cai. (N. Y.) 489.

1. 2 Arnould Mar. Ins. (6th ed.) 744. These are the perils enumerated in the English form of policy, and are the same covered by all ordinary policies.

Perils of the Seas.—“The term ‘perils of the seas’ denotes all marine casualties resulting from the violent action of

the elements, as distinguished from their natural silent influence upon the fabric of the vessel, casualties which may, and not consequences which must, occur.” Per LUSH, J., in Merchants’ Trading Co. v. Universal Mar. Ins. Co., L. R., 9 Q. B. 596.

Loss by wreck or foundering at sea is, of course, by peril of the seas. Houston v. Thornton, Holt N. P. 242; Newby v. Reid, 1 Park Ins. 148; Green v. Brown, 2 Stra. 1199; Sturm v. Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281; Hogar v. New England etc. Ins. Co., 59 Me. 460; Western Ins. Co. v. Tobin, 32 Ohio St. 77; Swan v. Union Ins. Co., 3 Wheat. (U. S.) 168; Cleveland v. Union, 8 Mass. 308.

Where a vessel is insured against perils of the lake, excepting certain excluded causes, if the vessel is lost from perils not arising from one of the excluded causes, the company is liable. Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497.

Where a raft of logs was insured for a voyage in charge of a tow-boat, and coming to the mouth of a river up which it was to be placed a short distance, was lost under circumstances which did not disclose any extraordinary action of the elements, or, as far as could be observed, any negligence of navigation, and it was proven that the raft was seaworthy, the court held that there was, in the absence of proof to the contrary, a presumption of loss by some unknown peril insured against; that it was probable the loss was caused by the combined action of the currents of the two rivers, the strain of the tugs engaged in towing, and the possible unskilful or negligent navigation of the crews employed in the tow, and all of this being covered by the policy, the insurer was liable. Moores v. Louisville Underwriters, 14 Fed. Rep. 226.

There is no fixed rule as to when a vessel which has not been heard from

shall be held to be lost. When the usual voyage was seven weeks and the vessel had been out nine months, a recovery was allowed. *Houstman v. Thornton*, Holt N. P. 242.

The assured must prove that the vessel sailed. *Cohen v. Hinckley*, 2 Camp. 51.

Proof of sailing and nonarrival, and a report of loss by foundering is enough without calling any one of the crew, though the crew were reported saved. *Koster v. Reed*, 6 B. & C. 19. See also *Koster v. Innes*, Ry. & Moo. 333.

Where the policy excepted loss from capture and seizure, and the vessel was never heard from, it was *held*, that the assured was not bound to prove the loss not due to capture or seizure, but had made out a case for the jury on proof of sailing in seaworthy condition and of nonarrival. *Green v. Brown*, 2 Stra. 1199.

Yet, where the underwriter was not to be liable for loss from rottenness, inherent defects, and other unseaworthiness, it was *held* that the assured must prove the vessel seaworthy, when lost, either by direct proof or by proof that the cause of the loss was such as to exclude the inference of unseaworthiness. *Berwind v. Greenwich Ins. Co.*, 21 J. & Sp. (N. Y.) 102.

Stranding is a peril of the seas. *Hahn v. Corbett*, 2 Bing. 205; *Livil v. Jansen*, 12 East 648; *Fletcher v. Ingalls*, 2 B. & Ald. 315; *Corcoran v. Gurney*, 1 E. & B. 456; *Bales of Cotton*, 8 Blatchf. (U. S.) 221; *Potter v. Suffolk Ins. Co.*, 2 Sumn. (U. S.) 197; *Hagar v. New England Mut. Mar. Ins. Co.*, 59 Me. 460; *Rathbone v. Fowler*, 6 Blatchf. (U. S.) 294; *McLaughlin v. Atlantic etc. Ins. Co.*, 57 Me. 170; *Fitzpatrick v. Bales of Cotton*, 3 Ben. (U. S.) 42.

Injury by ice or by freezing in is such a peril. *Jordan v. Great Western Ins. Co.*, 24 New Brunswick 421; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549; *Mississippi Valley Ins. Co. v. Humphrey*, 66 Ind. 600; *Reybold v. U. S.*, 15 Wall. (U. S.) 202. See *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332.

So injury to animals resulting from their being tossed about in a gale. *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Coit v. Smith*, 3 Johns. Cas. (N. Y.) 16; *Snowdon v. Guion*, 101 N. Y. 458.

Although the wounds are inflicted by their kicking one another. *Gabay v. Lloyd*, 3 B. & C. 793.

The cutwater of a whaling vessel, that had been unaffected by a heavy gale in the Arctic Ocean, was injured by striking against floating ice. She was taken to a port, examined, and no unsoundness discovered. In order to put her on a gridiron for repairs, it was found necessary to beach her to ascertain her depth and shape. She was sharp built, drew nineteen feet of water, and, upon being put upon the beach, heeled over at an angle greater than forty degrees. When the tide left she was badly strained, and became a total wreck. She was injured against perils of the sea, and other losses and misfortunes coming to her damage. *Held*, that the loss was properly found to occur from a peril insured against and not from any inherent weakness in the vessel. *Swift v. Union etc. Marine Ins. Co.*, 122 Mass. 573.

So damage to cargo by rain while in transit. *Underwriters' Agency v. Sutherland*, 55 Ga. 266. Or by sea water shipped in tempestuous weather or admitted by leakage caused by straining. *Carr v. Royal Exch. Ins. Co.*, 5 B. & S. 433; *Montaya v. London Ass. Co.*, 6 Exch. 451; *Cator v. Great Western Ins. Co.*, L. R., 8 C. P. 552; *Williams v. Cole*, 16 Me. 207.

Destroying a vessel to prevent capture has been held a loss by peril of the seas. *Gordon v. Remington*, 1 Camp. 123.

Injury from the swell of a passing steamer is by a peril of the sea. *Washington Ins. Co. v. Reed*, 20 Ohio 199. Or from escaping steam. *Union Ins. Co. v. Groom*, 4 Bush. (Ky.) 289.

So the loss of a slave by accidentally falling from a vessel. *Moore v. Perpetual Ins. Co.*, 16 Mo. 98.

The loss of a boat from the stern davits in a gale. *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472.

The peril attending making river landing is a peril of navigation. *Seaman v. Enterprise F. & M. Ins. Co.*, 21 Fed. Rep. 778.

Loss of animals in embarkation or disembarkation is a peril of the seas. *Anthony v. Aetna Ins. Co.*, 1 Abb. (U. S.) 343; *Aetna Ins. Co. v. Stivers*, 47 Ill. 86.

Where sailors were sent ashore to change a fastening, but were seized by a press gang and carried away before they could do it, and the vessel was injured, this was held a loss by a peril of the seas. *Hodgson v. Malcolm*, 2 B. & P. N. R. 336.

So where a vessel was taken in tow

by a man of war by mistake and exposed to a tempestuous sea which injured goods, it was held a loss by perils of the seas. *Hagedorn v. Whitmore*, 1 Stark. 157.

Where a part of a cargo being linseed, which was wet by the water that came in through the holes made in a vessel by ice, and the linseed became swollen and injured the vessel, the injury so caused was a damage from a peril of the sea. *Rathbone v. Fowler*, 6 Blatchf. (U. S.) 294.

So where a vessel which was driven into port of necessity was unable to leave it owing to a pestilence, the delay was held to be by a peril of the seas. *Williams v. Smith*, 2 Cai. (N. Y.) 1.

Where the owner of cargo had it ready for shipment but the vessel which had contracted to carry it was lost by accident in getting out of a dock, it was held that the loss was by a sea peril. *Dervaux v. l'Anson*, 5 Bing. N. R. 519.

A loss by collision is manifestly by such a peril. See cases cited later on negligence of master.

What Is Not a Peril of the Seas.—No loss which is the result of ordinary wear and tear, or a necessary consequence of the employment of a vessel in the usual course of navigation, is a loss by a peril of the seas.

Thus, damage by worms to an unsheathed vessel. *Rohl v. Parr*, 1 Esp. 445; *Lovell v. McMillan*, Fac. Dec. (1808-1810) 341; *Hazard v. New Eng. Mut. Ins. Co.*, 8 Pet. (U. S.) 557; 1 Sumn. (U. S.) 218; *Martin v. Salem Mar. Ins. Co.*, 2 Mass. 420. Or damage by rats to the ship's bottom. *Hunter v. Potts*, 4 Camp. 203; *Laveroni v. Drury*, 8 Exch. 160. *Contra*, *Garrigues v. Coxe*, 1 Binn. (Pa.) 592. Or damage by the vessel's taking bottom in the usual course of navigation. *Magnus v. Buttemer*, 11 C. B. 876. See also *Wells v. Hapwood*, 3 B. & Ad. 20 at 34. Or by other ordinary wear and tear. *Coles v. Mar. Ins. Co.*, 3 Wash. (U. S.) 159; *Harrison v. Universal Mar. Ins. Co.*, 3 F. & F. 190.

Leakage and breakage from packages is such ordinary wear and tear. *Crafts v. Marshall*, 7 C. & P. 597.

So injury to an ocean cable by the chemical action of the sea water. *Patterson v. Harris*, 1 B. & S. 336.

Whether damage by heavy cross seas in the gulf stream is by the ordinary action of the seas is for the jury. *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148.

Where a raft of logs being towed from one river into another was lost apparently by the action of the two currents and the strain of the tugs, it was held error "to rule that because there was apparently no extraordinary condition of wind and current there was no peril of navigation to cause the loss." The underwriter may be liable for a loss from the ordinary action of the sea, if that ordinary action in fact is fatal to a seaworthy vessel. *Moores v. Louisville Underwriters*, 14 Fed. Rep. 226.

Damage resulting to a vessel while hove down, or hauled upon a beach for repairs, has been held not by peril of the seas. *Thompson v. Whitmore*, 3 Taunt. 227; *Rawcroft v. Dunsmore*, cited 3 Taunt. 227.

Barratry is not of itself a peril of the sea. *Heyman v. Parish*, 2 Camp. 151. Nor is embezzlement of cargo. *Hicks v. Fitzsimmons*, 1 Wash. (U. S.) 279.

Fire.—The policy covers loss by fire on a steamship. *Patteson v. Mills*, 1 Dow & Clark 342; 2 Bligh N. S. 519.

It covers a burning to prevent capture. *Gordon v. Remington*, 1 Camp. 123.

A policy of marine insurance "against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire other than the fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," includes a loss from a fire which is caused by collision, although it does not include losses caused directly by collision. *Insurance Co. v. Transportation Co.*, 12 Wall. (U. S.) 194. See also *Germania Ins. Co. v. Sherlock*, 25 Ohio 33; *Waters v. Merchants' Ins. Co.*, 11 Pet. (U. S.) 213; *Montgomery v. Fireman's Ins. Co.*, 16 B. Mon. (Ky.) 427; *Mason v. Franklin Fire Ins. Co.*, 12 Gill & J. (Md.) 468; *Gilmore v. Carman*, 9 Miss. 279; *Perrin v. Protection Ins. Co.*, 11 Ohio 147; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256.

Collision is a peril of the sea. *Peters v. Warren Ins. Co.*, 14 Pet. 99; s. c., 3 Sumn. 389; *Sherwood v. Ins. Co.*, 1 Blatchf. (U. S.) 251; s. c., 14 How. (U. S.) 351; *Hale v. Washington Ins. Co.*, 2 Story (U. S.) 176; *Nelson v. Suffolk Ins. Co.*, 8 Cush. (Mass.) 477; *Stewart v. Ins. Co.*, 1 Humph. (Tenn.) 242; *Norwich etc. Co. v. Western Ins. Co.*, 34 Conn. 561; *Caldwell v. St. Louis Ins. Co.*, 1 La. An. 85; *Mathews v. Howard Ins. Co.*, 13 Barb. (N. Y.) 234; *Street*

v. Augusta etc. Ins. Co., 12 Rich. (S. Car.) L. 13.

Enemies, Pirates and Rovers.—A taking by a confederate vessel during the civil war is within this risk. *Monongahela Ins. Co. v. Chester*, 43 Pa. St. 491; *Dole v. New England etc. Ins. Co.*, 2 Cliff. (U. S.) 394.

So a taking by coolie passengers. *Palmer v. Naylor*, 23 L. J. Exch. 323; 10 Exch. 382; *Kleinwort v. Shepard*, 1 E. & E. 447. Or mutinous sailors. *Brown v. Smith*, 1 Dow. 349. Or, of course, by pirates. *Dean v. Hornby*, 3 E. & B. 180.

Thieves.—In *England*, this risk is limited to loss by theft from without accompanied by force. *Harford v. Maynard*, 1 Park Ins. (8th ed.) 36. The rule is the same in *Tennessee*. *Marshall v. Ins. Co.*, 1 Humph. (Tenn.) 99.

In *New York*, theft without violence has been held within the policy. *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285, 293; *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 563; 1 Hill (N. Y.) 25.

The wrongful seizure and sale of a cargo by a consul of the United States is not a loss, under a clause in a policy which insures against the acts of pirates and assailing thieves. *Paddock v. Commercial Ins. Co.*, 2 Allen (Mass.) 93.

A policy of insurance of goods shipped by river included perils "of the rivers, fires, rovers, assailing thieves, and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof by reason of the dangers of the rivers." Held to cover a loss from the seizure of the vessel and cargo by a mob, where, although the mob could not be properly classed as assailing thieves, because the evidence did not establish that the taking was done *animo furandi*, yet the acts were of such a character that they were clearly included within the general words at the end of the clause. *Babbett v. Sun etc. Ins. Co.*, 23 La. An. 314.

Worms are not a peril of the sea. *Hazard v. Ins. Co.*, 1 Sumn. (U. S.) 218; *Martin v. Salem Ins. Co.*, 2 Mass. 420.

Taking, Arrests, Restraints and Detainments.—Where the underwriter and the assured are of the same country, a restraint by its government is within the policy. *Page v. Thompson*, 1 Park Ins. (8th ed.) 175; *Green v. Young*, 2 Ld.

Raym. 840. See also *Tawteng v. Hubbard*, 3 B. & P. 291 at 302.

It is immaterial that the taking is unlawful. *Logano v. Jansen*, 2 E. & E. 160; *Sewall v. Royal Exch. Ass. Co.*, 4 Taunt. 855; *Powell v. Hyde*, 5 E. & B. 607; *Seymour v. London Provincial Mar. Ins. Co.*, 27 L. T., N. S., 417.

It is not necessary to prove sentence of condemnation. *Carruthers v. Gray*, 15 East 35; 3 Camp. 142.

A temporary seizure for the purposes of plundering is within this clause. *Johnston v. Hogg*, 10 Q. B. Div. 432. And so a taking by coolie passengers. *Kleinwort v. Shepard*, 1 E. & E. 447. And a seizure and prosecution because of barratrous act of the master. *Cory v. Burr*, L. R., 8 App. Cas. 393; 9 Q. B. Div. 463; 8 Q. B. Div. 313. So a taking by a privateer with collusion of the master of the vessel. *Archangelo v. Thompson*, 2 Camp. 620.

Where the policy covered land and water transit, a detention in Paris by the German armies was held within the policy. *Rodonachi v. Elliott*, L. R., 9 C. P. 518; L. R., 8 C. P. 649.

A detention by a belligerent for search constitutes a detention. *Barker v. Blakes*, 9 East 283.

So, of course, an embargo. *Rotch v. Edie*, 6 T. R. 413.

The underwriter will be liable if the vessel is in fact detained, although if the master had abandoned the return cargo the vessel need not have remained at the port. *Schroder v. Thompson*, 7 Taunt. 462. See also on the general subject *Levi v. Allnutt*, 15 East 267; *Wilbraham v. Wartnaby*, Lloyd & Welsby 144.

Under a policy which ran thus: "touching the risks I am willing to bear, they are the same as contained in all regular policies of insurance," it was held that a loss by capture and condemnation was included. *Levy v. Merrill*, 4 Me. 180. See also in general *McCall v. Mar. Ins. Co.*, 8 Cranch (U. S.) 59; *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 183; *Williams v. Sufold Ins. Co.*, 13 Pet. (U. S.) 415; *Levy v. Merrill*, 4 Me. 180; *Pollock v. Babcock*, 6 Mass. 234; *Robinson v. Jones*, 8 Mass. 536; *De Peau v. Russell*, 1 Brev. (S. Car.) 441; *Lorent v. S. Car. Ins. Co.*, 1 Nott & M. (S. Car.) 505.

Barratry.—As to what constitutes barratry see SHIPPING.

LORD ELLENBOROUGH, C. J., in *Earl v. Rawcroft*, 8 East at 134, said: "It is extraordinary that this species of

loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance. . . . So, however, it is that this description of loss has, from the earliest times, held its place, as a subject of indemnity, in British policies of insurance." Where the policy does not specify the perils, barratry is included, although the assured appoints the master, and is owner. *Parkhurst v. Gloucester Fishing Ins. Co.*, 100 Mass. 301; *Briose v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246.

In *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213, the policy enumerated many perils, but did not set out barratry, and the court held the underwriter not liable for loss by barratry.

It is a general rule, where barratry is excepted from the risks, that if the immediate cause of the loss is a peril insured against, it is no defence that the loss was remotely caused by the gross negligence of the agent of the insured not amounting to barratry. *Shultz v. Pacific Ins. Co.*, 14 Fla. 73. See also *Swan v. Union Ins. Co.*, 3 Wheat. 168; *Patapasco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *Crousset v. Ball*, 4 Dall. (U. S.) 204; *Brown v. Union Ins. Co.*, 5 Day (Conn.) 1; *Tate v. Protection Ins. Co.*, 20 Conn. 481; *Richardson v. Marine Ins. Co.*, 6 Mass. 102; *Ward v. Wood*, 13 Mass. 539; *Wiggin v. Smory*, 14 Mass. 1; *Taggard v. Loring*, 16 Mass. 336; *Walden v. Fireman's Ins. Co.*, 12 Johns. (N. Y.) 128; *Hallett v. Columbian Ins. Co.*, 8 Johns. (N. Y.) 272; *Cook v. Ins. Co.*, 11 Johns. (N. Y.) 40; *Messonnier v. Union Ins. Co.*, 1 Nott & M. (S. Car.) 155; *Gazzam v. Ohio Ins. Co.*, Wright (Ohio) 202.

"Other Losses, Perils and Misfortunes."—These words cover only losses from perils of the same kind and nature as the foregoing. Thus they do not cover a loss by an extraordinary duty placed upon a cargo while captured and detained. *De Peau v. Russel*, 1 Brev. (S. Car.) 441.

Nor loss of passage money through the decree of a court at a port whither the vessel was driven and at which it was libelled by the passengers, ordering the return of the passage money. *Marks v. Nashville M. & F. Ins. Co.*, 6 La. An. 126.

Nor a loss by negligently pumping water into the air chamber of a vessel's

engine. *Thames & Mersey Mar. Ins. Co. v. Hamilton, L. R.*, 12 App. Cas. 484, *reversing s. c.*, 17 Q. B. Div. 195.

But they do cover a loss from the breaking of a rope which allowed the vessel to fall over at low tide and become injured. *Napier v. Wood*, 4 C. C. Sc. 19.

So, where in a similar way, damage was done to cargo. *Laurie v. Douglas*, 15 M. & W. 746.

They cover a loss by straining while beached for repairs. *Swift v. Union Mut. Mar. Ins. Co.*, 122 Mass. 373.

A loss by being blown over while in a graving dock. *Phillips v. Barber*, 5 B. & Ald. 161.

A loss caused by the sticking of the vessel on the ways while being launched. *Frichette v. State Mut. F. & Ins. Co.*, 3 Bosw. (N. Y.) 190.

A loss by the bursting of a steamship's boiler. *West India etc. Co. v. Home & Colonial Mar. Ins. Co.*, 6 Q. B. Div. 51. But see *Thames & Mersey Mar. Ins. Co. v. Hamilton, L. R.*, 12 App. Cas. 484, *disapproving*.

A policy of marine insurance which exempts loss by the bursting of boilers, but covers that "occurring subsequent to and in consequence of such bursting," does not cover a total loss occasioned by an explosion so violent as to tear open the sides of the vessel to such an extent that the water admitted sinks her in five or ten minutes. *Evans v. Columbian Ins. Co.*, 44 N. Y. 146.

Or by an injury to goods caused by water entering through a cock negligently left open. *Davidson v. Burnaud, L. R.*, 4 C. P. 117; *Good v. London Steamship etc. Co.*, L. R., 6 C. P. 563.

These words cover also an injury caused by being fired upon by mistake by a man-of-war. *Cullen v. Butler*, 4 Camp. 289; 5 M. & S. 461.

Where specie was thrown overboard to prevent its capture, the loss was held covered by these words. *Butler v. Wildman*, 3 B. & Ald. 398.

And so where it was sunk in shallow water for a similar purpose and not regained. *Kohn v. New Orleans Ins. Co.*, 12 La. (O. S.) 348.

The loss was held within these words also where a vessel was seized by a mob and the sugar covered by the policy was lost. *Babbitt v. Sun Mut. Ins. Co.*, 23 La. An. 314.

A payment for salvage is recoverable under these words. *Ritchison v. Lohre, L. R.*, 4 App. Cas. 755; 2 Q. B. Div.

The underwriter will not be liable unless the loss is a result of which the perils insured against are the proximate and efficient cause.¹

501; 3 Q. B. Div. 558; *Dent v. Smith*, L. R., 4 Q. B. 414.

Where the policy is against all risks, it includes every loss except those caused by the acts of the assured. *Goix v. Knox*, 1 Johns. Cas. (N. Y.) 337; *Barnwall v. Church*, 1 Cai. (N. Y.) 217; *M'Cargo v. Merchants' Ins. Co.*, 10 Rob. (La.) 334; *Lockett v. Merchants' Ins. Co.*, 10 Rob. (La.) 339; *Maryland Ins. Co. v. Bathurst*, 5 G. & J. (Md.) 159.

The cause of the loss must appear. The captain's protest does not prove the cause. *Bernard v. Greenwich Ins. Co.*, 53 N. Y. Super. Ct. 102.

1. **Proximate Cause.**—Much difficulty has arisen in deciding what is the proximate cause of loss, and probably the question will never be free from difficulty. The law regards only the proximate and disregards the remote cause of loss.

In *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581; 1 Q. B. Div. 96; L. R., 2 App. Cas. 284, a vessel structurally too weak was driven ashore in bad weather and wrecked. But for her weakness she probably would not have been driven ashore. The question was as to the proximate cause of loss. This the queen's bench held to be the peril of the seas, and this decision was sustained by the house of lords, after being reversed in the exchequer chamber.

The law and the difficulty are well stated by BLACKBURN, J., L. R., 9 Q. B. at 595: "In all cases the law regards the proximate cause of the loss, and it would be difficult to find a better example of what LORD BACON calls the infinity of the 'causes of causes,' and their impulsion one on the other' than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water, and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been, and this last is said to be the

proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent anyone who knowingly sent her out in that state from recovering indemnity for this loss." See also *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 99; *Magoun v. New England Mar. Ins. Co.*, 1 Story (U. S.) 157; *Potter v. Ocean Ins. Co.*, 3 Sumn. (U. S.) 27; *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 270; *Merchants etc. Ins. Co. v. Butler*, 20 Md. 41; *Phoenix etc. Ins. Co. v. Cochran*, 51 Pa. St. 143; *Dyer v. Piscataqua Ins. Co.*, 53 Me. 118.

Where a vessel was insured "free from all consequences of hostilities," she was wrecked off Cape Hatteras owing to the fact that the confederate forces, in order to injure the federal commerce, had put out the light maintained there for years by the government of the United States. It was held that the loss was from a peril of the seas and not a consequence of hostilities. Part of the cargo could have been saved had not the confederate forces prevented. This loss the court held a consequence of hostilities for which the underwriter was not liable. *Ionides v. Universal Mar. Ins. Co.*, 14 C. B., N. S. 259.

Where a vessel was driven ashore by perils of the sea and captured before she could be got off, this was held a loss by capture. *Green v. Emslie, Peake*, N. S. 212. A similar decision was reached in *Livie v. Jansen*, 12 East 648; *Rice v. Homer*, 12 Mass. 230; *c/ Hahn v. Corbett*, 2 Bing. 205.

So where a vessel was wrecked, part of the cargo lost and the part put on shore destroyed by the natives, the whole loss was held to be by peril of the seas. *Bordrett v. Hentigg*, 1 Holt N. P. 147.

Where a vessel being towed along a river had some of her sails set and was carried by a sudden gust of wind against the abutments of a bridge and injured, it was held that the wind was the proximate cause of loss and not the negligence of the crew. *Greenwich Ins. Co. v. Raab*, 11 Ill. App. 636.

And he will be liable only for the direct and immediate and not for remote consequences of the peril.¹

Where the cargo of a canal boat was insured, the risk to cease "if prevented or detained by ice or the closing of navigation from terminating trip," a gale separated the boat from the tug in charge and drove it ashore. Here it was frozen in so that the tug could not get at it, and, later, after a thaw, wind and ice forced another boat against it, in consequence of which it broke in two and sunk. It was held that the underwriter was liable, as the proximate cause of the loss was the storm and not the ice. *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332.

Where a ship was so negligently loaded that it became leaky and was finally run ashore in heavy weather to prevent its foundering, it was held that the proximate cause of loss was the peril of sinking. *Redman v. Wilson*, 14 M. & W. 476.

Where a vessel insured against barratry but not against seizure, was seized for a barratrous act of the master, the seizure was held the proximate cause and the underwriter held not liable. *Cory v. Burr*, L. R., 8 App. Cas. 393; 9 Q. B. Div. 463; 8 Q. B. Div. 313.

Where a vessel was driven ashore during a detention the peril of the sea was held the proximate cause of loss. *Bailey v. South Carolina Ins. Co.*, 2 Brev. (S. Car.) 354.

Where a vessel warranted free from loss if not permitted entry in consequence of having negroes on board, anchored outside a port to await permission to enter, and was lost in a hurricane before permission could be obtained, it was held that the proximate cause of loss was the hurricane. *Dickey v. United Ins. Co.*, 11 Johns. (N. Y.) 358.

A loss by derangement of the mud valves of a vessel, the derangement not being the proximate cause, is not within the exception of a policy freeing the company from a claim for loss by derangement of machinery. *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67.

A vessel was injured by sea perils but managed to land its cargo, and the owner received the freight. On a survey the vessel was condemned and abandoned to the underwriters, who thereupon claimed the freight and, after suit, obtained it. The owner then brought suit to recover the freight from

an underwriter on the freight. It was held that the proximate cause of the loss was the abandonment of the vessel and not the perils of the seas, and that the underwriter was not liable. *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. L. 334.

Where a charter party allowed the charterer to cancel it if the vessel failed to arrive by a certain date, the vessel failed to arrive at the day fixed owing to delay caused by perils insured against, and the charterer cancelled the charter. It was held that the proximate cause of the loss of freight was not the perils, but the exercise of the option by the charterer, and recovery against the underwriter was refused. *Mercantile Steamship Co. v. Tyser*, 7 Q. B. Div. 73.

In *New York & Boston Dispatch Express Co. v. Traders and Mechanics' Ins. Co.*, 132 Mass. 377, goods were insured "against all such immediate loss or damage as may occur by fire to the property." The vessel was run into by another and caught fire. She sunk, carrying down the goods untouched by the fire. They were damaged by the water. *ENDICOTT, J.*, said: "Undoubtedly the injury occasioned by the collision would have caused the vessel to sink and thereby have injured the plaintiffs' property; and if that had been the only cause operating the plaintiffs cannot recover, for the insurance is not against collision, but only against fire. But if means and appliances were at hand by which that result could have been avoided, and the intervention of a new agency, namely, that of fire, prevented their use, then the fire was the proximate and immediate cause of the loss." It was held error to refuse to allow the question of the possibility of preventing the injury had not the fire supervened, to go to the jury, and a new trial was granted. It was also held that no peculiar force was to be given to the word "immediate" in the policy.

1. Direct and Remote Consequences.—

Thus where part of the cargo is sold to pay for repairs to the ship caused by perils insured against, the loss is not the result of the peril, but of the sale, and cannot be recovered of the underwriter. *Powell v. Gudgeon*, 5 M. & S. 431; *Sarqy v. Hobson*, 2 B. & C. 7; *Dyer v. Piscataqua F. & M. Ins. Co.*,

53 Me. 118; Ruckman v. Merchant's Louisville Ins. Co., 5 Duer (N. Y.) 342.

Or where, owing to supplies giving out from delay caused by sea perils, part of the cargo is used for the passengers. Moses v. Sun Mut. Ins. Co., 1 Duer (N. Y.) 159.

Or cargo is used for fuel owing to the ship's supply proving inadequate on a voyage protracted by sea perils.

The underwriter is not liable for loss caused by a sale of the cargo because it has been damaged by a sea peril, or because the vessel has been rendered by a peril insured against unable to carry it on. The loss in such a case is the result of the sale and not of the peril. Meyer v. Ralli, 1 C. P. Div. 358; Philpott v. Swann, 11 C. B. N. S. 270; Moody v. Jones, 4 B. & C. 394; Murray v. Nova Scotia Mar. Ins. Co., 1 Russ. & C. (Nova Sc.) 24; Wood v. Pleasants, 3 Wash. (U. S.) 201; Dodge v. Union Mar. Ins. Co., 17 Mass. 471; Paddock v. Commercial Ins. Co., 2 Allen (Mass.) 93.

Of course if the sea damage to the cargo is such as to render it a total loss without the sale, the loss is the result of the peril and the underwriter is liable. Royal Exch. Ass. Co. v. McSwiney, 14 Q. B. 634; Carr v. Royal Exch. Ass. Co., 5 B. & S. 433.

The law is the same where, owing to damage to the vessel by a peril insured against, additional expense is incurred in forwarding goods or passengers, unless this is rendered absolutely necessary. Baillie v. Mandigliani, 1 Park Ins. (8th ed.) 116; Malinckrodt v. Jefferson Mut. Ins. Co., 1 Mo. App. 205; Howard v. Astor Mut. Ins. Co., 5 Bosw. (N. Y.) 38.

And the underwriter is not liable for additional expense for corn and provisions during a detention caused by a peril insured against. Eden v. Poole, 1 Park Ins. (8th ed.) 117; Fletcher v. Poole, 1 Park Ins. (8th ed.) 115; Lateward v. Curling, 1 Park Ins. (8th ed.) 288; Robertson v. Ewer, 1 T. R. 127; Sharp v. Gladstone, 7 East 24, 33; Everth v. Smith, 2 M. & S. 278; De Vaux v. Salvador, 4 Ad. & E. 420; Martin v. Salem Mar. Ins. Co., 2 Mass. 420; Perry v. Ohio Ins. Co., 5 Ohio 305; Gazzam v. Cincinnati Ins. Co., 6 Ohio 71; Webb v. Protection Ins. Co., 6 Ohio 456.

Nor for the lessened value of cargo from the delay. Thompson Steel Co. v. Baylston Mut. Ins. Co., 12 Mo. App. 244.

The underwriter's liability in cases of injury by a collision does not extend to the payment of damages for personal injury to passengers. Taylor v. Dewar, 5 B. & S. 58.

Contra.—Excelsior Co. v. Smith, 2 L. T., N. S. 90 (Scotch); Coey v. Smith, 22 C. C. Sc. 955.

Nor is he liable for any balance above the cost of repairs to the vessel insured which it is required to pay to make up one-half of the expenses of a collision where both vessels were in fault. De Vaux v. Salvador, 4 Ad. & E. 420.

The American law is *contra*. Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99, the American court refusing to consider the judgment of the court assessing the damages as the proximate cause of loss.

So also the underwriter on cargo was held not liable for a loss caused by the cargo owner being forced to pay a balance on a bottomry bond not paid by the ship and freight. Greer v. Poole, 5 Q. B. Div. 272.

The underwriter is liable for all the consequences which flow naturally from the peril insured against or are incident thereto. Thus for a loss of a boat in consequence of a ship becoming unmanageable in a storm, although it did not occur during the storm. Potter v. Ocean Ins. Co., 3 Sumn. (U. S.) 27.

The same rule was followed where a vessel was stranded by the fraudulent act of the master and mariners. She was then taken into port by salvors and the cargo labelled for salvage and condemned. The cargo owners labelled the vessel for damages, and she was sold to pay them. It was held that the underwriter was liable for the loss to the owner of the vessel. Pike v. Merchants' Mut. Ins. Co., 26 La. An. 392.

So, too, the underwriter was held where, after a capture and condemnation, a *bona fide* compromise was made and the decree reversed. Berens v. Rucker, 1 W. Bl. 313.

Where a portion of a cargo is damaged by actual contact with sea water during a storm, and another portion is injured by the moisture arising from them, this has been held a loss by the perils insured against. Montoza v. London Ins. Co., 6 Exch. 459.

But a different rule is followed in the United States. Neidlinger v. Ins. Co. of North America, 18 Blatchf. (U. S.) 297; 11 Fed. Rep. 514; s. c., 10 Ben. (U. S.) 254. In this case there was a claim for damages for the loss of a

The underwriter is not liable for any loss caused through apprehension of a loss by a peril insured against.¹

The fact that the negligence of the master or crew contributes to the loss will not preclude a recovery from the underwriter.²

cargo of barley in sacks, the malting quality of which had been injured. The policy contained a clause that the grain was to be "free from damage or injury from dampness, change of the flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged." The court *held* that, assuming that the damage to the sacks of barley which were not reached by the sea water was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged within the meaning of the policy, and that the company was not liable.

A similar question arose in *Cory v. Boylston Ins. Co.*, 107 Mass. 140. In that case a policy of marine insurance upon champagne wines, valued by the case, contained printed clauses providing that the insurers should not be liable for loss by leakage, unless occasioned by stranding or collision; nor "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or moldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils." A vessel with such wine on board met with severe gales and stress of weather, which prolonged the voyage and caused her to ship much sea water; and upon her arrival at the port of destination all the cases were found to be more or less wet, either by the sea water, or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed, some of the bottles, though still corked, were partly empty, the cases and their contents heated, and the wine impaired in flavor and merchantable value. It was *held* that the insurers were not liable for the loss of the wine which had escaped from the bottles, nor for injury by dampness or change of flavor to cases with which the sea water had not actually come in contact.

1. Apprehension.—Thus where a ves-

sel was detained by a commander of convoy through fear of a hostile embargo laid by Russia, it was *held* the underwriter was not liable for the loss. *Forster v. Christie*, 11 East 205.

So where a master turns back through fear of capture. *Hadkinson v. Robinson*, 3 B. & P. 388; *Blackenhazen v. London Ass. Co.*, 1 Camp. 454; *Lubbock v. Rawcroft*, 5 Esp. 50; *Tucker v. United M. & F. Ins. Co.*, 12 Mass. 288; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226; *Ferguson v. Phoenix Ins. Co.*, 5 Binn. (Pa.) 544.

2. Negligence.—This is established law both in England and the United States. The English cases upon the question are: *Busk v. Royal Exch. Ass. Co.*, 2 B. & A. 73; *Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219; *Haldsworth v. Wise*, 7 B. & C. 794; *Hodgson v. Malcolm*, 2 B. & P., N. R. 336; *Dixon v. Sadler*, 3 M. & W. 405; 8 M. & W. 895; *Carmichael v. Liverpool Sailing Ship Owners' Ass.*, 19 Q. B. Div. 242.

In the United States some of the earliest cases followed a different rule. *Grim v. Phoenix Ins. Co.*, 13 Johns. (N. Y.) 451; *Lodwicks v. Ohio Ins. Co.*, 5 Ohio 433; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, pt. 1, 276; *Fulton v. Lancaster Ins. Co.*, 7 Ohio, pt. 2, 5.

These, however, have been distinctly overruled. *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Perrin v. Protection Ins. Co.*, 11 Ohio 147. But see *Fayerweather v. Phoenix Ins. Co.*, 7 N. Y. St. Rep. 25.

And the law is as stated. *U. S. v. Hunt*, 2 Story (U. S.) 120; *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213; 1 McLean (U. S.) 275; *Van Sickle v. The Ewing, Crabbe (U. S.)* 405; *Sperry v. Delaware Ins. Co.*, 2 Wash. (U. S.) 243; *National Ins. Co. v. Webster*, 83 Ill. 470; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549; *Mississippi Valley Ins. Co. v. Humphrey*, 66 Ind. 600; *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311; *Hagar v. New England Mut. Mar. Ins. Co.*, 59 Me. 460; *Georgia Ins. Co. v. Dawson*, 2 Gill (Md.) 365; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77;

Sherlock v. Globe Ins. Co., 1 Cin. Sup. Ct. (Ohio) 193; Germania Ins. Co. v. Sherlock, 25 Ohio St. 33; Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35; Flanigen v. Washington Ins. Co., 7 Pa. St. 306; American Ins. Co. v. Insley, 7 Pa. St. 223; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143; Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28; M'Millan v. Union Ins. Co., 1 Rice (S. Car.) 248; Hume v. Providence Washington Ins. Co., 23 S. Car. 190; Hays v. Phenix Ins. Co., 6 N. Y. S. 3; Underwriters' Agency v. Sutherland, 55 Ga. 266; Empire Varnish Packer Co. v. Union Ins. Co., 32 La. An. 1081; Richelieu etc. Nav. Co. v. Boston Mar. Ins. Co., 26 Fed. Rep. 596.

The reason for the rule is explained in Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, as follows: "But it is insisted that the court should have granted the request of the company to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the master. Had that request been granted in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence as distinguished from simple negligence. Hence the court properly said in effect that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy. The principle upon which the court below acted was that expressed by CHIEF JUSTICE GIBSON, in American Ins. Co. v. Insley, 7 Pa. 223, 230, when he said that 'public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim *respondet superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself.'" Williams v. Suffolk Ins. Co., 3 Sumn. 270.

Where, however, the assured is himself directly in fault for negligence, he cannot recover. Piper v. Cole, 1 Camp. 434; Heyman v. Parish, 2 Camp. 149. See also Thompson v. Hopper, 6 E. & B. 937; Tanner v. Bennett, Ryan & Moo. 182; Williams v. New England Mut. Mar. Ins. Co., 3 Cliff. (U. S.) 244; Levi v. New Orleans Ins. Co., 2 Woods (U. S.) 63; Riffin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; Cleveland v.

Union Ins. Co., 8 Mass. 308; Smith v. Touro, 14 Mass. 112; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Himely v. Stewart, 1 Brev. (S. Car.) 209; Orient Ins. Co. v. Adams, 123 U. S. 67; Ad-dlerly v. American etc. Ins. Co., Taney (U. S.) 126.

The underwriter is not liable to indemnify the insured for losses by the peril insured against directly incurred through the fraud or gross misconduct of the insured. Hence an insurer can relieve himself by showing that the efficient and direct cause of encountering the peril was the failure on the part of the insured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation and care of the vessel. Shultz v. Pacific Ins. Co., 14 Fla. 73.

Of course if the policy excepts loss by negligence or warrants against it the underwriter will not be liable. Levi v. New Orleans Ins. Co., 2 Woods (U. S.) 63; Richelieu etc. Nav. Co. v. Boston Mar. Ins. Co., 26 Fed. Rep. 596; Gillespie v. Brit. American F. & L. Ass. Co., 7 U. C., Q. B. 108; Lawton v. Royal Canadian Ins. Co., 50 Wis. 163.

A time policy of insurance on a steam tug to be employed on the lakes contained, among other exceptions, incompetency of master, . . . want of ordinary care and skill in navigating said vessel, "rottenness, inherent defects, . . . and all other unseaworthiness." While towing vessels in Lake Huron, in July, her shaft was broken, causing a leak. Instead of taking her into the nearest port, the master endeavored to tow her to Cleveland, her home port, and she sank on the way. On a trial of a suit on the policy, the court charged that if a master of competent judgment might reasonably have supposed in the exercise of ordinary care, that the tug was sufficiently seaworthy to be towed to Cleveland, and therefore omitted to repair her, such omission was no bar to a recovery. The court held that there was error in so charging. Union Ins. Co. v. Smith, 224 U. S. 405.

Where a policy of marine insurance exempts the underwriter from liability for "all perils, losses, misfortunes or expenses, consequent upon or arising from or caused by . . . the want of ordinary care and skill in navigating said vessel," the insured cannot recover general average expenses incurred in rescuing the vessel from a peril brought

X. Losses Not Covered.—The underwriter is not liable when the loss is due to the inherent vice of the subject insured.¹ Or to the act of the government of the assured if hostile to the government of the underwriter.²

XI. Total Loss and Abandonment.—A total loss is such a loss as entitles the assured to recover from the underwriter the full amount of his subscription to the policy.³

It is either absolute or constructive.

1. *Absolute Total Loss.*⁴—An absolute total loss occurs when-

about by negligence in her navigation. The Ontario, 37 Fed. Rep. 220.

Misconduct of the Assured.—Though an insurance policy may protect against losses through mere negligence and carelessness, it will not protect against the misconduct of the party assured. In *Citizens' Ins. Co. v. Marsh*, 41 Pa. 386, it was held that misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand, while in contradistinction, carelessness, negligence and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. If acts of barratry, such as the misconduct of the master and a crew of a vessel, by which it is lost, be not expressly insured against, they are at the risk of the owner; if done with the consent of the insured, they are not covered by the barratry clause in the policy; nor are they insured against when committed by the owner himself. Therefore, where the insured, the master of a river steamboat, caused a barrel of turpentine to be brought from the hold to the furnace, and used it in order to increase the head of steam, whereby the vessel was set on fire and destroyed, it was held that he could not recover his insurance; for, under the act of congress of August 30th, 1853, turpentine must be secured upon steamboats in metallic safes, or in apartments lined with metal, at a secure distance from any fire; and, therefore, in using it he violated a clear and definite rule of duty, which would subject him to whatever loss resulted therefrom.

1. **Loss Not Covered.**—As where meat becomes putrid owing to delay caused by tempestuous weather. *Taylor v. Dunbar*, L. R., 4 C. P. 206. See also *Boyd v. Dubois*, 3 Camp. 133; cf. *British American Ins. Co. v. Joseph*, 9 Low. Can., Q. B. 448.

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The same principle applies in case of mortality among animals, and was applied in early slave cases. *Jones v. Schmoll*, 1 T. R. 130, note; *Jotham v. Hodgson*, 6 T. R. 656; *Lawrence v. Aberdein*, 1 B. & A. 107; *Gabay v. Lloyd*, 3 B. & C. 793. The term "fire" in a marine policy does not cover an inherent infirmity in the goods, as spontaneous combustion or chemical action occurring in oil cloth clothing packed in boxes. *Providence Washington Ins. Co. v. Adler* (Md.), 3 Cent. Rep. 218; s. c., 65 Md. 162.

2. The cases on this point, *Conway v. Gray*, 10 East 536; *Conway v. Forbes*, 10 East 539; *Maury v. Shedden*, 10 East 540, arose upon policies in favor of American subjects made in England, when the loss was due to detentions by the American Embargo acts of 1807. The court held that the subjects of a foreign state are party to its acts, and that, consequently the assured could not recover, the detention being their own act. The embargo in these cases was directed against England and was essentially hostile. The court did not limit the principle to hostile acts, but later cases have established such a limitation. *Aubert v. Gray*, 3 B. & S. 163; *Barett v. Meyer*, 5 Taunt. 824; *Anthony v. Moline*, 5 Taunt. 711; *Simcon v. Bozett*, 2 M. & S. 94.

It is immaterial that the policy is made in ignorance of hostilities. *Campbell v. Innes*, 4 B. & A. 423.

3. 2 *Arnould Mar. Ins.* (6th ed.) 951.

4. **Absolute Total Loss—Ship.**—An absolute total loss is such a loss that nothing is left to the assured worth abandoning to the underwriter, and the criterion is the impossibility of procuring the arrival of the thing insured. 2 *Arnould Mar. Ins.* (6th ed.) 988; *Raux v. Salvador*, 3 Bing. N. C. at 286, per LORD ABINGER. *Burt v. Brewers' Ins. Co.*, 16 N. Y. Sup. Ct. 383.

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ever the subject insured is totally annihilated by perils insured against.¹

Or, in the case of a vessel, is so damaged by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired;² or is wholly lost to her owner by capture, seizure or detention.³ Or is lost to the assured by a *bonafide* and proper sale made by the master in consequence of loss by perils insured against.⁴

1. Obviously this must be so, and citation of authorities is unnecessary. Where the vessel is never heard from a total loss is allowed. *Haustman v. Thornton*, Holt N. P. 242; *Foster v. Reeve*, 5 L. J., K. B. 73; *Ferrier v. Sandieman*, Fac. Dec. 1808-1810, 373; *Hallett v. Phoenix Ins. Co.*, 2 Wash. (U. S.) 279; *Ruan v. Gardner*, 1 Wash. (U. S.) 145; *Gordon v. Bowne*, 2 Johns. (N. Y.) 150; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26.

2. *Cambridge v. Anderton*, 2 B. & C. 691; *Shawe v. Felton*, 2 East 109; *Irvine v. Manning*, 1 H. L. Cas. 287; 6 C. B. 391; *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159; *Levy v. Merchants' Mar. Ins. Co.*, 52 L. J. 263; *Stagg v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 34; *Carr v. Providence Washington Ins. Co.*, 38 Hun (N. Y.) 86; *Walker v. United States Ins. Co.*, 11 S. & R. (Pa.) 61; *California Nav. & Exp. Co. v. State Investment & Ins. Co.*, 70 Cal. 586; *Wood v. Lincoln etc. Ins. Co.*, 6 Mass. 479; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254; *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Bryant v. Comm. Ins. Co.*, 13 Pick. Mass. 543; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Orrok v. Comm. Ins. Co.*, 21 Pick. (Mass.) 456; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Crosby v. New York Ins. Co.*, 5 Bosw. (N. Y.) 369.

The sinking of the vessel does not by itself create a total loss. *Kemp v. Halliday*, 6 B. & S. 723; *Sewall v. United States Ins. Co.*, 11 Pick. (Mass.) 90; *Burt v. Brewers and Maltsters' Ins. Co.*, 78 N. Y. 400.

3. *Tyson v. Gurney*, 3 T. R. 477; *Hewit v. Flexney*, 1 Beewes (6th ed.) 458; *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357; *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Delano v. Bedford Ins. Co.*, 10 Mass. 347; *Brown v. Phoenix Ins. Co.*, 4 Binn. (Pa.) 445; *Gordon v. Bowne*, 2 Johns. (N. Y.) 150.

If the vessel is recaptured several early English cases held that if the as-

sured had lost the voyage the loss remained an actual total loss. *Miller v. Fletcher*, 1 Doug. 231; *Jenkins v. Mackenzie*, 4 Bro. P. C. 447, note; *Pond v. King*, 1 Wils. 191.

But these cases are probably not law. 2 *Arnould Mar. Ins.* 1034, 1035; *Pole v. Fitzgerald*, 5 Bro. P. C. 131; *Willes* 641.

A decree of restoration will not render the loss less than an actual total loss if the result of the capture is a complete loss of the vessel to the owner. *Stringer v. English & Scottish Mar. Ins. Co.*, L. R., 7 Q. B. 599. Or, it has been held, if it result in a loss of the voyage. *Storey v. Brown*, 4 Bro. P. C. 445, notes.

The loss is not less an actual total loss if the vessel be recaptured but then be sold for salvage under a decree of court. *Storer v. Gray*, 2 Mass. 565.

If, however, the original owners buy it at the sale for much less than its value, they cannot both retain the vessel and recover for a total loss. *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37.

4. For the cases on the authority of the master to sell see SHIPPING. Where the sale is proper the underwriter is liable. *Cambridge v. Anderton*, 2 B. & C. 691; *Robertson v. Carruthers*, 2 Stark. 571; *Robertson v. Clark*, 1 Bing. 445; *Fleming v. Smith*, 1 H. L. Cas. 513. See *Allen v. Seegrul*, 8 B. & C. 561, but on this case *cf. Irving v. Manning*, 1 H. L. Cas. 817; *Anchor Mar. Ins. Co. v. Keith*, 9 Can. Sup. Ct. 483; 3 Russ. & G. (Nova Sc.) 402; *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 510; *Hall v. Ocean Ins. Co.*, 37 Fed. Rep. 371; *Prince v. Ocean Ins. Co.*, 40 Me. 481; *Dunning v. Merchants' Mut. Mar. Ins. Co.*, 57 Me. 108; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill (Md.) 459; *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Graves v. Washington Mar. Ins. Co.*, 12 Allen (Mass.) 391; *Stephenson v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.) 232; *Stephenson v. Piscataqua etc. Ins. Co.*, 54 Me. 55; *Saltus v. Commercial*

In the case of insurance upon cargo, there is an absolute total loss where by perils insured against the cargo ceases to exist in specie;¹ or where, in consequence of perils insured against, although the goods still exist *in specie*, yet they are so damaged as not to be worth carrying on and are accordingly properly sold;² or the vessel is so damaged that it cannot complete the voyage and no other can be obtained, or the expense of forwarding would exceed the value of the goods and they are therefore sold;³ or the goods are lost to the owner by capture, seizure or detention.⁴

Where the subject of the insurance is freight there is an absolute total loss where the ship is so damaged by perils insured against that she cannot earn the freight save at an expense exceeding the freight agreed upon, or as to entitle the

Ins. Co., 10 Johns. (N. Y.) 487; McCall v. Sun Mut. Ins. Co., 66 N. Y. 505; Wright v. Williams, 20 Hun (N. Y.) 320.

In *Hanberry v. King*, 4 Bro. P. C. 445, *note*, the old rule of loss of voyage was followed, and a sale made where the voyage was lost, was held to constitute a total loss.

The following cases further support the text, but as in each the sale was held not stringently necessary, the underwriter was held not liable for a total loss. *Cobequid Mar. Ins. Co. v. Barbeaux*, L. R., 6 P. C. 319; *Bell v. Nixon*, Holt 423; *Martin v. Crokatt*, 14 East 465; *Tanner v. Bennett*, R. & M. 182; *Doyle v. Dallas*, 1 M. & Rob. 48; *Malburn v. Leckie*, 1 Park Ins. (8th ed.) 347; *Furneaux v. Bradley*, 1 Park Ins. (8th ed.) 365; *Gallagher v. Taylor*, 5 Can. Sup. Ct. 368, *reversing* 1 Russ. & G. (Nova Sc.) 279; *Millville Mut. M. & F. Ins. Co. v. Driscoll*, 11 Can. Sup. Ct. 183; 23 New B. 160; *Wood v. Symest*, 5 Allen (N. B.) 309; *Cort v. Delaware Ins. Co.*, 2 Wash. (U. S.) 375; *Peck v. Nashville*, 6 La. An. 148; *Hallett v. Peyton*, 1 Cai. Cas. (N. Y.) 28.

Sale Under Decree of Court.—The law is the same where the sale is made by a decree of court in consequence of damage by a peril insured against. *Cossmann v. West*, 13 App. Cas. 160.

1. Cargo.—*Dyson v. Rawcroft*, 3 B. & P. 474; *Bordreth v. Hentigg*, Holt N. P. 149; *Duff v. Mackenzie*, 3 C. B., N. S. 16; *Young v. Pacific Ins. Co.*, 34 N. Y. Sup. Ct. 321; *McCall v. Sun Mut. Ins. Co.*, 34 N. Y. Sup. Ct. 313.

Total physical loss of goods is not necessary to entitle owners of merchan-

dise insured against perils of the sea, "free of particular average only," to recover as for a total loss, if the right to abandon is exercised during the continuance of the peril, and there is a total loss of value to the owners. *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204.

As in the case of policies upon the ship the early cases held a loss of the voyage by the vessel to constitute a total loss of the cargo. *Manning v. Newnham*, 3 Doug. 130; *Wilson v. Royal Exch. Ass. Co.*, 2 Camp. 623, *note*.

2. *Saunders v. Baring*, 34 L. T., N. S. 419; *Roux v. Salvador*, 3 Bing. N. C. 279; *Snowden v. Guion*, 101 N. Y. 458; *Morau v. United States Ins. Co.*, 1 Wheat. (U. S.) 219; *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220; *Gould v. Louisiana etc. Ins. Co.*, 20 La. An. 259; *Tudor v. New England Ins. Co.*, 12 Cush. (Mass.) 554; *Waler v. Thompson*, 9 Serg. & R. (Pa.) 115; *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543.

When the salvage falls short of the freight there is a total loss. *Bayfield v. Brown*, 2 Stra. 1065.

3. *Miller v. Fletcher*, 1 Doug. 231; *Farnworth v. Hyde*, 18 C. B., N. S. 835. See *Browning v. Provincial Ins. Co. of Canada*, L. R., 5 P. C. 263; *Edgar Thompson Steel Co. v. Boylston Mut. Ins. Co.*, 12 Mo. App. 244; *Abbott v. Broome*, 1 Cai. (N. Y.) 292.

4. *Mellish v. Andrews*, 15 East 13; *Mullett v. Shedden*, 13 East 304; *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237; *Brown v. Phoenix Ins. Co.*, 4 Binn. (Pa.) 445.

owners to abandon the vessel as a total loss; or to disable her from fulfilling the terms of her charter party.¹

So also if she is detained by capture or embargo so as to prevent earning the freight insured.²

Where the ship is so damaged that she is sold justifiably, there is an actual total loss of the freight.³

Where, after damage to the vessel or cargo, the assured might, nevertheless, go on and earn the freight, he cannot recover for a total loss if he fails to do so.⁴

1. **Freight.**—*De Cuadra v. Swann*, 15 C. B., N. S. 772; *Potter v. Rankin*, L. R., 6 H. L. 83; L. R., 3 C. P. 562; *Jackson v. Union Mar. Ins. Co.*, L. R., 10 C. P. 125; *Kidstone v. Empire Mar. Ins. Co.*, L. R., 2 C. P. 357; *Driscoll v. Millville Mut. M. & F. Ins. Co.*, 23 New Br. 160; *Jordon v. Great Western Ins. Co.*, 24 New Br. 421; *Hugg v. Augusta Ins. & Bank Co.*, 7 How. (U. S.) 595; *Redyard v. Phillips*, 4 Blatchf. (U. S.) 443; *Hodgson v. Mississippi Ins. Co.*, 2 La. (O. S.) 341; *Blanks v. Hibernia Ins. Co.*, 36 La. An. 599; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109; *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163; *Robinson v. Manufacturers' Ins. Co.*, 1 Met. (Mass.) 143; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443; *Parsons v. Manufacturing Ins. Co.*, 82 Mass. 463; *Marmond v. Melledge*, 123 Mass. 173; *Willard v. Millers and Manufacturers' Ins. Co.*, 24 Mo. 561; *Lockwood v. Atlantic Mut. Ins. Co.*, 47 Mo. 50; *Stilwell v. Commercial Ins. Co.*, 2 Mo. App. 22; *Stevens v. Col. Ins. Co.*, 3 Cal. (N. Y.) 43; *Center v. American Ins. Co.*, 4 Wend. (N. Y.) 46; 7 Cow. (N. Y.) 564; *Robertson v. Atlantic Mut. Ins. Co.*, 68 N. Y. 192; *Hugg v. Augusta Ins. Co.*, Taney 159; *Meech v. Philadelphia Ins. Co.*, 3 Whart. (Pa.) 473; *De Longue-mere v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 127; *American Ins. Co. v. Carter*, 4 Wend. (N. Y.) 45.

If the failure to earn freight or perform a charter party is due to the exercise of a power granted to the charterer to terminate the contract, the loss is not the result of a peril insured against, and the underwriter is not liable. *Inman Steamship Co. v. Bischoff*, L. R., 7 App. Cas. 670; 6 Q. B. Div. 648.

If the assured receives the freight in fact, although the vessel has been so damaged that he can abandon for a total loss, he cannot recover for a total

loss of the freight. *Benson v. Chapman*, 8 C. B. 950; 2 H. L. Cas. 606.

2. *Puller v. Staniforth*, 11 East 232; *Puller v. Glover*, 12 East 124; *Charleston Ins. & Tr. Co. v. Corner*, 2 Gill (Md.) 410; *Davy v. Hallett*, 3 Cal. (N. Y.) 16.

If she earns another freight the underwriters are entitled to the benefit of it. *Puller v. Staniforth*, 11 East 232; *Charleston Ins. & Tr. Co. v. Corner*, 2 Gill (Md.) 410.

If there is merely a detention which does not prevent an actual earning of a freight there is no total loss. *Everth v. Smith*, 2 M. & S. 278; *Mayo v. Maine F. & M. Ins. Co.*, 4 Mass. 374.

3. *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755; *Mount v. Harrison*, 4 Bing. 388; *Currie v. Bombays Native Ins. Co.*, L. R., 3 P. C. 72.

Insurance Co. v. Mordecai, 22 How. (U. S.) 111; *Callender v. Ins. Co. of North America*, 5 Binn. (Pa.) 525; *Dunning v. Merchants' Mut. Mar. Ins. Co.*, 57 Me. 108.

Where, however, goods were so damaged that the master justifiably sold them, and so lost freight *pro tanto*, it was held that the underwriter was not liable. *Mordy v. Jones*, 4 B. & C. 394.

4. *Hart v. Delaware Ins. Co.*, 2 Wash. (U. S.) 346; *Hughes v. Sun Mut. Ins. Co.* (N. Y.), 1 Cent. Rep. 319; *Marks v. Louisiana State M. & F. Ins. Co.*, 3 Rob. (La.) 454; *Clark v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 104; *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109; *Field v. Citizens' Ins. Co.*, 11 Mo. 50; *Herbert v. Hallett*, 3 Johns. Cas. (N. Y.) 93; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Ogden v. General Mut. Ins. Co.*, 2 Duer (N. Y.) 204.

In *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437, it was held that, under a contract for the insurance of freight, the owner or master of the vessel cannot voluntarily surrender or abandon the

2. *Constructive Total Loss*.¹—A constructive total loss of the ship is said, by JUDGE STORY,² to exist “where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture;³ where there is a moral restraint or detention which deprives the owner of the free use of the ship, as in cases of embargoes, blockades and arrests by sovereign authority;⁴ where there is a present total loss of the physical possession and use of the ship, as in case of submersion;⁵ where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port where the disaster happens;⁶ and lastly, where the injury is so extensive that by

cargo to the shipper or underwriter, free of freight, upon the occurrence of any injury short of a technical total loss, or inability to deliver the goods *in specie* at the port of destination. If the owner demands the goods at the port of detention, the master should make payment of full freight a condition to delivery. Having surrendered them without payment, he cannot hold the insurer liable.

1. *Constructive Total Loss*.—A constructive or technical total loss “is such a loss as entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment.” 2 Arnould Mar. Ins. (6th ed.) 1024.

It is a loss such that in the eye of the law the assured is entitled, on transferring such part or remnant of the subject insured as is surviving to the underwriter, to claim the whole amount of his subscription. 2 Phillips Ins. (5th ed.), § 1487; 2 Parsons Mar. Ins. 107.

It is no less a total loss than is an absolute total loss, and the underwriter of a policy against “total loss only” is liable for a constructive total loss. *Adams v. McKenzie*, 32 L. J., C. P. 92; *Forwood v. Provincial Mut. Mar. Ins. Co.*, 9 Q. B. Div. 732; 7 Q. B. Div. 57; *O’Leary v. Stymest*, 6 Allen (New Br.) 259; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131; *Greene v. Pacific Ins. Co.*, 9 Allen (Mass.) 217; *Trou v. Union Mut. Mar. Ins. Co.*, 119 Mass. 592.

2. *Ship*.—*Peele v. Merchants’ Ins. Co.*, 3 Mason (U. S.) 27 at 65. The learned judge is speaking of the right to abandon, but the words must apply to a constructive loss, since without the existence of that right there can be no such loss.

3. *McIver v. Henderson*, 4 M. & S.

576; *Lozano v. Janson*, 28 L. J., Q. B. 337; *Goss v. Withers*, 2 Burr. 683; *Dean v. Hornby*, 23 L. J., Q. B. 129; 3 E. & B. 180; *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357; *Dutilh v. Gatliff*, 4 Dall. (Pa.) 446; *Russel v. Union Ins. Co.*, 4 Dall. (U. S.) 421; *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202; *Thompson v. Mississippi M. & F. Ins. Co.*, 2 La. (O. S.) 228; *Ruan v. Gardner*, 1 Wash. (U. S.) 145; *Odlen v. Penn Ins. Co.*, 2 Wash. (U. S.) 312; *Lee v. Boardman*, 3 Mass. 238; *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Lovering v. Mercantile Ins. Co.*, 2 Pick. (Mass.) 348; *Stover v. Grey*, 2 Mass. 565; *Livingston v. Columbian Ins. Co.*, 3 Johns. (N. Y.) 49; *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412; *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79, 80; *Watson v. Marine Ins. Co.*, 7 Johns. (N. Y.) 57; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241; *Gouverneur v. United Ins. Co.*, 1 Cai. (N. Y.) 592; *Duval v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 278; cf. *Barney v. Maryland Ins. Co.*, 5 Har. & J. (Md.) 139; *Thomson v. Read*, 12 Serg. & R. (Pa.) 440.

4. *Rotch v. Edie*, 6 T. R. 413; *Fowler v. English & Scottish Mar. Ins. Co.*, 18 C. B., N. S. 919.

5. See *Greene v. Pacific Mut. Ins. Co.*, 9 Allen (Mass.) 217.

A similar case is presented in *Snow v. Union Mut. Mar. Ins. Co.*, 119 Mass. 592. A vessel caught in the ice in the Arctic ocean was abandoned by the master and crew to save their lives. Later she was recovered, yet the loss was held constructively total.

6. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.) 594; *Snow v. Union Mut. Mar. Ins. Co.*, 119 Mass. 592; *Stagg v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 34.

reason of it the ship is useless, and yet the necessary repairs would exceed her present value."¹

In the United States, there is a constructive total loss where the cost of repairs exceeds one half the value of the vessel.²

1. A loss is to be considered total where a prudent owner if uninsured would not have repaired. *Irving v. Manning*, 1 H. L. Cas. 287; 6 C. B. 391; *Thompson v. Colvin, Lloyd & Wels*, 140; *Young v. Turing*, 2 M. & Gr. 593; *Moss v. Smith*, 9 C. B. 94; *Lindsay v. Leathley*, 11 L. T., N. S. 194; *Barker v. Janson, L. R.*, 3 C. P. 303; *Forwood v. North Wales Mut. Ins. Co.*, 9 Q. B. Div. 732; 5 Q. B. Div. 57; *Adams v. Murray, Fac. Dec.* (1801-1807) 360; *Kenneth v. Moore*, 10 Sc. Sess. Cas. (4th ed.) 547; *Meagher v. Aetna Ins. Co.*, 20 U. C. Q. B. 607; *King v. Western Ass. Co.*, 7 U. C. C. P. 300; *Troop v. Jones*, 5 Russ. & G. (Nova Sc.) 230.

But a constructive total loss is not to be presumed to be provided for by language in a policy fairly susceptible of a contrary interpretation. *Merchants S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444.

The assured is always at liberty to repair, and if he does so, the cost of the repairs is the measure of the loss. *Pitman v. Universal Mar. Ins. Co.*, 9 Q. B. Div. 192.

Even though this exceeds the amount for which the underwriter would be liable as for a total loss. *Aitcheson v. Lohre, L. R.*, 4 App. Cas. 755.

The mere fact that the vessel was so damaged that the master, acting in good faith, sold her, is not enough to constitute a total loss. It must be proved justifiable through pressure of urgent necessity. *Gardiner v. Salvador*, 1 M. & Rob. 116; *Domett v. Young, Car. & M.* 465; *Martin v. Crockett*, 14 East 465; *Knight v. Faith*, 15 Q. B. 649; *Hall v. Jupe*, 43 L. T., N. S. 411; 49 L. J., C. P. 721; *Cobequid Mar. Ins. Co. v. Barteaux, L. R.*, 6 P. C. 319; *Millville Mut. M. & F. Ins. Co. v. Driscall*, 11 Can. Sup. Ct. 183; *Wood v. Stymest*, 5 Allen (N. Br.) 309; *Leslie v. Taylor*, 1 Russ. & C. (Nova Sc.) 352; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415.

A vessel laden with coal, valued at \$9,000, struck on the beach on the west side of Block Island, about ten o'clock at night, and in a thick fog. She lay on a sandy beach with rocks and stones under and around her, nearly on an even keel and head on the beach, but

so that she was broadside to the sea. Next morning the wind increased somewhat in violence, and as the tide arose the vessel chafed heavily; and about 10 A.M. bilged and filled with water. The master applied to a wrecking company, who offered to get the vessel off for \$5,000. The following day the owner's agent arrived. The weather had moderated somewhat. A survey was called, and four days later the vessel was sold at auction for \$610. The vessel was in an exposed condition, and local witnesses testified that a large proportion of coal vessels which were bilged on that part of the island became a total loss. It was held that the master was justified in making the sale, and the insurers liable for a total loss, although the vessel was afterwards saved. *Hall v. Ocean Ins. Co.*, 37 Fed. Rep. 371.

2. This is not the rule in England. There the cost of repairs must equal the value of the repaired vessel. 2 *Arnould Mar. Ins.* (6th ed.) 1055.

It is, however, established law in the United States. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Phillips v. St. Louis Ins. Co.*, 11 La. An. 459; *Lincaln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Ellicott v. Alliance Ins. Co.*, 14 Gray (Mass.) 318; *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Lockwood v. Sangamo Ins. Co.*, 46 Mo. 71; *Abbott v. Broome*, 1 Cai. (N. Y.) 292; *Smith v. Bell*, 2 Cai. Cas. (N. Y.) 153; *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9; *Center v. American Ins. Co.*, 4 Wend. (N. Y.) 46; 7 Cow. (N. Y.) 564; *Dickey v. American Ins. Co.*, 3 Wend. (N. Y.) 658; *Peters v. Phoenix Ins. Co.*, 3 S. & R. (Pa.) 25; *Ritchie v. United States Ins. Co.*, 5 S. & R. (Pa.) 501; *American Ins. Co. v. Francia*, 9 Pa. St. 390; *Hedley v. Nashville Ins. Co.*, 6 Rich. (S. Car.) 130; *cf. Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

The decisions of different States whether or not the value of the vessel stated in the policy is conclusive as to her value are not in accord. In the following the stated value is conclusive:

A constructive total loss of the cargo takes place where it is changed into something of a different species;¹ or cannot be carried to its destination at all or without undergoing a change of species by the way.²

Massachusetts.—Winn *v.* Columbian Ins. Co., 12 Pick. (Mass.) 279; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456; Hall *v.* Ocean Ins. Co., 21 Pick. (Mass.) 472.

New York.—American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287.

In the following it is not:

Alabama.—Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

Ohio.—Peabody Ins. Co. *v.* Memphis & Arkansas River Packet Co., 1 Cin. L. Bul. 42, 379.

And so in the courts of the United States. Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378; *U. S.*, too, in Scotland. Stewart *v.* Greenock Mut. Ins. Co., 6 C. C. S. 359.

In arriving at the cost of repairs, the expense of raising and towing a vessel to port is part of the cost; and so, if she be stranded, the expense of getting her off. Wallace *v.* Thames & Mersey Ins. Co., 22 Fed. Rep. 66; Sewall *v.* United States Ins. Co., 11 Pick. (Mass.) 90; Ellicott *v.* Alliance Ins. Co., 14 Gray (Mass.) 318; Patrick *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 9.

And the law is the same as to the expense of taking a vessel to a port for repairs. Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.) 22.

The deduction of one-third new for old is not to be made in estimating the cost of the repairs. Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378; Peele *v.* Merchants' Ins. Co., 3 Mason (U. S.) 27; Phillips *v.* St. Louis Ins. Co., 11 La. An. 459; Dupuy *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 182; Peabody Ins. Co. *v.* Memphis & Arkansas River Packet Co., 1 Cin. L. Bul. 379, 42.

The following cases hold that such a deduction should be made. Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303 at 314; Sewall *v.* United States Ins. Co., 11 Pick. (Mass.) 90; Heebner *v.* Eagle Ins. Co. of Cincinnati, 10 Gray (Mass.) 131 at 143; American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287; Smith *v.* Bell, 2 Cai. Cas. (N. Y.) 153; Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282; Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50.

The value to be taken in estimating the constructive total loss is the value

at the place where the repairs are made. Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378; American Ins. Co. *v.* Francia, 9 Pa. St. 390.

And the value after the repairs are made. Peele *v.* Merchants' Ins. Co., 3 Mason (U. S.) 27.

If a general average due from freight and cargo reduces the expense of repairs below one-half the vessel's value, there can be no abandonment for a constructive total loss. Pezant *v.* National Ins. Co., 15 Wend. (N. Y.) 453; Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415.

The law is the same in the case of constructive total loss of cargo. Lapsley *v.* Pleasant's Ins. Co., 4 Binn. (Pa.) 502.

1. **Cargo.**—Lowndes' Mar. Ins. (2nd ed.) 134.

In an early case, Cocking *v.* Fraser, 1 Park Ins. (8th ed.) 247; 4 Doug. 295, it was held that if it remained *in specie*, though rendered of no value by sea damage, there was no constructive total loss; but this has been disapproved by Lord ALVANLEY, Dyson *v.* Rawcrofts, 3 B. & P. 474; Lord KENYON, Burnett *v.* Kensington, 7 T. R. 210, and Lord ELLENBOROUGH in Calogan *v.* London Ass. Co., 5 M. & S. 447. Cf. also Chadsey *v.* Guion, 14 J. & Sp. (N. Y.) 118, per SEDGEWICK, J.

2. Hudson *v.* Harrison, 3 Bro. & B. 97; Roux *v.* Salvador, 1 Bing. N. C. 526; 3 Bing. N. C. 266; Parry *v.* Aberdeen, 9 B. & C. 411; Fairbanks *v.* Union Mar. Ins. Co., Thomson (Nova Sc.) 67.

The mere fact that it would be unprofitable owing to their damaged state to carry the goods on is not enough to render the loss constructively total. Thompson *v.* Royal Exch. Ass. Co., 16 East 214; Richardson *v.* Stodart, Fac. Dec. (1781-1787) 299.

The fact that the master has sold the cargo owing to damage to it or to the ship is not enough to render the loss total. "As a general rule, when the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. . . . If

Or except at an extraordinary expense exceeding its value.¹

In the United States, there is a constructive total loss of the cargo where the value of the part saved is less than half the full value.²

A mere loss of the voyage if the goods are not perishable does not entitle the assured to recover on abandonment as for a total loss.³

Damage to part of the cargo where some still exists in specie

the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible." Per JERVIS, C. J., in *Rosetto v. Gurney*, 11 C. B. 176 at 186.

If it lies within the master's power to send the cargo on he must do it. *Atlantic Mut. Ins. Co. v. Herth*, 16 Ch. Div. 474; *Farnworth v. Hyde*, L. R., 2 C. P. 204; *Navone v. Haddon*, 9 C. B. 30; *Rugely v. Sun Mut. Ins. Co.*, 7 La. An. 279; *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543; 6 Pick. (Mass.) 131; *Ludlow v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 335; *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. Car.) 190.

But if it cannot be sent on because no vessel can be obtained, and the master sells justifiably, the loss is constructively total. *Manning v. Newnham*, 3 Doug. 130.

When the sale by the master is justifiable the assured may recover for a constructive total loss. *Semonds v. Union Ins. Co.*, 1 Wash. (U. S.) 382; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400; *Vanderheuel v. United Ins. Co.*, 1 Johns. (N. Y.) 406; *Moses v. Columbian Ins. Co.*, 6 Johns. (N. Y.) 219; *Snowden v. Guion*, 101 N. Y. 458.

The sale must be absolutely necessary, and not merely expedient. In *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466, PUTMAN, J., said: "There must be something more than expediency in the case; the sale should be indispensably requisite. The reason for it should be cogent. We mean a necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to the act. The master acts for the owners of insurers, because they cannot have an opportunity to act for themselves. If the property could be kept safely until they could be consulted, and have an opportunity, in a reasonable time, to exercise their own

judgment in regard to sale the necessity to act for them would cease." See also *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543; *Stephenson v. Pacific Ins. Co.*, 7 Allen (Mass.) 232; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Orrok v. Com. Ins. Co.*, 21 Pick. (Mass.) 456; *Patapasco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *The Sarah Ann*, 2 Sumn. (U. S.) 206; *The Amelie*, 6 Wall. (U. S.) 18.

1. *Reimer v. Ringrose*, 6 Ex. 263; *Watson v. Mercantile Mar. Ins. Co.*, 3 Nova Sc. Dec. 396.

2. *Gardner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *Judah v. Randal*, 2 Cai. Cas. (N. Y.) 324; *Boardman v. Boston Marine Ins. Co. (Mass.)*, 6 N. Eng. Rep.; s. c., 16 N. E. Rep. 26; *Budd v. Union Ins. Co.*, 4 McCord (S. Car.) 1.

In estimating the amount of damage to determine whether the cargo is damaged more than half its value, the damage to memorandum articles must be excluded. *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.) 39.

3. *Anderson v. Wallis*, 2 M. & S. 240; *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47.

Thus, the constructive total loss of a whaling ship at a port where whaling outfits are bought and sold, and where such outfits are in safety, is not a constructive total loss of the outfits, although no vessel is obtainable within a reasonable time to carry forward the outfits on the voyage insured. *Macy v. China Mut. Ins. Co.*, 135 Mass. 328.

When they are perishable, the loss of the voyage may render the loss total. *Columbian Ins. Co. v. Catlett*, 12 Wheat (U. S.) 383.

In the United States a loss of the voyage by turning back on learning of the blockade of the port of destination has been held sufficient to constitute a total loss. *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 382; *Schmidt v. United Ins. Co.*, 1 Johns. (N. Y.) 249.

does not entitle the assured to claim as for a total loss of that part.¹

So also there is a constructive total loss of cargo where it is captured, seized or detained.²

A constructive total loss of freight takes place where there is a constructive total loss of the vessel.³ Or where the cargo is so damaged that it cannot be carried to its destination at an expense less than will render the loss on cargo constructively total, or unless there is a constructive total loss of the cargo.⁴

Where the vessel loses her chartered freight, but, nevertheless, earns a freight on the same voyage the loss is not total.⁵

In the United States, the underwriter is bound to accept an abandonment and pay the full amount of his subscription when

1. *Roux v. Salvador*, 1 Bing. N. C. 326; 3 Bing. N. C. 266; *McAndrews v. Naughan*, 1 Park Ins. (8th ed.) 252; *Meyer v. Ralli*, 1 C. P. Div. 358; *Browning v. Provincial Ins. Co. of Canada*, L. R., 5 P. C. 263; *Hedberg v. Pearson*, 7 Taunt. 153; *Hills v. London Ass. Co.*, 5 M. & W. 569; *Ralli v. Janson*, 6 E. & B. 422; *Entwistle v. Ellis*, 2 H. & N. 549; *Seton v. Delaware Ins. Co.*, 2 Wash. (U. S.) 175.

This is not so if the whole of a distinct species of the cargo is destroyed. *Duff v. Mackenzie*, 3 C. B., N. S. 16; *Wilkinson v. Hyde*, 3 C. B., N. S. 30.

In *Spence v. Union Marine Ins. Co.*, L. R., 3 C. P. 427, a cargo of cotton belonging to different owners was so mixed by peril of the sea as to be undistinguishable. It was held that no single owner could recover as for a total loss of his part, but could get only the difference between his share of what was saved and the value of what he shipped.

2. *Barker v. Blakes*, 9 East 283; *Marshall v. Parker*, 2 Camp. 69; *Cologan v. London Ass. Co.*, 5 M. & S. 447; *Smith v. Robinson*, Hayes 125; *Russel v. Union Ins. Co.*, 4 Dall. (U. S.) 421; *Mar. Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357; *Dorr v. New England Mar. Ins. Co.*, 4 Mass. 221; *Livingston v. Columbia Ins. Co.*, 3 Johns. (N. Y.) 49; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. (N. Y.) 1; *Waddell v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 61; *Dutilh v. Gatliff*, 4 Dall. (Pa.) 446; *Brown v. Phoenix Ins. Co.*, 4 Binn. (Pa.) 445.

The law is the same though the seizure be by the crew. *Dixon v. Reid*, 5 B. & Ald. 597. Or by pirates. *Gilfert v. Hallet*, 2 Johns. Cas. (N. Y.) 296.

3. **Freight.**—*Benson v. Chapman*, 6 M. & G. 810; *Thompson v. Rawcroft*, 4 East 34; *Dunning v. Merchants' Mut. Mar. Ins. Co.*, 57 Me. 108; *Coolidge v. Gloucester, Mar. Ins. Co.*, 15 Mass. 341; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443; *Callender v. Ins. Co. of North America*, 5 Binn. (Pa.) 525.

The test of the constructive loss is the state of the vessel. *Green v. Royal Exch. Ass. Co.*, 6 Taunt. 66; *Moss v. Smith*, 9 C. B. 94.

4. *Michael v. Gillespie*, 2 C. B., N. S. 627; *Currie v. Bombay Native Ins. Co.*, L. R., 3 P. C. 72.

A clause in a marine policy on freight—"The insured shall not have a right to claim for a total loss on account of the estimated amount of repairs exceeding the valuation of the vessel, nor to abandon, unless the amount which the insurer would be liable to pay, after usual deductions, shall exceed half the value of said vessel; and the highest value under which the vessel is insured in any policy shall be a basis for ascertaining the technical total loss of freight,"—does not apply where the claim is based upon a loss of cargo, and other parts of the policy regulate the claim for freight upon a loss of specific articles of cargo. *Boardman v. Boston Marine Ins. Co. (Mass.)*, 6 N. Eng. 88; 16 N. East. 26.

In a case of marine insurance, where the vessel sank, and the cargo is saved and brought to port by the insurer, and sold without regard to the carrier's lien for freight, the insurer is liable to the carrier. *Hughes v. Sun Mut. Ins. Co.*, (N. Y.) 1 Cent. Rep. 319.

5. *Brocklebank v. Sugrue*, 1 B. & Ad. 81.

the state of affairs actually existing at the time of the notice of abandonment is such as constitutes a total loss.¹

In England, the extent of the underwriter's liability depends upon the actual state of affairs at the time the action is brought. Events subsequent to the notice of abandonment may reduce the loss from one constructively total to a partial loss.²

3. *Abandonment*.—An abandonment is a cession to the underwriter of all advantages direct and indirect of ownership in the thing insured.³

1. *Determined by Facts at Time of Notice of Abandonment*.—The American law on this subject is thus laid down by MARSHALL, C. J., in *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202 at 206: "The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss at the time the abandonment is made is the proper and safe criterion of the rights of the parties."

The law is definitely settled by many cases that the state of the facts and not of the information determines the obligation of the underwriter to accept the abandonment. The total loss must continue up to the time of the abandonment. *Rhineland v. Ins. Co. of Pennsylvania*, 4 Cranch (U. S.) 29; *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202; *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 183; *Humphreys v. Union Ins. Co.*, 3 Mason (U. S.) 429; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Lee v. Boardman*, 3 Mass. 238; *Delano v. Bedford Mar. Ins. Co.*, 10 Mass. 348; *Hallet v. Peyton*, 1 Cal. Cas. (N. Y.) 28 (overruling *Slocum v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 152; and *Mumford v. Church*, 1 Johns. Cas. (N. Y.) 147; *Jurnel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412; *Child v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76; *Dutilh v. Gatliff*, 4 Dall. (Pa.) 446.

Although the information in the possession of the assured at the time of the notice of abandonment discloses a constructive total loss, the underwriter is not bound to accept the abandonment if, in point of fact, events subsequent to the date of his information, but prior to the notice, have reduced the loss to a partial loss. Thus, if a vessel abandoned as seized, captured or detained, has, in point of fact, been restored or recaptured. *Dorr v. Union*

Ins. Co., 8 Mass. 502; *Parage v. Dale*, 3 Johns. Cas. (N. Y.) 156; *Muir v. United Ins. Co.*, 1 Cal. (N. Y.) 49; *Adams v. Delaware Ins. Co.*, 3 Binn. (Pa.) 287; *Brown v. Phoenix Ins. Co.*, 4 Binn. (Pa.) 445; *Messonier v. Union Ins. Co.*, 1 N. & McC. (S. Car.) 155.

Or if she has been repaired at such a cost as not to constitute a constructive total loss. *De Pau v. Ocean Ins. Co.*, 5 Cow. (N. Y.) 63; *Dickey v. American Ins. Co.*, 3 Wend. (N. Y.) 658.

2. The restitution of the property before the action is brought reduces the loss to a partial loss. *Bainbridge v. Neilson*, 10 East 329; *Patterson v. Ritchie*, 4 M. & S. 393; *Brotherson v. Barber*, 5 M. & S. 418; *Faulkner v. Ritchie*, 2 M. & S. 290; *Naylor v. Taylor*, 9 B. & C. 718; 2 *Arnould Mar. Ins.* (6th ed.) 1028.

Where the underwriter has accepted the abandonment subsequent events reducing the loss are immaterial. *Smith v. Robertson*, 2 Daw. 474.

3. *Abandonment*.—*Lowndes Mar. Ins.* (2nd ed.) 153.

The right of abandonment as for a total loss depends on the probabilities at the time the right is exercised, and is not affected by the fact that the vessel was got off subsequently, or that the damage was less than was supposed. *Orient Ins. Co. v. Adams*, 123 U. S. 67.

In an action on a marine policy, the vessel having been abandoned during the voyage, evidence is admissible to show the prices demanded by mechanics in the port of distress, in response to advertisements for bids for the repairs necessary to enable the vessel to continue, the burden of proof being on plaintiff to show that the expense of such repairs justified the abandonment. *Osborne v. New York Mut. Ins. Co.*, 6 N. Y. Sup. 103. See also *Snow v. Union Mut. Ins. Co.*, 119 Mass. 592.

Where an insured vessel is stranded and abandoned there are three courses open to the underwriters: (1) They

Notice of abandonment is absolutely essential to enable the assured to recover for a constructive total loss.¹

The notice may be given by anyone interested in the subject insured.²

may accept the abandonment and pay for a total loss; (2) they may allow the vessel to lie on the beach and contest the owner's right to abandon; or (3) they may elect to raise and repair her, and thus avoid paying a total loss. *Northwestern Transp. Co. v. Continental Ins. Co.*, 24 Fed. Rep. 171. See also *Prince v. Ocean Ins. Co.*, 40 Me. 481; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450; *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138; *Portsmouth Ins. Co. v. Brazee*, 16 Ohio 81; *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176; *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 382; *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *Clarke v. The Steamer Fashion*, 2 Wall. Jr. (U. S.) 339; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226; *Cord v. United States Ins. Co.*, 8 Johns. (N. Y.) 277; *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Peele v. Merchants' Ins. Co.*, 3 Mass. 27; *Wood v. Lincoln etc. Ins. Co.*, 6 Mass. 479; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Gordon v. Mass. Ins. Co.*, 2 Pick. (Mass.) 249; *Cooledge v. Gloucester Ins. Co.*, 15 Mass. 341; *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Winn v. Columbian Ins. Co.*, 12 Mass. 279; *King v. Hartford Ins. Co.*, 1 Conn. 422; *Marks v. Nashville Co.*, 6 La. An. 127; *Hanan v. Louisiana etc. Ins. Co.*, 15 La. An. 201; *Fuller v. Kennebec Mutual Ins. Co.*, 31 Me. 325; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. (Pa.) 25; *Salisbury v. Mut. Ins. Co.*, 23 Mo. 553; *Ralston v. Union Ins. Co.*, 4 Binn. (Pa.) 386;

1. **Notice.**—*Fleming v. Smith*, 1 H. L. Cas. 513; *Knight v. Faith*, 15 Q. B. 649; *Kaltenbach v. Mackenzie*, 3 C. P. Div. 467; *Townsend v. Phillips*, 2 Root (Conn.) 400; *Thomas v. Rockland Ins. Co.*, 45 Me. 116; *Barney v. Maryland Ins. Co.*, 5 Har. & J. (Md.) 139; *Mellon v. Louisiana State Ins. Co.*, 17 Mart. (La.) 563; *Lovering v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Hubble v. Great Western Ins. Co.*, 74 N. Y. 246; *Sherlock v. Glové Ins. Co.*, 1 Cin. L. Bul. (Ohio) 26; *American Ins. Co. v. Francia*, 9 Pa. St. 390; *Cossman v. West*, 6 Russ. & G. (Nova Sc.) 461.

An abandonment is not necessary, however, where it could not possibly be of benefit to the underwriter. "Notice is only necessary to be given when upon receiving it the underwriters could do something in the exercise of their rights over the salvage." Per *LORD CHELMSFORD*, in *Rankin v. Potter*, L. R., 6 H. L. 83; *Holbrook v. United States*, 21 Ct. of Cl. (U. S.) 434; *Babbitt v. Sun Mut. Ins. Co.*, 23 La. An. 314; *Fosdick v. Norwich Ins. Co.*, 3 Day (Conn.) 108; *Walker v. Protection Ins. Co.*, 29 Me. 317.

In *Burt v. Brewers' etc. Ins. Co.*, 16 N. Y. Sup. Ct. 383, it was held that a notice of abandonment is of no effect in case of an actual total loss; that such notice is only necessary when something still exists which is capable of abandonment, and when the insured seeks to convert a partial into a constructive total loss.

The fact that at the time information is received the property has already been sold does not do away with the necessity of abandoning. *Hodgson v. Blackiston*, 1 Park Ins. (8th ed.) 400.

It is not necessary for the assured, on the vessel's reaching its destination in a foreign port, to give notice to the underwriters of its condition before the former can abandon for a total loss. *Cohen v. Ins. Co.*, *Dudley* (S. Car.) 147; *Hedley v. Nashville Ins. Co.*, 6 Rich. (S. Car.) 130.

No notice of abandonment need be given an underwriter upon a policy of reinsurance. *Uzielli v. Boston Mar. Ins. Co.*, 15 Q. B. Div. 11.

2. **By Whom Given.**—Thus one of several jointly interested in a cargo may give a notice for all. *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47.

So one owner of a vessel who has insured for whom it may concern. *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191.

So also an agent who makes insurance for his principal. *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Cassedy v. Louisiana State Ins. Co.*, 6 Mart. (La.) N. S. 421.

An abandonment by the president of a corporation owning the vessel is sufficient. *Northwestern Transportation*

Notice to the broker who effected the policy is a sufficient notice of abandonment.¹

The notice must be given as soon as the assured has the information which enables him to elect whether to repair or abandon.²

Co. v. Continental Ins. Co., 24 Fed. Rep. 171. But not by a mere depository of the policy. *Jardine v. Leathley*, 3 B. & S. 700. Nor a consignee of the goods. *Hicks v. McGehee*, 39 Ark. 264.

A notice by one part owner of abandonment of his interest does not necessarily affect the interest of other part owners. *Kirby v. Thames & Mersey Ins. Co.*, 27 Fed. Rep. 221.

1. *Crousillat v. Ball*, 3 Yeates (Pa.) 375.

2. **Time of Notice.**—*Abel v. Potts*, 3 Esp. 242; *Mitchell v. Edie*, 1 T. R. 608; *Read v. Bonham*, 6 Moore 397; *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47; *King v. Walker*, 3 H. & C. 209; *Potter v. Campbell, L. R.*, 3 C. P. 304, *note*; *Kaltenbach v. Mackenzie, L. R.*, 3 C. P. Div. 467; *Maryland Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338; *Bell v. Beveridge*, 4 Dall. (Pa.) 272; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Gardner v. Columbian Ins. Co.*, 2 Cranch (U. S.) 550; *Livermore v. Newburyport Ins. Co.*, 1 Mass. 264; *Smith v. Newburyport Ins. Co.*, 4 Mass. 668; *Dorr v. Union Ins. Co.*, 8 Mass. 494; *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Tucker v. United M. & F. Ins. Co.*, 12 Mass. 288; *Livingston v. Newburyport Ins. Co.*, 1 Mass. 264; *Howland v. India Ins. Co.*, 131 Mass. 239, 253; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191; *Pierce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Krumbhoar v. Marine Ins. Co.*, 1 Serg. & R. (Pa.) 281; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. (N. Y.) 1.

If delay has not impaired the underwriter's rights, it is immaterial. *Young v. Union Ins. Co.*, 24 Fed. Rep. 279. But see *Taber v. China Mut. Ins. Co.*, 131 Mass. 239.

The assured cannot take the chance of first endeavoring to save and make the best of the property, and then abandon when this is found not to his advantage. *Anderson v. Royal Exch. Ass. Co.*, 7 East 38; *Martin v. Crockatt*, 14 East 465; *Fleming v. Smith*, 1 H. L. Cas. 513; *cf. Kelly v. Walton*, 2 Camp. 155.

So also if the assured before abandonment either recovers the subject insured or receives an indemnity for its loss, he cannot thereafter elect to abandon. Thus a policy in its terms rendered the insurers liable only for a total loss. The vessel having been forcibly seized by the officers of the government was lost while in the government service. The assured, without any previous abandonment, made and obtained payment of a claim upon the United States government to an amount nearly equal to the whole value of the vessel. It was held that this circumstance caused the capture to cease from operating as a total loss. *Murray v. Harmony Ins. Co.*, 58 Barb. (N. Y.) 9.

Upon a time policy it is immaterial that notice is given after the expiration of the policy, if otherwise in season. *Dean v. Hornby*, 3 E. & B. 180.

The assured is entitled to reasonable time for examining into the state of the property in order to decide whether to abandon. *Gernon v. Royal Exch. Ass. Co.*, 6 Taunt. 383; *Kelly v. Walton*, 2 Camp. 155; *Currie v. Bombay Native Ins. Co., L. R.*, 3 P. C. 72; *Duncan v. Koch, Wall. C. C. (U. S.)* 33. *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191.

An abandonment on learning of condemnation is seasonable, although the assured did not abandon on learning of capture. *Dorr v. Union Ins. Co.*, 8 Mass. 494; *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 314; *Bohlen v. Delaware Ins. Co.*, 4 Binn. (Pa.) 430.

The notice was held too late in the following cases. *Allwood v. Henckell*, 1 Park Ins. (8th ed.) 399; *Barker v. Blakes*, 9 East 283; *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47; *Aldridge v. Bell*, 1 Stark. 493; *Granger v. Martin*, 4 B. & S. 9; *Harkley v. Provincial Ins. Co.*, 18 Up. Can. C. P. 335; *Morton v. Patillo*, 3 Nova Sc. Dec. 17; *Livermore v. Newburyport Ins. Co.*, 1 Mass. 264; *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37; *Smith v. Newburyport Mar. Ins. Co.*, 4 Mass. 668; *Orrök v. Com. Ins. Co.*, 21 Pick. (Mass.) 456; *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Chadsey v. Guion*, 14 J. & Sp. (N. Y.) 118; *Fuller v. McCall*, 1 Yeates (Pa.)

No special form of notice is essential.¹

The notice may be waived by acts of the assured inconsistent with an abandonment of ownership.²

464; *Krumbhoar v. Marine Ins. Co.*, 1 S. & R. (Pa.) 281.

Whether within a reasonable time is a question of law. *Smith v. Newburyport Mar. Ins. Co.*, 4 Mass. 668. Or of mixed law and fact. *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191.

In *Bell v. Beveridge*, 4 Dall. (Pa.) 272, the jury held an abandonment within a reasonable time though not made until five months after notice of the loss, the assured having been absent from business owing to an epidemic of yellow fever, and having gone upon journey immediately after. For a similar case see also *McCalmont v. Murgatroyd*, 3 Yeates (Pa.) 27.

1. Form of Notice.—The use of the word "abandon" is not necessary. *Currie v. Bombay Native Ins. Co.*, L. R., 3 P. C. 72; *cf. Parmeter v. Todhunter*, 1 Camp. 542.

Simply sending to the underwriter a letter from the master stating the loss and directing that the underwriter be notified was held enough in *King v. Walker*, 3 H. & C. 209.

"... Though no particular form of abandonment is necessary, yet in substance it must be positive and absolute, not fettered by contingencies, conditions or limitations, and must, in express terms or by necessary implication, import an actual present relinquishment of the interest or subject matter to which the abandonment applies, and must truly state the reasons or grounds upon which the abandonment is made and a total loss claimed." Per *SHAW, C. J.*, in *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83 at 93; *Dicken v. New York Ins. Co.*, 4 Cow. (N. Y.) 222.

A claim for an absolute total loss has been held equivalent to an abandonment. *Sherlock v. Globe Ins. Co.*, 25 Ohio St. 50.

On the general subject see also *Burnham v. Boston Mar. Ins. Co.*, 139 Mass. 399; *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 307; *Baker v. Brown*, 3 Nova Sc. Dec. 100.

In the following cases turning merely on their particular facts the form of the abandonment was held sufficient. *Patapasco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Dederer v. Dela-*

ware Ins. Co., 2 Wash. (U. S.) 300; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131; *Perkins v. Augusta Ins. & B. Co.*, 10 Gray (Mass.) 312; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443; *Sillaway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *Thomas v. Rockland Ins. Co.*, 45 Me. 116; *Savage v. Corn Exch. etc. Ins. Co.*, 4 Bosw. (N. Y.) 1; *Bell v. Beveridge*, 4 Dall. (Pa.) 272; *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. Car.) 190.

If the causes assigned are insufficient to justify the abandonment, the notice is ineffectual. *Bosley v. Chesapeake Ins. Co.*, 3 G. & J. (Md.) 450; *Suydam v. Mar. Ins. Co.*, 1 Johns. (N. Y.) 182; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226; *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Firemen's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311. And the law is the same if they are not so stated that the underwriter can determine whether or not he is bound to accept the abandonment. *McConochie v. Sun Mut. Ins. Co.*, 26 N. Y. 477.

Where a clause on a policy required notice of abandonment to be in writing, a telegram informing the company that the vessel was ashore at a given point, and that the insured abandoned it and claimed a total loss, is sufficient. *Richelleu & O. Nav. Co. v. Thames & M. Ins. Co. (Mich.)*, 40 N. W. Rep. 758.

2. Waiver of Notice.—*Martin v. Salem Ins. Co.*, 2 Mass. 420; *Smith v. Touro*, 14 Mass. 112; *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37; *McLellan v. Marine Ins. Co.*, 12 Mass. 246; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39; *Saidler v. Church*, 1 Cai. (N. Y.) 297, *note*; *Ogden v. New York Ins. Co.*, 10 Johns. (N. Y.) 177; *Ogden v. New York Firemen's Ins. Co.*, 12 Johns. (N. Y.) 25; *Abbott v. Broome*, 1 Cai. (N. Y.) 292; *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 139; *King v. Middletown Ins. Co.*, 1 Conn. 184. But acts of the master will not in general waive the rights of the assured as after the abandonment he becomes agent of the underwriter.

After the abandonment has been once accepted all question of its seasonableness or sufficiency are waived.¹

The effect of the abandonment is to vest in the underwriter the property in what remains of the subject insured.²

Lovering v. Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 340.

Whether an abandonment is waived or not is a question for the jury. *Currier v. Phila. Ins. Co.*, 5 Serg. & R. (Pa.) 113; *cf. King v. Hartford Ins. Co.*, 1 Conn. 333.

1. **Acceptance.**—*Smith v. Robertson*, 2 Dow. 474; *Haustman v. Thornton*, Holt N. P. 242; *New Orleans Ins. Assoc. v. Piaggio*, 16 Wall. (U. S.) 378; *Gloucester Ins. Co. v. Younger*, 2 Curt. (U. S.) 322; *The Sarah Ann*, 2 Sumn. (U. S.) 206; *Child v. Sun. Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76; *Bell v. Smith*, 2 Johns. (N. Y.) 109; *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 1917 per SHAW, C. J.; *Buffalo City Bank v. Northwestern Ins. Co.*, 30 N. Y. 251.

Where an insurer, upon notification of an abandonment of a vessel, gets it off, brings it to port, repairs it at great expense, and never offers to return it, believing the loss caused by a peril covered by the policy, the abandonment is thereby accepted, and the company cannot defend on the ground that it is not liable, but must pay the full amount of the policy, as it should have investigated the cause of the loss before accepting the abandonment. *Richelieu & O. Nav. Co. v. Thames & M. Ins. Co.* (Mich.), 40 N. W. 758.

An unreasonable delay of the underwriter in refusing the abandonment has been held to amount to an acceptance. *Hudson v. Harrison*, 3 Moore 288. But the general law in England seems now to be that if no answer is returned to the notice of abandonment, the underwriter must be taken to refuse to accept it. *Lowndes Mar. Ins.* (2nd ed.) 164; *Provincial Ins. Co. v. Leduc*, L. R., 6 P. C. 224 at 237. This will not be so, however, if he takes any action in regard to the property inconsistent with such a refusal. *Provincial Ins. Co. v. Leduc*, L. R., 6 P. C. 224; *Shepherd v. Henderson*, L. R., 7 App. Cas. 49; *Baker v. Brown*, 3 Nova Sc. Dec. 100; *Western Ins. Co. v. Pearson*, Ramsay's App. Cas. (Law Can.) 373; *Northwestern Transportation Co. v. Continental Ins. Co.*, 24 Fed. Rep. 171; *Phoenix Ins. Co. v. Copeland*, 9 Wall. (U. S.) 461; *Gloucester Ins. Co. v. Younger*, 2 Curt. (U.

S.) 322; *Norton v. Lexington F. & M. Ins. Co.*, 16 Ill. 235; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *M'Lellan v. Maine F. & M. Ins. Co.*, 12 Mass. 246; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254; *Northwestern Transportation Co. v. Thames & Mersey Ins. Co.*, 59 Mich. 214; *Copelin v. Phoenix Ins. Co.*, 46 Mo. 211.

Merely superintending repairs is not such a possession. *Griswold v. New York Ins. Co.*, 3 Johns. (N. Y.) 321; *Commonwealth Ins. Co. v. Chase*, 20 Pick. (Mass.) 142; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191; *Wood v. Lincoln etc. Ins. Co.*, 6 Mass. 479. That a failure to return any answer is a refusal. See also *Child v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76.

In *Northwestern Transportation Co. v. Continental Ins. Co.*, 24 Fed. Rep. 171, a ship which had been voluntarily stranded and abandoned to the underwriters was raised by them and tendered back to the owner without being repaired, and without an offer to pay the expense of the repairs rendered necessary by the stranding. It was held that the owner was under no obligation to receive her, and the underwriters must be deemed, as matter of law, to have accepted the abandonment.

2. **Effect.**—The transfer dates by relation to the time of the loss. *Commell v. Sewell*, 3 H. & N. 617; 5 H. & N. 728; *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. L. Cas. 334; *Holbrook v. United States*, 21 Ct. of Cl. (U. S.) 434. *The Manitoba*, 30 Fed. Rep. 129; *Clamageran v. Banks*, 6 Mart. (La.) N. S. 551. It transfers all the property insured, together with all benefit and advantage belonging or incident to it. *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159; *Haustman v. Thornton*, Holt N. P. 242; *Whitworth v. Shepherd*, 12 Sc. Sess. Cas. (4th ed.) 204; *Stalker v. Weir*, 1 James (Nova Sc.) 248; *The Bristol*, 29 Fed. Rep. 867; *Shaw v. United States*, 8 Ct. of Cl. 488; *Ches. Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Murphy v. Dunham*, 38 Fed. Rep. 503; *Graham v. Ledda*, 17 La. An. 45; *Hardman v. Brett*, 37 Fed. Rep. 803; *Liverpool etc. Co. v. Phoenix Ins. Co.*, 9 S. Ct. (N. Y.) 469; *The Planter*, 2 Woods (U. S.) 490; *Rogers v. Hosack*, 398

18 Wend. (N. Y.) 319; Child v. Sun Mutual Ins. Co., 2 Sandf. (N. Y.) 76; Clarkson v. Phoenix Ins. Co., 9 Johns. (N. Y.) 1; Waddell v. Columbian Ins. Co., 10 Johns. (N. Y.) 61; Carr v. Security Ins. Co., 109 N. Y. 504; Hammond v. Essex etc. Ins. Co., 4 Mass. 196; Norton v. Lexington etc. Ins. Co., 16 Ill. 235; Phillips v. St. Louis Ins. Co., 11 La. An. 459; Graham v. Ledda, 17 La. An. 45; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83; Smith v. Touro, 14 Mass. 112; Oliver v. Newburyport Ins. Co., 3 Mass. 37; Badger v. Ocean Ins. Co., 23 Pick. (Mass.) 347; Gould v. Citizens' Ins. Co., 13 Mo. 524; Gardner v. Smith, 1 Johns. (N. Y.) 141; Union Ins. Co. v. Burrell, Anth. (N. Y.) 128; Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514; Rogers v. Hosack, 18 Wend. (N. Y.) 319; Atlantic Ins. Co. v. Storrow, 1 Edw. (N. Y.) 621; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 200.

A difficult question arises where only a part interest in a vessel is covered by the policy. In such a case if the vessel is wrecked and abandoned, the assured remains owner of that part which was not insured, and cannot recover from the insurers more than the amount of the policy. This is well illustrated by the case of the Allegheny Insurance Co. v. Ranson, 69 Pa. 496. In that case a vessel was insured on a valued policy for one third its value. It was subsequently wrecked and abandoned. Notice was at once given to the insurance company, whose agent examined the wreck and decided that it was not worth the risk and expense of raising. The company consequently did nothing about the wreck but paid as for total loss. Subsequently the assured brought an action of assumpsit against the company alleging that the defendants had taken possession of the steamer and were liable "for a sum of money which bore the same proportion to the whole value of said wreck which the uninsured portion bore to the agreed valuation." The plaintiffs recovered a verdict in the court below. On a writ of error the judgment was reversed. SHARSWOOD, J., said: "The plaintiffs did not show that the defendants had ever received one dollar or one dollar's worth from the wreck. They seem to have gone upon the idea that they had a right to maintain the action for their share of what the defendants might have realized by the sale. But this is founded upon an entire misapprehen-

sion of the relation between them. The defendants were not trustees for them. According to their own theory, if there was an abandonment all they ceded to the defendants was so much only as was covered by the insurance. They remained the owners of that for which they stood their own insurers. Of course the defendants had no title to sell more than had been abandoned to them. It may be that when one tenant in common, who is in possession of the joint property, abandons it to inevitable destruction it would be the same thing as if he had destroyed it himself, which would be a conversion, and entitle his cotenant to maintain trover and recover the value of his share in damages. The authorities certainly go that length. But that was not this case. The defendants, through their agent, after examination and enquiry, thought that the sunk steamer was not worth the risk and expense of raising. They did nothing. The plaintiffs themselves might have raised the wreck if they had seen fit. The defendants did nothing to prevent it. It was just as much their right to look after their interests as it was the defendants'. No action of trover, therefore, could have been maintained, and certainly without evidence that the defendants had recovered or received anything for which they were liable to account to their cotenants, assumpsit would not lie."

A request to instruct the jury that the verdict should be reduced by the sum for which the vessel was sold after its abandonment, on the ground that the plaintiff was presumed to have received the proceeds of the sale, and that the defendant should have credit therefor, no issue upon this point having been raised by the pleadings, *held*, properly refused. *California Nav. Exp. Co. v. State Investment & Ins. Co.*, 70 Cal. 586. See also *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *The Mary E. Perew*, 15 Blatchf. (U. S.) 58.

Abandonment by one part owner of a stranded vessel of his interest in the vessel to the insurer of such interest does not affect the interest of other part owners nor the master's control over the vessel so far as their interest is concerned. Thus A and B each owned one half of a vessel. A obtained insurance on his half. She stranded, and A requested assistance from the insurer, who sent C with a tug and pumps. The vessel was got off, and A and C and the master and

XII. Return of Premium.—Where any risk has been run, although less than the full risk contemplated by the parties, the underwriter is entitled to retain the premium; but where no risk has been run he is bound to return it.¹

crew, without further orders from the insurer, attempted to navigate her to her port of destination. On the voyage she was lost. *Held* that, without regard to the effect of an attempted abandonment by A, the insurer was not liable to B. *Kirby v. Thames & Mersey Ins. Co.*, 27 Fed. Rep. 221.

Where insurance reaches every part of the ownership of a vessel indiscriminately, an abandonment will extend to the entire property, though its value exceeds the amount of the insurance. *The Manitoba*, 30 Fed. Rep. 129.

An abandonment of the ship transfers freight earned subsequently to the abandonment. *Davidson v. Case*, 5 Moore 116; 5 M. & S. 79; *M'Carthy v. Abel*, 5 East 338; *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. L. Cas. 334; *Barclay v. Stirling*, 5 M. & S. 6; *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159; *cf. Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 443.

And this is so although the freight is insured separately and is abandoned to the underwriter upon freight. *Thompson v. Rawcroft*, 4 East 34; *Leatham v. Terry*, 3 B. & P. 479; *M'Carthy v. Abel*, 5 East 388; *cf. Sharp v. Gladstone*, 7 East 24.

Where a ship and cargo is insured, and the freight is also separately insured under a policy providing that no claim for total loss shall be made, except in the case of an actual or technical loss of the vessel under the policies of insurance on her, if an abandonment of the vessel and cargo is accepted by the underwriters, they cannot refuse to accept an abandonment of the freight: for, after accepting an abandonment of the vessel and cargo, the question whether the loss was partial or total is no longer open. *Hubbell v. Great Western Ins. Co.*, 17 N. Y. Sup. Ct. 167.

Where, however, the master after abandonment, acting as agent of the assured, forwarded his passengers by another vessel and received the chartered freight, it was held to belong to the owners and not to the underwriter. *Hickie v. Rodocanachi*, 4 H. & N. 455.

So where the cargo was the property of the ship owner, it was held that the

underwriter was entitled only to compensation for the portion of the voyage subsequent to the abandonment. *Miller v. Woodfall*, 8 E. & B. 493.

In *Davy v. Hallett*, 3 Cal. (N. Y.) 16, the English doctrine whereby the assured who has abandoned his ship is held to have abandoned the freight also and to be unable to recover from the underwriter of freight is denied, and the latter held liable. See also *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564; 4 Wend. (N. Y.) 46.

In *Phillips v. St. Louis Ins. Co.*, 11 La. An. 459, it was held that if the value of the thing insured exceeded the total amount of the insurance the assured is his own underwriter for the balance, and is entitled to a *pro rata* share of the salvage. This is followed as law in *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200; *Rice v. Cobb*, 9 Cush. (Mass.) 302.

But the following cases are *contra*, holding that where the insurance covers the whole ownership indiscriminately, the abandonment passes the whole title. *The Manitoba*, 30 Fed. Rep. 129; *The Mary E. Perew*, 15 Blatchf. (U. S.) 58; *The George, Olc.* (U. S.) 89.

1. Return of Premium.—The rules are thus laid down by LORD MANSFIELD in *Tyrie v. Fletcher*, 2 Cowp. 666: "The first is, that where the risk has not begun, whether this be owing to the fault, pleasure or will of the assured, or any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the assured, and to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium was put into his hands fails, and therefore he ought to return it. Another rule is that if an entire risk has once commenced, there shall be no apportionment or return of premium afterwards; for though the premium is estimated and the risk depends on the nature and length of the voyage, yet, if it was commenced, though it be only for twenty-four hours, or less, the risk is run; the contract is for the entire

Where the risk is apportionable and part has been run, the assured may recover a ratable portion of the premium for the risk not run.¹

Where the contract is void for illegality the premium cannot be recovered back.² If, however, the illegal voyage is never en-

risk, and no part of the consideration shall be returned." The law is well established.

Where the policy has not attached the assured may recover the premium. *Tyrie v. Fletcher*, 2 Cowp. 666; *Penson v. Lee*, 2 B. & P. 330; *Colby v. Hunter*, 3 C. & P. 7; *Martin v. Sitwell*, 1 Shaw 156; *Cleveland v. Tettyplace*, 3 Mass. 392; *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Homer v. Dorr*, 10 Mass. 26; *Hendricks v. Commercial Ins. Co.*, 8 Johns. (N. Y.) 1. Although owing to misrepresentation, if without fraud. *Anderson v. Thornton*, 8 Exch. 425; *Feise v. Parkinson*, 4 Taunt. 639; *Taylor v. Sumner*, 4 Mass. 56.

The law is the same in the United States. *Delavigne v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 310; *Forbes v. Church*, 3 Johns. Cas. (N. Y.) 159; *Robertson v. Columbian Ins. Co.*, 8 Johns. (N. Y.) 491; *Elbers v. United Ins. Co.*, 16 Johns. (N. Y.) 128; *Waddington v. United Ins. Co.*, 17 Johns. (N. Y.) 23.

Where the insurance fails owing to want of interest in the assured, if without fraud, the premium may be recovered by the assured. *Routh v. Thompson*, 11 East 428 (*cf.* *Boehm v. Bell*, 8 T. R. 154); *Finney v. Warren Ins. Co.*, 1 Met. (Mass.) 16; *Holmes v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 329; *Howland v. Com. Ins. Co.*, Anth. (N. Y.) 26. Or where there is in failure of the warranty without fraud. *Delavigne v. United Ins. Co.*, 1 Johns. (N. Y.) 310; *Richards v. Marine Ins. Co.*, 3 Johns. (N. Y.) 307; *Murray v. Columbian Ins. Co.*, 4 Johns. (N. Y.) 443; *Scriba v. Ins. Co. of N. A.*, 2 Wash. (U. S.) 107; *Porter v. Bussey*, 1 Mass. 435; *Penniman v. Tucker*, 11 Mass. 66; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85.

The law is the same where the policy was obtained without authority, and consequently was never binding. *Steinback v. Rhinelanders*, 3 Johns. Cas. (N. Y.) 269.

If the risk has once begun, it is immaterial that in fact the voyage is ended

and the chance of loss has ceased before the policy is made, provided both parties are ignorant of this. *Bradford v. Symondson*, 7 Q. B. Div. 456; *Natusch v. Hendewerk*, 7 Q. B. Div. 460, *note*.

Where an entire risk has once attached the premium is earned and a return cannot be had. *Meyer v. Gregson*, 3 Doug. 402; *Annen v. Woodman*, 3 Taunt. 299; *Bermon v. Woodbridge*, 2 Doug. 781; *Turner v. Burrows*, 8 Wend. (N. Y.) 144; *Crowningshield v. N. Y. Ins. Co.*, 3 Johns. (N. Y.) 142; *N. Y. Ins. Co. v. Thomas*, 3 Johns. (N. Y.) 142; *Hendricks v. Commercial Ins. Co.*, 8 Johns. (N. Y.) 1; *New York Fire Mar. Ins. Co. v. Roberts*, 4 Duer (N. Y.) 141; *Marine Ins. Co. v. Stras*, 1 Munf. (Va.) 408.

If the contract, legal when made, becomes illegal by subsequent law, the premium may be recovered, although it has once attached. *Gray v. Sims*, 3 Wash. (U. S.) 276.

1. While the law is settled as stated, the difficulty has been to determine whether the risk was divisible. In the following cases a usage to return part of the premium where part of the risk had not been run was sustained, and the risk held divisible. *Stevenson v. Snow*, 3 Burr. 1237; *Gale v. Machel*, 2 Marsh. Ins. 667; *Long v. Allen*, 4 Doug. 276; *Rothwell v. Cooke*, 1 B. & P. 172.

And the risk has been held divisible in *Scott v. Rae*, 2 Doug. 787; *Waters v. Allen*, 5 Hill (N. Y.) 421.

On a time policy the risk is entire. *Lorraine v. Thomlinson*, 2 Doug. 585; *Tyrie v. Fletcher*, 2 Cowp. 666.

2. *Lubbock v. Potts*, 7 East 449; *André v. Fletcher*, 3 T. R. 266; *Vanduyck v. Hewitt*, 1 East 96; *Morck v. Abel*, 3 B. & P. 35; *Lowry v. Bourdieu*, 2 Doug. 468; *Cowie v. Barber*, 5 M. & S. 16; *Alkins v. Jupe*, 2 C. P. Div. 375; *cf.* *Hentig v. Staniforth*, 5 M. & S. 122.

If paid in ignorance of facts which rendered the policy illegal the premium may be recovered. *Oom v. Bruce*, 12 East 225.

tered upon in fact, the assured may recover the premium paid, after formally renouncing the contract.¹

Where the policy is avoided by the fraud or misconduct of the assured, he cannot recover the premium.²

If void for the fraud of the underwriter, the premium may be recovered.³

In the event of over-insurance the assured may recover the premium on the amount of the over-insurance.⁴

XIII. Particular Average—1. *Definition*.—Particular average is the damage or loss, short of total, falling directly upon particular articles of property. When the loss happens from any peril insured against by a policy of marine insurance, the owners of the property have a right to be indemnified by the underwriters.⁵

2. *Distinction Between Particular Average and Partial Loss*.—Particular average is a loss on the ship, cargo or freight to be borne by the owner of the subject assured. If the subject assured is not entirely lost, the loss is called a partial loss. The term particular average includes all partial losses except general average.⁶

1. The formal notice is essential. *Palyart v. Leckie*, 6 M. & S. 290.

2. *Tyler v. Horne*, 1 Park Ins. (8th ed.) 455; *Chapman v. Fraser*, 1 Park Ins. (8th ed.) 456; *Langhorn v. Calogian*, 4 Taunt. 329; *Schwartz v. United States Ins. Co.*, 3 Wash. (U. S.) 170; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Hoyt v. Gilman*, 8 Mass. 335; *Hemely v. S. Car. Ins. Co.*, 1 Mills (S. Car.) Const. 154; *Waters v. Allen*, 5 Hill (N. Y.) 421.

3. *Duffell v. Wilson*, 1 Camp. 401; *Carter v. Boehm*, 3 Burr. 1909.

4. *Fisk v. Masterman*, 8 M. & W. 165; *New York Ins. Co. v. Thomas*, 3 Johns. Cas. (N. Y.) 1.

5. *Padelford v. Boardman*, 4 Mass. 549.

Particular average is a loss on the ship, cargo or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and if not total it is also called partial loss. *Bouv. L. Dict.*

6. In *Wadsworth v. Pacific Insurance Co.*, CHANCELLOR WALWORTH said: "I believe in the United States the terms partial loss and average are understood by commercial men to mean the same thing; and that average other than general includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with sal-

vage. Partial loss includes both general and particular average, and the latter term includes all partial losses, except general average."

In *Phillips on Insurance*, § 1422, the following explanation is given of the distinction between particular average, general average, partial loss and total loss: "A particular average is a loss borne wholly by the party upon whose property it takes place, and is so called in distinction from a general average for which divers parties contribute. A partial loss is one in which the insurers are liable to pay an amount less than that insured for damages happening to the subject, or expense incurred and occasioned by the perils insured against in distinction from a total loss in which the insurer is liable to pay the entire value at which the subject is insured, so far as it is covered by the policy, as the price of the whole or such proportion of it. Mr. Benecke proposes to apply the expression "particular average" to cases of damage or deterioration in value, or loss by expense, to be borne in either case by the owner of the subject or his underwriters, and not to the case of a total destruction of a part of the subject, which he would denominate a "partial loss." He does not, however, propose to restrict the expression "partial loss" to that case, but would extend it to all those cases comprehended under particular average. This distinc-

3. *On the Ship*—(a) *Repairs*.—Where parts of a ship are injured or destroyed by the perils insured against, the cost of replacing or repairing the parts so injured is particular average.¹ Where the timbers or other materials are replaced by new, the assured must himself bear one third of the expense of the labor and materials for the repairs. This deduction is said to be on account of "new for old."² In England and some of the United

tion seems to be in conformity to the customary use of the terms."

1. *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456; *Giles v. Eagle Ins. Co.*, 2 Metc. (Mass.) 140; *Sewall v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Crofts v. Marshall*, 7 Carr. & P. 597; *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *Wadsworth v. Pacific Ins. Co.*, 3 Robt. (N. Y.) 528; *Hagar v. New England etc. Ins. Co.*, 59 Me. 460.

A vessel having lost her boat and camboose, and had her mainsail damaged in a gale, repaired the sail at sea, with duck taken from the cargo, and bought an old boat and camboose at a port of necessity, and on reaching home sold the boat, sail and camboose, and procured new ones. *Held*, that the loss was particular average. *Brooks v. Oriental Ins. Co.*, 7 Pick. (Mass.) 259.

Defendant, an insurance company, insured plaintiff's steamship for \$75,000, which amount, for the purposes of the insurance, was agreed to be its value. She went ashore, and being in danger of becoming a total wreck, defendant consented that plaintiff might use every effort to save her, whereupon plaintiff paid \$21,000 to get her afloat, and \$46,000 to repair her. The real value of the steamer was \$275,000 and defendant contended that its liability, in addition to \$46,000 was only such proportional part of \$21,000 as \$275,000 bore to \$75,000. *Held*, that this contention was untenable; that defendant was bound to pay the whole amount, it being less than \$75,000. *Providence & Stonington S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559.

2. "One-third New for Old."—*Fisk v. Commercial Ins. Co.*, 18 La. 77; *Sanderson v. Marine Ins. Co.*, 2 Cranch (U. S.) 218; *Peele v. Merchants' Ins. Co.*, 3 Mass. (U. S.) 27; *Burnes v. Nat. Ins. Co.*, 1 Cowen (N. Y.) 265; *Savage v. New York Ins. Co.*, 4 Cowen (N. Y.) 245; *Brooks v. Oriental Ins. Co.*, 7 Pick.

(Mass.) 259; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Kerr v. Quaker City Ins. Co.*, 33 Mo. 158; *Orrok v. Com. Ins. Co.*, 21 Pick. (Mass.) 456; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521.

In computing the amount of loss under a policy of insurance, the temporary repairs necessary to enable a ship which could not be fully repaired at the port of destination to proceed on her voyage, as well as the complete repairs made at a subsequent port, are subject to the deduction of one-third new for old. *Paddock v. Commercial Ins. Co.*, 104 Mass. 521.

The right of recovery under a marine policy is not limited to the amount actually expended for repairs, after deducting one-third new for old. *Hager v. New England etc. Ins. Co.*, 59 Me. 460.

The ordinary deduction in cases of a partial loss of one-third new for old, from the repairs, is inapplicable to the case of a technical total loss by an injury exceeding one-half the value of the vessel. *Wallace v. Thames & Mersey Ins. Co.*, 22 Fed. Rep. 66. But see *Deloils v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303.

In case of repairs of the damage done to the ship by perils insured against, the customary deduction of one-third new for old is applicable only to the labor and materials employed in the repairs, and the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to other incidental expenses having no connection with the repairs, or new articles furnished and from which the assured can possibly derive no enhanced value or benefit beyond his loss, such as steamboat towage, boat hire, etc. *Potter v. Ocean Ins. Co.*, 3 Sumn. (U. S.) 27.

The rule applies also to steamboats plying on interior waters. *Wallace v. Ohio Ins. Co.*, 4 Ohio 234; *Perry v. Ohio Ins. Co.*, 5 Ohio 306.

States the deduction of one third on account of "new for old," does not apply to the first voyage.¹

In applying the rule it seems to have been the usual custom to take the value of the old materials towards payment of the new, and to allow the deduction of one third from the balance.²

(b) *Extraordinary Expenses of Raising Funds*.—The extraordinary expense of raising funds for particular average expenses is at the risk of the underwriter. Thus he is liable for the payment of marine interest on money borrowed on the ship or cargo; or for a loss arising by the sale of goods at an intermediate port at a price less than their value at the port of destination.³

(c) *Wages and Provisions of Crew During Detention for Repairs*.—In France, the wages and provisions of the crew during a delay for repairs is particular average on the ship.⁴ The same rule prevails in Massachusetts, where it has been distinctly held that the labor of the crew in repairing damage occasioned by the perils insured against is chargeable to the underwriters.⁵

1. *Fenwick v. Robinson*, 3 Carr. & P. 323; *Wallace v. Ohio Ins. Co.*, 4 Ohio 234; *Fireman's Ins. Co. v. Fitzhugh*, 4 B. Mon. (Ky.) 160.

No exception to the rule was made in *Nickels v. Maine F. & Mar. Ins. Co.*, 11 Mass. 253; *Sewall v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Dunham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 315.

2. In *Byrnes v. National Ins. Co.*, 1 Cow. (N. Y.) 265; SUTHERLAND, J., said: "It seems to me to resolve itself into the enquiry, to whom do the old materials belong? If they belong to the assured, there is an end of the question; for having been applied by them to the payment of the repairs, *pro tanto*, the assured cannot possibly claim any further benefit from them. If there is anything in the nature of an abandonment of them to the underwriters, then the principle contended for by the defendant may be well founded. But there is nothing like an abandonment. The assured do not, and could not claim, from the underwriters, the gross amount of the repairs. They can only claim the difference between that amount and the value of the old materials; for to that extent, only are they injured; and an indemnity is all that they can claim. It is more analogous to the adjusting of a partial loss, in which case the title to the goods remains in the assured. The true rule, therefore, seems to me to be this—to apply the old materials towards payment for the new, and to allow the deduction of the one-third new for old upon the balance. It

affords full indemnity to the assured, and gives to the underwriters all the benefit that the principle, upon which the practice of deducting one-third new for old has been established, will justify." *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Brooks v. Oriental Ins. Co.*, 7 Pick. (Mass.) 259; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141.

3. See *Alers v. Tobin, Abbot Shipp.* (3rd ed.) 245.

4. *Phillips on Ins.*, § 1429.

5. In *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472, PUTNAM, J., said: "It is very clear that such charges are not to be put to the account of general average; they would not be sustained for the general good, but for the particular benefit of the ship. The voyage was broken up; and it seems to us that the owner of the ship must bear these, as he bears the other expenses incident to the ship. He would have no claim upon the underwriter for those charges. It would be a very prudent thing for the master to pay a mate and seaman for a month or more, for holding themselves in readiness to serve at a minute's warning, under such circumstances; but that expense would be a charge upon the freight. It would cost the owner of the ship just so much more to earn his freight than it would if he were not subjected to the payment of extra wages or services. But the services of the officers and seamen might be rendered by them as laborers, in making the repairs; and in such case their labor would be charge-

The rule varies in other States.¹

(d) *Risks Excluded by the Memorandum.*—To prevent disputes respecting partial losses arising from trivial subjects of difference, it is the general practice to provide in the policy that the insurer shall not be liable for any partial loss under a certain rate per cent. This rate is usually five or seven per cent.²

4. *On Freight.*—A particular average or partial loss on freight occurs when the ship is lost after a part of the voyage is completed and it is necessary to hire another ship to carry the cargo to the port of destination in order to earn the freight.³ It also

able, just as if other laborers had been employed to make the repairs. And it would be necessary that some person should be employed on the part of the owner to superintend the repairs, whose work or business should be to see that they were completely made; and this charge is to be considered as for part of the labor employed in the reparation."

1. *Perry v. Ohio Ins. Co.*, 5 Ohio 306; *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio 73; *Webb v. Protection Ins. Co.*, 6 Ohio 456; *Dunham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 315; *Sage v. Middletown Ins. Co.*, 1 Conn. 239.

2. Under a policy of insurance upon a ship, which provides that the endorsers shall not be liable for a partial loss, unless it shall amount to five per cent, successive partial losses by distinct gales or storms upon different passages cannot be added together to make up the requisite five per cent; and the burden of proving a partial loss amounting to five per cent from one gale or storm is upon the assured. *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Hagar v. New England etc. Ins. Co.*, 59 Me. 460. But see *Donnell v. Columb. Ins. Co.*, 2 Sumn. (U. S.) 366.

Under a similar policy, where the sum apportioned on a vessel, on account of injury to another vessel occasioned by an accidental collision, together with their own loss, exceeded five per cent, the underwriters were held liable for the whole loss borne and apportioned on her. *Peters v. Warren Ins. Co.*, 1 Story 463.

A vessel insured under a similar policy arrived at her port of destination, and delivered a part of her cargo, which was insured in safety. In the progress of a regular delivery of the balance, it was partially damaged by the perils of the sea. In an action for a partial loss, *held*, that

although the amount of the particular loss did not reach five per centum on the whole value of the cargo shipped, still the insured was entitled to recover, the loss being more than five per cent on the amount at risk at the time of the damage. *Maryland Ins. Co. v. Bosley*, 9 Gill & J. (Md.) 337.

A clause in a policy that the insurer was not liable for any partial loss "on the vessel or freight unless it amounts to seven per cent, exclusive of all charges," etc., applies to a loss occurring by reason of the damages which the owners of the insured vessel are compelled to pay to the owners of another vessel in consequence of a collision in which the insured vessel was alone in fault. *Whorf v. Equitable Mar. Ins. Co.* (Mass.), 3 N. E. Rep. 720.

Where goods were insured against the perils of the sea, and against all other losses and misfortunes which shall come to the goods to which the insurers are liable, by the rules and customs of assurances in B, with a provision that the "assurers shall not be liable for any partial loss on goods esteemed perishable in their own nature, unless it amount to seven per cent, and happen by stranding," *held*, that the insurers were liable for a loss of such perishable goods, not occasioned by stranding. *Williams v. Cole*, 16 Me. 207; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109.

3. It is the duty of the master, when the ship becomes disabled during the voyage, to procure another vessel if it is in his power; and the insurer is not answerable for consequences of his voluntary neglect to do so, unless such neglect is caused by an act of barratry. And it is a general rule that the plaintiff, in an action on the policy, in order to entitle himself to recover on the ground of the loss of the voyage, must show that another vessel could not be

occurs where a part of the cargo is lost and the ship is thereby prevented from earning the freight.¹

obtained. *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21.

The master, however, is not bound to seek another vessel out of the port of distress, or out of a port immediately contiguous thereto; and if part only of the cargo is sent to its port of destination in another vessel, the insurer on freight is not entitled to a deduction or allowance for the freight earned on that part, unless he shows that the goods were delivered to the insured at the port of destination, or that they had notice of their arrival and situation. *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107.

A vessel being lost on her voyage to a port where a cargo was waiting, which the owner of the vessel had contracted to transport, the insured can recover the freight which have become due for the transportation of that cargo. *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163.

In a policy on freight at and from Gibraltar to Philadelphia, a vessel sailed from Gibraltar with specie, but without obtaining a cargo, or contracting for one, and was lost. *Held*, that the insured were not entitled to recover. *Adams v. Pennsylvania Ins. Co.*, 1 Rawle (Pa.) 97.

If a capture takes place during the voyage, the freight will be chargeable up to the day of capture. *Leavenworth v. Delafield*, 1 Cai. (N. Y.) 573.

Where goods insured were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterwards restored on payment of full freight, but the owner was obliged to hire another vessel to carry the goods to their place of destination, *held*, that the insured was liable to pay additional or increased freight, being an expense necessarily incurred in consequence of the capture. *Mumford v. Commercial Ins. Co.*, 5 Johns. (N. Y.) 262.

Mere delay of the voyage is not a particular average on freight for wages and provisions. *Ins. Co. of North America v. Jones*, 2 Binn. (Pa.) 547. See also *Mayo v. Maine F. & Mar. Ins. Co.*, 4 Mass. 374.

1. In *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 504, a ship laden with tobacco and cotton, and bound from New

Orleans to Havre, was injured by the perils of the sea and a part of the cargo was destroyed, and she returned to New Orleans for repairs. The cargo could not be sent on in another vessel at a lower rate of freight, and the master delivered it up to the shipper. It was *held* that the insurers on the freight were responsible for the loss of the freight on the portion of a cargo which was wholly destroyed. CHIEF JUSTICE SHAW, in delivering the opinion of the court, said: "In order to earn freight there must be a vessel to carry it, a cargo to be carried, either actually on board, or so engaged as to give the ship owner a right to have it. Where the freight is insured on a particular voyage, by a particular vessel, and the cargo has been put on board, and the vessel actually sails in the prosecution of the voyage, it is the freight of that cargo, in that vessel, and on that voyage, which is the subject of insurance and to which the policy attaches. Then if the vessel is lost by one of the perils insured against, the freight is lost by that peril. Or if the cargo is lost by one of the same perils, as if consumed by fire or captured by an enemy, the owner loses his power of earning his freight by carrying that cargo, and the freight is lost by one of the perils insured against. There may be a freight *pro rata itineris*, in case the vessel, after carrying the cargo a part of distance, has done a beneficial part of the service, and the owner of the goods consents to receive his property at a place short of the destined port, or the master may engage another vessel to carry on the cargo to the place of destination and thus earn his full freight at the expense of the hire of such other vessel. So in case of the loss of cargo other goods may be taken in its stead if they can be obtained, the freight of which may enure by way of salvage. In various ways, by the application of the equitable principles of maritime law, the loss may be relieved and mitigated; but in strictness, if the ship be destroyed or prevented from prosecuting and completing the voyage thus commenced by stranding, by hostile seizure or by any of the perils insured against; or if the specific goods so laden are destroyed, so they do not exist and cannot be car-

Where goods are transported for a part of the voyage only by the ship whose freight is insured, the loss is computed by deducting from the gross freight the expense of forwarding the goods to the place of destination.¹

5. *On the Cargo*.—Where a portion of the cargo is totally destroyed, the insurer is liable to pay for the goods so far as they are covered by policy at the price at which they are insured.²

If, however, the goods are merely damaged, so that their value is diminished, the loss to the insurer is ascertained by finding the selling price of the sound goods and also of the damaged goods, and taking the ratio of these two quantities and applying it to the whole value of the goods as fixed by the policy. Thus if the damaged goods sell for only one third of what the same goods would have sold if sound, the direct loss by the damage is thirty-

ried to the port of destination, the freight insured is lost."

Where salt on board ship was washed away by causes attributable to the perils of the sea, so that freight could not be recovered, *held*, that the loss might be recovered in an action on the freight policy. *De Wolf v. State Mut. Fire & Mar. Ins. Co.*, 6 Duer (N. Y.) 191. See also *Mordy v. Jones* (4 Barn. & Cressw. 394); *Griswold v. New York Ins. Co.*, 3 Johns. (N. Y.) 321; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Herbert v. Hallett*, 3 Johns. (N. Y.) 93; *Whitney v. New York Ins. Co.*, 18 Johns. (N. Y.) 208; *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342; *Clark v. Mass. F. & Mar. Ins. Co.*, 2 Pick. (Mass.) 104.

1. In *Coffin v. Storer*, 5 Mass. 252, CHIEF JUSTICE PARSONS said: "The loss on freight must be decided, not by the proportion in time of sailing, as was determined in *Luke v. Lyde* (2 Burr. 882), but the respective rates of freight. Let the average from Demarara to Biddeford, if she has not been wrecked, be ascertained, and deduct therefrom the expense of bringing the goods on." See also *Searle v. Scovel*, 4 Johns. (N. Y.) 218; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Bork v. Norton*, 2 McLean, C. C. 423.

Underwriters cannot avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage which they have insured, and which has already terminated. Thus, where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another voyage to Eng-

land was substituted, on which freight was earned, it was *held* that the underwriters were not entitled to the freight of the substituted voyage, as in the nature of salvage freight. *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342.

2. Where 198 bales of cotton were insured, and only a part was lost, the underwriters were discharged from liability for whatever portion was safely landed at the port of destination. *Mobile Marine Dock and Mut. Ins. Co. v. McMillan*, 27 Ala. 77.

In an open policy of insurance on three barge loads of wheat, the risk was described as "39,085 bushels bulk wheat, at \$1.15 per bushel,—sum \$44,945; rate 1, premium \$449.45." *Held*, that a clause: "each package shall be subject to its own average," did not apply to such risk; that the insurance was in bulk and not in packages either of one bushel or one barge each; and that in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained. *Haenschen v. Franklin Ins. Co.*, 67 Mo. 156.

Clauses in an open, uniform, canal cargo policy of insurance being to the amount of \$8,000 on goods worth \$20,000, and the loss being \$9,738.01, the liability of the insurer was held to be only for two-fifths of the loss, and not for the \$8,000. *Breed v. Providence Washington Ins. Co.*, 17 Blatchf. C. Ct. 287.

Where the insurance was made by the owners of five-sixths of a cargo of specie, amounting to \$90,000, upon their interest in the cargo to the extent of

three and one-third per cent., and the insurer must pay, not one-third of the price of the sound goods at the port of destination, but one-third of the value at which the goods were insured.¹

6. *Excepted by the Terms of the Policy.*—In many policies the insurers except liability for particular average or partial loss. This is usually done by inserting in the policy such expressions as “free from average unless general,” or “free from particular average.”²

\$30,000, and a loss heppened; *held*, that they were entitled to recover the whole sum insured, and not merely five-sixths thereof. *Pacific Ins. Co. v. Catlett*, 4 Wend. (N. Y.) 75.

1. Under a policy of marine insurance which fixes the value of the goods at the sum insured, in case of a partial loss; and where the property insured was grain, a portion of which reached the port of destination in a damaged condition, the standard of the liability of the insurer is the value so fixed, and not the value in the market. Thus, when the proportion of loss is ascertained by the difference between the selling price of the sound and damaged grain, that difference gives the aliquot part of the original value which may be considered as destroyed by the perils insured against and by applying this liquidated proportion of the loss to the standard of value as fixed in the policy, the proportion of loss, whatever it may be, is ascertained in terms of money. *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513; *Lewis v. Rucker*, 2 Burr. 1167; *Johnson v. Sheddon*, 2 East 581; *Hurry v. Royal Exch. Ass. Co.*, 3 Bos. & P. 308; *Usher v. Noble*, 12 East 630; *Dick v. Allen*, Park Ins. 167; *Lawrence v. New York Ins. Co.*, 3 Johns. (N. Y.) 217; *Evans v. Commercial Ins. Co.*, 6 R. I. 47; *Henderson v. Maid of Orleans*, 12 La. An. 352.

2. A cargo of potatoes was insured against a total loss, “free from average, unless general;” “free from particular average.” After the canal boat, on which the potatoes were, had reached her destination, and after 100 barrels out of 1,600 had been landed, the boat sank. *Held*, that the insurers were liable for nothing. *Chadsey v. Guion*, 48 N. Y. Super. Ct. 267.

Under a policy of insurance containing the clause “free from particular average less than fifty per cent.,” there can be no recovery from the insurer, of salvage and agent's expenses, when there are other insurers, and the pro-

portion of loss payable by the respondent is less than fifty per cent. of the amount of the policy. *Buzby v. Phoenix Ins. Co.*, 31 Fed. Rep. 422.

Where a cargo is insured “free from particular average,” a constructive total loss is sufficient; that is, a destruction of all value to the owner, and hence a total loss to him. *Chadsey v. Guion*, 46 N. Y. Super. Ct. 118.

A marine insurance policy covered all shipments from “ports and places . . . in Europe, generally to New York, and to Atlantic ports in the United States, direct or by port or ports, with privilege of transshipment per steamer, sailing vessels, and other conveyances, including all risks of lighterage, one-half interest in dried fruits or other merchandise. Each kind of goods separately. Dried fruits and other merchandise by steamer to be insured free from particular average, unless the vessel be stranded, sunk, burned or in collision.” *Held*, that “all risks of lighterage” meant any loss, partial or total, by lighterage, while the loss by steamer was limited, and to be free from particular average. *Hills v. Rhenish Westphalian etc. Ins. Co.*, 39 Hun (N. Y.) 552.

Authorities.—The authorities used in the preparation of this article have been *Arnould Mar. Ins.* (6th ed.) by Mac-lachlan, the leading authoritative work upon this subject for the English law; *Phillips Law of Ins.* (5th ed.); *Parsons Mar. Ins.*, and *Lowndes Law of Ins.* (2nd ed.)

The careful digests of the Law of Insurance by Sansum and by Berryman, and Pritchard's Digest of Admiralty and Maritime Law (3rd ed.), will prove of great assistance to lawyers looking into the subject.

There is no recent American text book upon the subject, the latest edition of Phillips' Law of Insurance being in 1867, while Parsons's Marine Insurance was published in 1868.

Much use has been made of the ad-

MARINER—MARITAL RIGHTS—MARITIME.

MARINER—(See also SEAMEN).—A person employed on a merchant ship or a ship of war. The term includes common sailors, a cook, porter, steward, purser, clerk, engineer, surgeon, captain, admiral; in fact, whoever has to do with the equipment and preservation of the vessel, or the welfare of the crew.¹

MARITAL RIGHTS.—See HUSBAND AND WIFE, Am. & Eng. Encyc. of Law, vol. 9, p. 789; CONTRACTS, Am. & Eng. Encyc. of Law, vol. 3, p. 872.

MARITIME—(See also MARINER).—Pertaining to navigation or commercial intercourse upon the seas, great lakes and rivers.²

mirable work of Arnould edited by Maclachlan.

1. 1 Conkl. Adm. 107; Wilkes v. Dinsman, 7 How. (U. S.) 89; Matthews v. Offley, 3 Sumn. (U. S.) 115; *Ex parte* Thompson, 4 Bradf. (N. Y.) 154; Atkyns v. Burrows, 1 Pet. Adm. (U. S.) 246; Ross v. Walker, 2 Wils. 264; Gwin's Will, 1 Tuck. (N. Y. Surr.) 44.

In *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71-80, RAPALLO, J., observes: "I am of the opinion that the purser does fall within the term 'mariner,' as used in this bill of lading, and that embezzlement by him was barratry. He was permanently attached to the ship as one of its officers, and performed duties which would otherwise devolve upon the master."

The authorities cited by the respondent are to the effect that barratry can be committed only by master and mariners, a point which is not disputed, but there is no authority showing that a purser of a ship is not included in the term "mariner." It is not necessary to bring a purser within the definition of mariner that he should be engaged in navigating the ship, provided his employment is on the sea, and he is attached to the ship. The duties of the purser are marine duties. McLachlan on Shipping 146, 148; The Gratitude, 3 C. Rob. 240, 257. The cook and steward have been held to be mariners, and entitled to sue as such. The Jane and Matilda, 1 Hagg. Adm. 187, 190; Smith v. Sloop Gilpin (U. S.) 505.

Mariner in a Statute—A master of a licensed vessel under twenty tons employed as a lighter in a harbor, and not going to sea, is not exempt from duty in the militia as a mariner in the sea service of a citizen of the United States, under the second section of the act of congress, 2nd Cong., 1st sess. ch. 33, passed May 8th, 1792. Pratt v. Hall.

4 Mass. 239; Brush v. Bogardus, 8 Johns. (N. Y.) 157.

A master of an enrolled vessel employed in transporting stones, etc., from one part to another of Boston bay, and occasionally making a short trip to sea for the purpose of fishing, was held not to be exempt from militia duty as a mariner in the sea service. Com. v. Newcomb, 14 Mass. 394.

Fishermen engaged in the cod fishery on board a vessel of more than twenty tons, duly licensed, and having signed an agreement required by the laws of the United States, are not liable to do duty in the militia, notwithstanding the statute of this commonwealth of 1814, ch. 63. Com. v. Douglas, 17 Mass. 49; Bayley v. Merritt, 2 Pick. (Mass.) 597.

2. Anderson's Law Dict.

Maritime.—Primarily, bordering on the sea; as a maritime town, coast, nation; secondarily, belonging to those who border on the sea, as maritime laws, rights, pursuits.

Maritime Law.—The law of the sea. The body of principles and usages which, by the consent of civilized communities or nations, has been adopted to regulate the affairs of men engaged in navigation and marine commerce. Anderson's Law Dict.

In the Lottawanna, 21 Wall. (U. S.) 558, BRADLEY, J., observes, in substance, that whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own. In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

MARITIME LIENS—(See also **BOTTOMRY**; **FREIGHT**; **LIENS**; **MASTER OF A VESSEL**; **SALVAGE**; **SEAMEN**; **SHIPPING**).

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I. DEFINITION.—A maritime lien is a right of property in a vessel which may be enforced directly against the vessel by a libel *in rem*, and it is immaterial in whose possession the vessel may be, or to whom the title may have been transferred.¹

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to, when it was declared in that instrument that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or act of congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends upon what

has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

1. *The Young Mechanic*, 3 Ware (U. S.) 58.

In *Verderwater v. Mills*, 19 How. (U. S.) 82, the libel set forth a contract between the owners of certain steam ships to convey freight and passengers between New York and California. The owner of one of the ships refused to employ his vessel according to this agreement, and sent her to the Pacific

The term is also applied to the mutual liens which the ship has upon the cargo for freight, and the cargo upon the ship for safe transport.

II. WHAT ARE SUBJECT TO MARITIME LIENS.—A maritime lien can only exist upon such movable things as are used in navigation, or upon things which are the subjects of commerce on the high seas, or on navigable waters. Thus, vessels, dredges and scows are subject to such liens, but not wharves, bridges, dry-docks, or real estate of any kind.¹

under a contract with other persons. For this breach of contract libellant demanded damages, assuming that the vessel was subject under the maritime law to a lien which might be enforced *in rem* in a court of admiralty. The circuit court dismissed the bill. On writ of error to the Supreme Court of the United States the judgment of the lower court was affirmed. In delivering the opinion of the court Mr. JUSTICE GRIER described a maritime lien as follows: "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy or inference."

In the case of *The Lottawanna*, 21 Wall. (U. S.) 558, 579, the Supreme Court of the United States said: "A lien is a right of property, and not a mere matter of procedure." See also *The J. W. Tucker*, 20 Fed. Rep. 129; *The Fanny*, 2 Law Rep. (U. S.) 508; *The Arcuturus*, 18 Fed. Rep. (U. S.) 748; *Ward v. Chamberlain*, 2 Black (U. S.) 430.

The more recent cases overrule the principle laid down in *The Triumph*, 2 Blatchf. (U. S.) 433 (note), and *The Globe*, 2 Blatchf. (U. S.) 427, 433

(1852), where it was held that a maritime lien "is, in reality, only a privilege to arrest the vessel for a debt which, of itself, constitutes no encumbrance on the vessel, and becomes such only by virtue of an actual attachment."

1. "It may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them. It cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien." *The Rock Island Bridge*, 6 Wall. (U. S.) 213.

Dredges and Scows.—Dredges and scows, though never used in the transfer of passengers or freight, and furnished with no motive power of their own, are vessels, and subject as such to maritime liens for service rendered and supplies furnished. *The Alabama*, 19 Fed. Rep. 544. See also *Endner v. Greco*, 3 Fed. Rep. 411.

A light boat built and adapted to be used as a floating light is a vessel upon which a lien for materials furnished may attach. *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

A Steam Dredge, being within the definition of a vessel in the United States Revised Statutes (tit. 1, ch. 1), is subject to a maritime lien for supplies. *Pioneer*, 30 Fed. Rep. 206.

Dry Docks.—In *Cope v. Vallette Dry Dock Co.*, 10 Fed. Rep. 142, and *Cope v. Vallette Dry Dock Co.*, 16 Fed. Rep. 924, the court, in deciding that a maritime lien could not exist on a dry dock, said: "The structure (a dry dock) to which they (the services) were rendered was not designed for navigation, and, being practically incapable of navigation, it had no more connection with trade or commerce than a wharf, a shipyard or a fixed dry dock, into which water crafts are introduced by being

The ordinary tackle, sails, boats, and appliances of a vessel are of course subject to any lien which may exist upon the vessel itself. In addition to the ordinary furniture of a ship, any special apparatus, or appliances on board a vessel, engaged in a particular vocation, such as whaling or wrecking, which are indispensable to the prosecution of such business, are also subject to the lien.¹

III. FOR WHAT A LIEN MAY EXIST—1. For Supplies and Repairs.—

(a) *Must be Necessary*.—In order to create a maritime lien for supplies it must appear that there was a reasonable necessity for the supplies themselves, and that they could only be obtained upon the credit of the vessel.²

drawn up on the ways. As shown by the findings, it had remained securely and permanently moored to the bank for a period of more than fourteen years; it partook more of the nature of a fixture attached to the realty than of a boat or ship."

Bridges.—In the *Rock Island Bridge Case*, 6 Wall. (U. S.) 213, it was held that a maritime lien could not exist upon a bridge.

A *seine boat* attached to a schooner engaged in the mackerel fishery, which had previously belonged to the owner of the schooner, but had been sold by him, and subsequently owned by the schooner, in prosecuting its business under a contract of hiring with the purchaser, is not subject, as appurtenant to the schooner, to a lien for supplies furnished the schooner. *Merrimac*, 29 Fed. Rep. 157. So also services rendered to two barges which had become disabled and were left behind from a tug, give no lien on the tug. *James Dalzell's Sons & Co. v. Daniel Kaine*, 31 Fed. Rep. 746.

Compressing Cotton.—No maritime lien for the compressing of cotton, when the compressing was performed inland, and before any contract of affreightment binding the ship was made. *The Paola R.*, 32 Fed. Rep. 174.

Where a steamboat and canal-boat, owned by the same person, were always employed together, it was held that a lien would not accrue as against the steamboat for work done on the canal-boat. *The Ida Meyer*, 31 Fed. Rep. 89.

A maritime contract may have for its subject a *canal-boat*, *Hipple v. The Fashion*, 3 Grant (Pa.) Cas. 40; a *pile driver*, *Kearney v. Pile Driver*, 3 Fed. Rep. 246; a *scow*, *Endner v. Greco*, 3 Fed. Rep. 411; a *floating elevator*, placed

on a canalboat, *The Hezekiah Baldwin*, 8 Ben. (U. S.) 556; a *floating derrick*, *Maltby v. A Steam Derrick-boat*, 3 Hughes (U. S.) 477; where the *res* is or has been afloat, *Gregg v. Sloop Clarissa Ann*, 2 Hughes (U. S.) 89; a *floating scow*, *The Count De Lesseps*, 17 Fed. Rep. 460.

Scow Platform.—But a libel in admiralty for wharfage is not maintainable where the thing charged with the wharfage was a scow platform, designed to be moored at a wharf so that refuse carts could be driven over it for the purpose of dumping their contents into boats, the platform being mainly stationary and rarely moved, although capable of being towed. Such a structure is not a vessel, within the meaning of the maritime law. *Ruddiman v. Scow Platform*, 38 Fed. Rep. 158.

1. Special Apparatus.—In *The Witch Queen*, 3 Sawyer (U. S.) 301, a vessel fitted out for a pearl fishing voyage was furnished with a diving bell, air pump and other apparatus, not contributing to navigation, but required and provided for the fishery intended, and belonging to her owners. It was held that these, as well as the tackle and furniture proper, were subject to the lien of material men for general supplies.

The fact that the ownership of the vessel and of such apparatus is separate will not be sufficient to exempt such apparatus from liability if in fact it was on board the vessel by the consent of its owners at the time the supplies were furnished. *The Edwin Post*, 11 Fed. Rep. 602.

2. "The authority of the master in contracting for repairs and supplies is not confined to such as are absolutely or indispensably necessary, but includes also such as are reasonably fit and proper for the ship and voyage. Where

such repairs and supplies are reasonably fit and proper, the master, if he has not funds and cannot obtain such on the personal credit of the owners, may obtain the same on the credit of the ship, either with or without giving a bottomry bond, as necessity shall indicate. Reasonable diligence in either event must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary and proper, as the master is not authorized to hypothesize the vessel unless such was the fact within the meaning of the maritime law. Such necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship. Proof that the supplies and repairs were necessary will not in any such case be sufficient to entitle the furnisher or lender to recover by a suit *in rem* against the vessel if it appear that the master had funds sufficient to execute the repairs and furnish the supplies, and that the party who made and furnished the same knew that fact, or that facts and circumstances were known to him sufficient to put him upon enquiry, and to show that if he had used due diligence he would have ascertained that no funds except such as the master already possessed were necessary for any such purpose. Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel for such a claim, but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon enquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purposes is not necessary to maintain the charge of bad faith, as it is well settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon the enquiry, and to show that if he had exercised due diligence

he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the enquiry ought to have been made." *The Lulu*, 10 Wall. (U. S.) 192.

"To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no cause of apparent necessity exists to have a credit and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." *Thomas v. Osborn*, 19 How. (U. S.) 22.

In *Pratt v. Reed*, 19 How. (U. S.) 359, it appeared that a running account for coal was kept with a vessel trading upon the lakes, the master of which was also the owner, and it did not appear that the only means of procuring the coal was upon the credit of the vessel. It was held, therefore, as between a libellant who furnished the coal, and the mortgagees of the vessel, that the latter were entitled to the proceeds of the sale of the boat.

In *Thomas v. Osborn*, 19 How. (U. S.) 22, it appeared that the master had received freight money, and, with the assistance of the libellants, invested it in a series of adventures as a merchant, partly carried on by means of the vessel, the command of which he had deserted for the purpose of conducting these adventures, and that money was advanced by the libellants to enable the master to repair and supply the vessel, and purchase a cargo to be transported and sold in the course of such private adventures; and that the freight money earned by the vessel was sufficient to pay for the repairs and supplies, and might have been commanded for that use if it had not been wrongfully diverted from it by the master, with the assistance of the libellants; the court held that the latter had no lien on the vessel for their advances.

In the case of *The Neversink*, 5 Blatchf. (U. S.) 539, it appeared that the master of the steamer had no funds

to pay for coal, and her charterers, who owned her *pro hac vice*, resided in a foreign jurisdiction, and the coal was a necessary supply, and it was obtained by the master, and credit therefor was, in fact, given to the vessel and her charterers. The court held that a lien was created on the vessel for the price of the coal furnished. In this case Mr. JUSTICE NELSON used the following language: "It has been said, or intimated, by every respectable authority, that this rule has been extended beyond its ancient strictness, in the recent cases of *Thomas v. Osborn*, 19 How. (U. S.) 22, and *Pratt v. Reed* 19 How. (U. S.) 359, and that a greater degree of proof of this necessity is now required, by these adjudications than had been previously exacted in the administration of this branch of the rule. I may be permitted to say that, having written one of the opinions, and fully concurred in the other, after extended arguments at bar, and the very discussions by the judges in their conferences, arising out of the differences of opinion among them, that no such purpose existed on the part of the court or any one of the justices; and a reference to the cases will show that the opinion delivered in each of them was placed, and intended to be placed, upon ancient and settled authority."

A claim for a sum advanced by the charterers after a vessel had been seized, and while in the custody of the court, cannot be allowed as a lien on the vessel where the advancements are not necessary for the due care and preservation of the vessel, and the charterers have actual notice of the seizure. *Augustine Kobbe*, 37 Fed. Rep. 702.

A lien does not attach upon a vessel, for damages for the master's refusal to accept and pay for supplies which have been ordered for the vessel's use. To create a lien, the supplies must have been actually furnished to the ship; the material man must have parted with them, and the ship must have received the benefit of them. *The Cabarga*, 3 Blatchf. (U. S.) 75.

Where the owner of a vessel has an agent residing at the place where the repairs are being made, who purchases the materials in his own name, and gives his personal undertaking to pay the price, there will be no lien on the vessel unless specially given. *Phelps v. The Camilla*, Taney (U. S.) 400.

Whether the credit is given to the vessel or to her owners is a question of

fact; the equitable ownership does not always determine the question of credit. *The George T. Kemp*, 2 Lowell (U. S.) 477.

A lien upon a vessel for repairs in a foreign port exists, notwithstanding the owner may be present at the time the repairs are ordered, if the repairs were done on the credit of the vessel, and not upon that of the owner, the latter being notoriously insolvent. *The Guy*, 9 Wall. (U. S.) 758.

A bill of supplies to a vessel, made out in the vessel's name, is evidence that the credit was given to the vessel, and not exclusively upon the personal liability of the owners. *The Mary Bell*, 1 Sawyer (U. S.) 135.

For other cases concerning liens for supplies and repairs see *James H. Prentice*, 36 Fed. Rep. 777; *Park v. Edgar Baxter*, 37 Fed. Rep. 219; *The Murphy Tugs*, 28 Fed. Rep. 429; *The Ellen Holgate*, 30 Fed. Rep. 125; *The Kingston*, 23 Fed. Rep. 200; *Berwind v. Schultz*, 25 Fed. Rep. 912; *The Howard*, 29 Fed. Rep. 604; *The General Smith*, 4 Wheat. (U. S.) 438; *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409; *The Jerusalem*, 2 Gall. (U. S.) 345; *The Nestor*, 1 Sumn. (U. S.) 73; *Zane v. The President*, 4 Wash. (U. S.) 453; *Woodruff v. The Levi Dearborne*, 4 Am. L. J., N. S. 97; *Davis v. New Brig*, Gilp. (U. S.) 478; *Sarchet v. The General Isaac Davis*, Crabbe (U. S.) 185; *The Hull of a New Brig*, 3 L. Rep. U. S. 69; *Nall v. The Illinois*, 6 McLean (U. S.) 413; *Carroll v. The T. P. Leathers*, Newb. Adm. 432; *Leland v. The Medora*, 2 Woodb. & M. (U. S.) 92; *The Lulu*, 10 Wall. (U. S.) 192; *The Kalorama*, 10 Wall. (U. S.) 204; *Burke v. The M. P. Rich*, 1 Cliff. (U. S.) 308; *The Eledona*, 10 Blatchf. (U. S.) 511; *The Washington Irving*, 2 Ben. (U. S.) 318; *Lyons v. The Lady Franklin*, 16 Pittsb. Leg. J. 30; *The Chausan*, 2 Story (U. S.) 455; *The Sea Lark*, 1 Sprague (U. S.) 571; *Scott's Case*, 1 Abb. (U. S.) 336; *Hatton v. Melita*, 3 Hughes (U. S.) 494; *Patapsco*, 13 Wall. (U. S.) 329; *The Native*, 14 Blatchf. (U. S.) 34; *The New Champion*, 17 Fed. Rep. 816; *The Eclipse*, 3 Biss. (U. S.) 99.

What Are Necessaries.—A *chronometer* is one of the necessities of a ship, and where one is supplied to a foreign ship, upon her credit by the direction of the master, a maritime lien arises therefor. *The Georgia*, 32 Fed. Rep. 637.

Expenses for provisions provided passengers and crew detained on board a vessel under seizure for being engaged in an unlawful enterprise, after arrival in port, and before service of attachment under libel for forfeiture, were allowed against the vessel in the case of *The City of Mexico*, 28 Fed. Rep. 239.

Copper sheathing is necessary. *The Perla*, Swabey 353; 4 Jur. N. S. 741. **Butcher's meat** is necessary. *The N. R. Gosfabrick*, Swabey 344; 4 Jur. N. S. 742; **Coals** supplied at intervals to a foreign steamer for several voyages may be recovered as necessities. *The West Friesland*, Swabey 454; 5 Jur. N. S. 658. **Rope** for the use of the ship in discharging its cargo is necessary. *The Ludgate Hill*, 21 Fed. Rep. 431.

Seamen's clothes are not necessary. *Rosenthal v. Die Gartenlaube*, 5 Fed. Rep. 827. Nor are oats and hay for a canal boat laid up for the winter, where it appears that the horses and men were engaged in an occupation not maritime. *The T. L. Wadsworth*, 13 Fed. Rep. 46.

There is no maritime lien for unpaid premiums of insurance. *The John T. Moore*, 3 Woods (U. S.) 61; *Insurance Co. v. Proceeds of Waubanshene*, 23 Blatchf. (U. S.) 292; *The Jennie B. Gilkey*, 19 Fed. Rep. 127; *The Paola R.*, 32 Fed. Rep. 74; *The Dolphin*, 1 Flip. (U. S.) 580, note.

Supplies of food were furnished in the city of New York to a passenger steamboat making several trips daily between that city and Long Branch, N. J., on her credit, such supplies not being absolutely necessary for the passengers or crew, but being useful and convenient. Some of the food was consumed by the employes of the vessel, but the larger part was dispensed at a restaurant on board to passengers, who paid for what they ordered. It was held that the vessel was subject to a lien for the supplies. There was sufficient necessity for them to sustain a lien, and the fact that they were dispensed to passengers from a restaurant formed no objection. *HUNT, J.*, in delivering the opinion of the court, said: "It is insisted that these supplies were not necessary, and, hence, that there is no lien. Necessity is a relative term. By a uniform construction of the courts much latitude is given in this respect. What is necessary for a packet ship to Liverpool or Havre, carrying passengers who pay the highest price and expect a table to be liberally supplied, may not be necessary for a vessel car-

rying coal or lumber, with crews working for low wages and accustomed to plain fare. But in each case, no doubt, a lien may exist for the articles supplied. I do not see that the fact of the dispensation of the supplies from a restaurant, *i. e.*, to individuals as called for, and to be paid for by such individuals, rather than that the passengers should be charged a passage price intended to include a charge for meals furnished, makes any difference. If a British steamer is about to sail for London with a crew of fifty men and one hundred passengers, she must be provided with the means for feeding them. She must lay in the needed supplies in advance, ascertaining what will be needed. Whether she charges a passenger one hundred dollars and furnishes him a state room and a seat at a general table well provided with food, or whether she charges him fifty dollars for his state room and furnishes him meals to be paid for when and as he requires them, can be of no importance. No man can make the voyage without food, and if it is supplied by the ship's company, the particular manner in which it is dispensed cannot be of importance. It certainly cannot be competent for the ship's owner to allege that, for such reason, the articles purchased on its account are not necessary supplies." *The Plymouth Rock*, 13 Blatchf. (U. S.) 505.

Water casks furnished to a foreign vessel are of the nature of materials, for which there is a lien. *Zane v. The President*, 4 Wash. (U. S.) 453.

Furnishing an air pump to a water craft used for pumping out a dry dock is a maritime service, for which a lien in admiralty may be enforced. *Winslow v. Floating Steam Pump*, 2 N. J., L. J. 124.

A chain cable was loaned by its maker to a master for the use of his vessel, under an agreement that it should be returned when another chain should have been made and delivered on board; and, on such delivery of the second chain, the first was promised to be returned at a fixed time, before which the vessel sailed and the chain was never afterwards returned. It was held that the vessel was properly chargeable with the price of both chains. *Sarchet v. The General Isaac Davis*, Crabbe (U. S.) 185.

The owner of a cargo, part of which is sold by the master to raise money for the necessary repairs of the vessel,

(b) *Presumption that They Are Furnished on the Credit of the Vessel.*—Where necessary supplies have been furnished in a foreign port, the presumption of law is, that in the absence of fraud or collusion the supplies were furnished upon the credit of the vessel. It is not necessary that there should be any express pledge of the vessel.¹

and part of which is consumed by the crew and passengers on the voyage, has a lien on the vessel for the value of what is so sold and consumed. *The Gold Hunter*, Blatchf. & H. Adm. 300.

Clothing of Seamen.—There is no lien upon a vessel for clothing furnished to seamen, unless needed by the seamen, and essential to the prosecution of the voyage. *Rosenthal v. The Die Gartenlaube*, 5 Fed. Rep. 827.

The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision and for attending the trial, are not necessities. *The Bonnie Amelie*, 1 L. R., Adm. 19; 35 L. J. Adm. 115; 14 L. T., N. S. 191.

Averages.—Where money is advanced to a master to pay averages with costs, such advances are not necessities. *The Altje Willemina*, 1 L. R., Adm. 107.

An advance of money to pay off a bottomry bond for which a ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit her for a new voyage, in consideration of receiving brokerage and the prepaid freight for the new voyage, is not within 3 & 4 Vict., ch. 66, § 6, and cannot be recovered in the Admiralty court. *The Onni*, Lush. 154; 3 L. T., N. S. 447.

"Necessaries" in 3 and 4 Vict., ch. 65, § 6, means articles immediately necessary for the ship, as contradistinguished from those merely necessary for the voyage. *The Comtesse de Tregeville*, 4 Lush. 329; 4 L. T., N. S. 713.

1. **Presumptions.**—In the case of the *Grapeshot*, 9 Wall. (U. S.) 129, the question of presumption as applicable to the subject of maritime hypothecation, is stated in the following propositions:

1. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due enquiry and credible representation, to be necessary.

2. Where proof is made of necessity for the repairs or supplies, or for funds

raised to pay for them by the master, and of credit given to the ship, a presumption will arise conclusive in the absence of evidence to the contrary, of necessity for credit.

3. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship.

4. The ordering, by the master, of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith.

5. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required; and, if the fact of necessity be left unproved, evidence is also required of due enquiry and of reasonable grounds of belief that the necessity was real and exigent.

When a contract contemplates the furnishing of supplies to a vessel at a foreign port, it is to be presumed that a lien on the vessel was contemplated by the parties, unless something to the contrary appears. *The Hiram R. Dixon*, 33 Fed. Rep. 297.

The presumption that necessary repairs were made on the credit of the vessel, arising from the fact that the owner was a non-resident of the State where the work was done, is strengthened by the fact that such repairs were charged to the vessel at the time, and is not overthrown by the fact that libellants, when they undertook the repairs, did not know where the owner resided; nor by the fact that they were made at the request of the owner's agent at the place where they were made; nor by the fact that ninety days were given the owner in which to pay for them; nor by the fact that nothing was said about a lien. *The Comfort*, 25 Fed. Rep. 158; *affirmed* 25 Fed. Rep. 159; rehearing denied, 32 Fed. Rep. 327.

The presumption that supplies furnished to a ship in a foreign port by

(c) Must be Furnished in a Foreign and Not in a Home Port.—

No lien exists for repairs made or supplies furnished in the home port.¹ Where advances and supplies are made to a vessel in her home port, the law presumes that they were made on the personal credit of the owners.² In such a case the home port is the place where the owner of the vessel resides.³

order of the master were furnished on the credit of the ship does not apply to a case where the material men ought to have known, or did know, that the master ordered the supplies without authority. *The Esteban De Antunano*, 31 Fed. Rep. 920.

A presumption of lien arises from the furnishing of supplies to a foreign vessel, which may be rebutted by proof that the master or agent ordering the supplies was in funds sufficient to pay therefor; that the material man either had notice of these facts, or knowledge of facts sufficient to put him on enquiry; and that reasonable enquiry or due diligence would have informed him of the existence of such funds and that there was no need of credit. *Berwind v. Schultz*, 25 Fed. Rep. 912. See also *The Belfast*, 7 Wall. (U. S.) 624; *The Emily Souder*, 17 Wall. (U. S.) 666; *The Lulu*, 10 Wall. (U. S.) 192; *The Eliza Jane*, 1 Sprague (U. S.) 152; *The Patapsco*, 13 Wall. (U. S.) 329; *The Charlotte Vanderbilt*, 19 Fed. Rep. 219; *The New Champion*, 17 Fed. Rep. 816; *The E. A. Baisley*, 13 Fed. Rep. 703; *Randall v. Roche*, 30 N. J. L. 220.

1. The leading case on this subject is *The General Smith*, 4 Wheat. (U. S.) 438, where JUSTICE STORY said: "Where repairs have been made or necessities have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law following the civil law gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessities in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State, and no lien is implied unless it is recognized by that law." See also *The Edith*, 94 U. S. 518; *affirming* 11 Blatchf. (U. S.) 451; s. c., 5 Ben. 432; *The Circassian*, 12 Am. L. Reg. 291; *Gill v. Continental*, 8 West. Jur. 232; *Woodruff v. The Levi Dearborne*, 4 Am. L. J., N. S. 97; *The Eliza Jane*, 1 Sprague (U. S.) 152; *Russel v. The Asa R. Swift*, Newb.

Adm. 553; *The Francis*, 21 Fed. Rep. 715; *Thomas Fletcher*, 24 Fed. Rep. 375.

2. *The Queen of St. Johns*, 31 Fed. Rep. 24; *The Canary*, No. 2, 22 Fed. Rep. 532; *The Francis*, 21 Fed. Rep. 715; *Buddington v. Stewart*, 14 Conn. 404. But see *Fox v. Holt*, 36 Conn. 558.

3. **Residence of Owner.**—"It has often been decided that the place of residence of the owners is to be considered the home port, even when the registration is in another State, if the facts of ownership and residence were known, or might have been known to the material man." *The Jennie B. Gilkey*, 19 Fed. Rep. 127.

A New Jersey corporation owned a steamboat which was enrolled in the port of New York and was run as a passenger boat between the city of New York and Long Branch, New Jersey, making several trips a day each way. It was held that her enrollment at New York did not make her a domestic vessel there, but she was, while there, a vessel in a foreign port, because her owner did not reside at New York. *The Plymouth Rock*, 13 Blatchf. (U. S.) 505.

The location of the custom house determines the place of enrollment; but when the place of enrollment and residence of the owners of the vessel differ, the latter will be considered the "home port," even though the place of enrollment is in another State, if the facts of the ownership and residence were known or might have been known to the material man. *The Lotus*, No. 2, 26 Fed. Rep. 637; *Hill v. The Golden Gate*, Newb. Adm. 308; 5 Am. L. Reg. 142; *The Mary Bell*, 1 Sawy. (U. S.) 135; *Parmlee v. The Charles Mears*, Newb. Adm. 197; *The Albany*, 4 Dill. (U. S.) 439; *The E. A. Barnard*, 2 Fed. Rep. 712; *The Mary Chilton*, 4 Fed. Rep. 847; *The Rapid Transit*, 11 Fed. Rep. 322; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 463; *The Sarah Stow*, 1 Sprague (U. S.) 453.

A vessel cannot have more than one home port at a time. She may, if owned

by the residents of different States, be a foreign vessel in the port of a State wherein certain of her owners reside. *The Ellen Holgate*, 30 Fed. Rep. 125.

If there are several equal co-owners, general or special, resident in different States, no lien will arise for supplies furnished in the State of the known residence of either. *The Rapid Transit*, 11 Fed. Rep. 322.

When the owner does nothing to inform the public of the charter, courts will not presume knowledge of the change of home port from the residence of the owner to that of the owner *pro hac vice*, so as to relieve a vessel of an otherwise valid lien. *The Cumberland*, 30 Fed. Rep. (U. S.) 449.

When a ship is run by charterers, being owners *pro hac vice*, their residence only is regarded in determining the ship's home port, and the presumptions of personal credit in regard to supplies furnished. *The Francis*, 21 Fed. Rep. 715.

Where a steam propeller was built by ship builders at Cleveland, under a contract with parties residents of Buffalo, N. Y., it was held that the former place was her home port until after her delivery and first voyage. *The Plymouth*, Newb. Adm. 56; 6 McLean (U. S.) 463.

On a libel against a vessel and her New York owners for materials furnished her at Baltimore, it was held that the portion furnished her while previously owned by a resident of Baltimore constituted no lien. Otherwise as to materials furnished after the change of ownership, unless furnished on the credit of the master. And the burden of proof of their having been furnished on his credit was on the claimants. *Jones v. The Rattler*, Taney (U. S.) 456.

A vessel was enrolled as belonging to a port in New Jersey, and a share in her was subsequently sold to a person in Philadelphia, who thereupon became managing owner, and obtained a new enrollment for her as belonging to Philadelphia. It was held, that as to charges for work and materials furnished, before the new enrollment, the district court in Pennsylvania had jurisdiction over her as a foreign vessel; but after that enrollment she became a domestic vessel, and as the lien which the local law of Pennsylvania gave, for work and materials furnished, had been under the law divested by her making subsequent voyages, the court had no jurisdiction as to the charges which ac-

crued subsequently to the second enrollment. *Tree v. The Indiana*, Grabbe (U. S.) 479.

In the case of *The Thomas Fletcher*, 24 Fed. Rep. 375, PARDEE, J., considered the question of residence as connected with the ownership of vessels on which liens are filed, in the following language: "As to what port is the home port of an American ship, there arise many difficult questions. When the residence of the owner is in the same State as the nearest port to such residence, and there is no other port in the State, there is no particular trouble in ascertaining the exclusive home port, provided the ship is enrolled at the proper port; but, if all these circumstances do not occur, the home port of a ship is a matter of uncertainty, under the authorities, the weight of authority being in favor of considering all the ports of the State in which the owner resides as home ports. See *The Albany*, 4 Dill. (U. S.) 439, and cases there cited. In the present case, the question is whether the port of New York was, at the time the supplies were furnished, a home port of the Fletcher. It is conceded that the enrollment of the Fletcher in New York makes only a *prima facie* case as to that being her home port; that a *prima facie* case seems to be overcome by the positive evidence that Pendergast lived in New Jersey, and that Perth Amboy was the proper place for his ship to be enrolled. But it is contended (see *The Albany*, 4 Dill. (U. S.) 439) that as Pendergast had a continuous business place in New York, where he was nearly always to be found during business hours, New York constituted his residence, in the sense of section 4141, Rev. Stat. relating to the enrollment. Without reviewing the authorities cited to maintain this proposition, I do not think it necessary to go further in this case than the language of the statute itself, which is: "Which port shall be deemed to be at or nearest to which the owner . . . usually resides." For certain commercial purposes a person's usual place of business may be taken for his residence, not because he resides there, but because he may be, or ought to be, found there; and the statute referred to seems to contemplate that a ship owner may reside in different places, for the residence to determine the place of enrollment is to be the usual residence, and no person can have more than one such residence. Pendergast may have had a residence

A port of one of the United States, other than the State to which the vessel belongs, is a foreign port, within the principles regulating the authority of a master to create a lien upon the vessel for necessary supplies.¹

The fact that a vessel sails under a foreign register and flag does not affect the rule that a port in the State where the vessel is owned is a home port, and no maritime lien arises for supplies there furnished.²

in New York at his business place, but it was not his usual residence. His usual residence was at Plainfield, New Jersey, where he kept his family, and where he lived continuously from 1878 to 1884, perhaps going to New York city the morning of every business day, and returning to his home at night. Business men in this country may have residences and business places scattered over the whole of our great territory, but I cannot see how, as a matter of fact, they can have more than one usual residence. At all events, I am clearly of the opinion that, under the evidence in this case, Pendergast's usual residence was at Plainfield, New Jersey, and not in the city of New York. In reaching this conclusion I do not hold that Pendergast, by his conduct, may not be estopped on the matter of residence; and this might be a very important question in this case if any of the libellants herein were adjudged to have, not maritime liens, but domestic liens, under the laws of New York."

While a yacht whose home was at Boston, Mass., was at Newport, R. I., on a pleasure excursion, goods were supplied to her at Newport, and were sent to her at Newport by express. It was held that while at Newport she was in a foreign port, and subject to a lien for the goods supplied. *Huron*, 29 Fed. Rep. 183.

1. *The Lulu*, 10 Wall. (U. S.) 192; *Burke v. The M. P. Rich*, 1 Cliff. (U. S.) 308; *Ex parte Easton*, 95 U. S. 68, 69; *The Canada*, 7 Sawy. (U. S.) 173; *The St. Lawrence*, 3 Ware (U. S.) 211; *The Chusan*, 1 Sprague (U. S.) 39; *The Sarah J. Weed*, 3 Lowell (U. S.) 555; *The Huron*, 29 Fed. Rep. 183; *The Nestor*, 1 Sumn. (U. S.) 73; *The Kalorama*, 10 Wall. (U. S.) 204; *The Patapsco*, 13 Wall. (U. S.) 329; *The Belfast*, 7 Wall. (U. S.) 624; *The Cumberland*, 30 Fed. Rep. 449; *The Sultana*, 19 How. (U. S.) 359, 362; *The Guy*, 9 Wall. (U. S.) 758; *The Rich*, 1 Cliff. (U. S.) 308; *The James Guy*, 5 Blatchf. (U. S.) 496;

The Plymouth Rock, 13 Blatchf. (U. S.) 505; *The Regulator*, 1 Haskell (U. S.) 17; *The Neversink*, 5 Blatchf. (U. S.) 539; *The General Burnside*, 3 Fed. Re.p. 228.

2. In *The E. A. Barnard*, 2 Fed. Rep. 712, the vessel was registered at St. Andrews, New Brunswick, and sailed under the British flag, but was owned by her master, who resided at Philadelphia. The court held that the home port was Philadelphia. BUTLER, J., said: "I cannot accept the conclusion that the vessel should be treated as foreign. She clearly is not. Her owner resides here, and here, therefore, is her home. That she has a foreign registry, and sails under a foreign flag, does not seem to be important. As against one who has been misled by such representations, the owner would not be allowed to assert the contrary. But here there has been no misleading. The residence of the owner in Philadelphia was well understood, and that the home of the vessels was well understood, and that the home of the vessels was therefore here, all persons dealing with him were bound to know. For necessary services and supplies furnished in foreign ports liens are allowed, on the presumption that credit is given the vessel, inasmuch as the owner personally has none there. When at home the presumption is preserved, and the credit treated as given to the owner personally. What difference can it make, therefore, that the owner registers his vessel abroad and sails under foreign colors? These facts do not affect the presumption on which alone the question of liens depends. But aside from the reasonableness of this view, the point has been so decided in this court after full consideration. In *McCorker v. The Brig Thomas Walker*, the owners, residing in Philadelphia, had their vessels registered abroad, and sailed under foreign colors to avoid danger from rebel cruisers, during the late war, and a lien was claimed for services ren-

(d) *Chartered Vessels*.—Where the general owner of a vessel charters it, and allows the charterers to have control, management, and possession of the vessel, and thus to become the owners for the voyage, he must be deemed to consent to a lien for necessary repairs and supplies furnished at a foreign port for the prosecution and completion of the voyage.¹

dered here on the ground that she was foreign. The claim was disallowed by the district court, and on appeal by the circuit court also; JUDGE GRIER filing a written opinion, in which, while expressing sympathy with the plaintiffs, he held that the foreign registration and the use of a foreign flag were unimportant, in view of the owner's residence here and the claimant's knowledge of this fact." See also the *Alice Tainter*, 14 Blatchf. (U. S.) 41; *The Walkyrien*, 3 Ben. (U. S.) 394; *The Mary Chilton*, 4 Fed. Rep. 847; *The Secret*, 3 Fed. Rep. 665; *The Norman*, 6 Fed. Rep. 406; *The Albany*, 4 Dill. (U. S.) 439; *Hill v. The Golden Gate*, 1 Newb. Adm. 308; *The Plymouth Rock*, 13 Blatchf. (U. S.) 505.

A domestic vessel may be subjected to liabilities of a foreign ship by being falsely held out as foreign by her owners; and material men who have been induced by such representations to give her credit may enforce their claims by a lien in admiralty, if the circumstances were calculated to deceive men of ordinary vigilance. *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409; *McAlister v. The Sam Kirkham*, 1 Bond (U. S.) 369; *The Nestor*, 1 Sumn. (U. S.) 73; *The Francis*, 21 Fed. Rep. 715.

The term "foreign vessel" does not include a foreign built ship sold and delivered to Americans, although under an agreement that the legal title should remain in the vendor. *The Guisborough*, 8 Ben. (U. S.) 407; *The Island City*, 1 Lowell (U. S.) 375; *The George T. Kemp*, 2 Lowell (U. S.) 477.

Part Owners.—Where there are several part owners residing in different States, no lien arises for supplies furnished in the State of the known residence of either. *Stephenson v. The Francis*, 21 Fed. Rep. 715; *The Rapid Transit*, 11 Fed. Rep. 322; *The Mary Chilton*, 4 Fed. Rep. 847; *Hill v. The Golden Gate*, 1 Newb. Adm. 308.

Repairs were furnished in Philadelphia to a vessel wholly owned and registered in New Jersey. One sixth of the vessel was sold to a resident of Philadelphia, who was thereupon made

managing owner, and a new registry was taken out in Philadelphia, and the repairs were continued under his direction. It was held that a lien accrued for the repairs prior to the sale of the one sixth, but that there was no lien for those made after the sale. *Tree v. The Indiana*, Crabbe (U. S.) 479.

A maritime lien does not exist for supplies sent from one State to a vessel lying at her home port within an adjoining State, which is the State of the owner's residence. *The Mary McCabe*, 22 Fed. Rep. 750; *The Eliza Jane*, 1 Sprague (U. S.) 152; 2 Jones on Liens 510.

1. **Charterers**.—"The affirmance of the decree of the district court may be satisfactorily placed upon the ground that the charterers were the owners of the vessel *pro hac vice*; that as such their contracts for necessary supplies bound the ship, and as the supplies were furnished at a foreign port, they are presumed to have been furnished on the credit of the vessel. That a charterer to whom is given the entire possession, management, and control of a ship, becomes the owner *pro hac vice*, although, by the terms of the charter party, the general owner appoints the master and selects the mariners, as was the case by the charter party here, is not doubted; and the proposition is assumed to be correct by the appellees. Authorities which are controlling upon this court decide that when the general owner allows the charterers to have the control, management and possession of the vessel, and thus to become the owner for the voyage, he must be deemed to consent that the vessel shall be answerable for necessary repairs and supplies to enable her to pursue her voyage, and that the special owner may bind the interest of the general owner of the vessel in this behalf. This doctrine was declared by Mr. JUSTICE NELSON, in *The City of New York*, 3 Blatchf. (U. S.) 187, where the parties furnished the supplies in a foreign port to the agent of the charterers, and knew of the charter, and that according to its terms

2. For Construction.—Materials and machinery furnished and work done in the original construction of a vessel do not give rise to a maritime lien in the United States, and a recovery therefor cannot be enforced in admiralty by a libel *in rem*.¹ This rule,

the charterers were bound to furnish the supplies for the voyage." *The India*, 16 Fed. Rep. 262. See also *Harney v. The Sidney L. Wright*, 5 Hughes (U. S.) 474; *The Stroma*, 14 Fed. Rep. 599.

In *The Cumberland*, 30 Fed. Rep. 439, it was held that where necessary supplies and repairs are furnished a chartered vessel, of which the charterer is owner *pro hac vice*, and part of the time master, and it is not shown that the material men had knowledge of the charter, such supplies will give a lien at the place of residence of the charterer, as long as he is master, but not after he has appointed another master and only procures supplies as charterer. It is only in circumstances of distress in a foreign port, or where repairs or supplies are necessary to enable the vessel to complete her voyage, or reach the hands of the owners, that the master has an implied authority from the owners to bind the ship contrary to the known terms of a charter party. *The William Cook*, 12 Fed. Rep. 919.

Where the charterers of a vessel agree to pay all the expenses of supplying her, and a person furnishing supplies is notified by the owner of the terms of the charter party, and forbidden to credit the vessel, he cannot acquire any lien upon her for supplies afterwards furnished. *The William Cook*, 12 Fed. Rep. 919.

The steamship *Norman*, an American vessel, registered at New York, was chartered to A & Co., of that city, who agreed to place her under foreign register, and to pay the expenses of victualling, manning, coaling, oiling and running the ship, she to be at their sole use and disposal during the voyage. Possession of the ship was given to the charterers at New York, and there, on their order, the coal in question was furnished and delivered to the ship. The master and engineer had nothing to do with the purchase. It was held that, conceding that the ship, by reason of her foreign register, was in a foreign port, as the liability sought to be imposed was not created by the act or engagement of the master, in his character of master, there could be no lien, and that as the coal was furnished upon

the order of A & Co., who were residents of the place where the vessel was at the time, and owners *pro hac vice*, the presumption was that the coal was furnished upon the personal credit of the charterers, and not upon the credit of the vessel. *The Norman*, 28 Fed. Rep. 383.

In *The Pirate*, 32 Fed. Rep. 486, it was held that there was no lien in favor of material men for repairs and supplies furnished in the port of Baltimore to two British steamers upon the orders of charterers, who were owners *pro hac vice*, and who were well known residents of Baltimore. See also *Neill v. The Francis*, 21 Fed. Rep. 921.

By a charter party it was agreed that the charterer might place an approved condenser in the vessel, one-half of the actual costs thereof to be allowed to him by the owners. Such a condenser was furnished, the charterer paying therefor one-half the price in cash, and giving his note for the balance, which was never paid. The party furnishing the condenser had at the time knowledge of the charter party. It was held that he was not entitled to a lien against the vessel for the balance of the price remaining unpaid. *Howard*, 29 Fed. Rep. 604.

See also in general as to charterers *The City of New York*, 3 Blatchf. (U. S.) 187; *Gracie v. Palmer*, 8 Wheat. (U. S.) 605; *The Freeman*, 18 How. (U. S.) 182; *The Columbus*, 5 Sawy. (U. S.) 487; *Hill v. The Golden Gate*, 1 Newb. Adm. 308.

1. Construction.—In *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, the Supreme Court of the United States decided that a contract to build and complete a vessel is not within the admiralty jurisdiction of the United States courts, though the intention might be to employ the vessel in navigating the ocean; and that a material man or builder, if he has a lien at all, has only the common law possessory lien, or such statutory lien as local legislation may have provided for; neither of which, of itself, confers admiralty jurisdiction. MR. JUSTICE CATRON in delivering the opinion of the court said: "It must be borne in mind that

liens on vessels encumber commerce, and are discouraged; so that where the owner is present, no lien is required by the material man; nor is any where the vessel is supplied or repaired in the home port. The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity and in the absence of the owner. It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land. The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract. It was thus held by the first, Judge Hopkinson, in 1781, who then declared, as respects ship builders, that 'the practice of former time doth not justify the admiralty's taking cognizance of their suits.' (*Chilton v. The Brig Hannah, Bee's Admiralty R.*, app. 419). And we feel warranted in saying that at no time since this has been an independent nation has such a practice been allowed. (*Turnbull v. Enterprise, Bee Adm. 345.*) It is proper, however, to notice the fact that district courts have recognized the existence of admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the State where the vessel was built, such as *Read v. The Hull of a New Brig, 1 Story (U. S.) 244*, and *Davis v. A New Brig, Gilp. (U. S.) 473*; *Ludington v. The Nucleus, 2 Law Jour. 563*. Thus far, however, in our judicial history no case of the kind has been sanctioned by this court."

A floating scow having been constructed in New Jersey and towed to Pennsylvania, where material and machinery were furnished upon contract with the building contractors, who had undertaken to construct the scow with such machinery, held that the machinery and material were furnished in the original construction of the vessel.

The Count de Lesseps, 17 Fed. Rep. 460.

Reconstruction.—A contract for the reconstruction of a vessel was made by the owner at the home port, but owing to low water the vessel was carried to a foreign port, where the work was completed by the contractors. It was held that no lien for that portion done in the latter place arose either under the general maritime or local law of the latter place. The *Rapid Transit*, 11 Fed. Rep. 322.

The owner of an old and decayed boat employed libellant, who was a ship carpenter, to assist in building for him the hull of a new boat, and, after it was completed, dismantled the old boat and used some of its materials in fitting up the new one. It was held that the libellant had no lien on the new boat for his wages, or for money, etc., deposited by him for safekeeping with the master of the boat. *Smith v. The Royal George, 1 Woods (U. S.) 290*.

In *Roach v. Chapman*, 22 How. (U. S.) 129, where a steamer under libel was built in Louisville, Ky., and the person who furnished the boilers and engines libelled in admiralty in Louisiana, the court held that there was no jurisdiction on the ground that "a contract for building a ship or supplying engines, timber or other materials for her construction is clearly not a maritime contract."

A contract to build and equip a steamboat made no mention of stores, fuel, tillerline, checkline, copper wire, packing for machinery, pails for roof, bedding, etc. These things were furnished after the hull was built and the propelling power put in, and on the day they were furnished the boat made her first trip. It was held that these things should be deemed included in the contract, they being necessary to make the boat serviceable, and that, therefore, no maritime lien existed for their price. *The Glenmont*, 32 Fed. Rep. 703. See also *Edwards v. Elliott*, 21 Wall. (U. S.) 532; *The Ship Norway*, 2 Ben. (U. S.) 121; 23 How. 494; *The Pacific*, 9 Fed. Rep. 120; *Baizley v. Odorilla*, 121 Pa. St. 231; *The No. 1*, 11 L. Rep. N. S. 281; *Collis v. The Coernine*, 7 Am. L. Reg. 5; *Collins v. The Fort Wayne*, 1 Bond (U. S.) 476; *The Antelope*, 2 Ben. (U. S.) 405; *The Guiding Star*, 18 Fed. Rep. 263; *Foster v. Ellis*, 5 Ben. (U. S.) 83; *Griffenberg v. The John Laughlin*, 2 W. N. C. (Pa.) 612; *Cunningham v. Hall*, 1 Cliff. (U. S.) 43;

however, does not apply where the work done and the material furnished was not in and about the original construction, but was for repairs or for rebuilding a portion of the vessel which had been destroyed.¹

Local laws by creating a lien for construction do not make the lien maritime so as to confer jurisdiction on the United States courts.²

3. For Advances of Money.—A lien exists for advances of money made to a captain in a foreign port to pay for necessary repairs or supplies. In such a case when the necessity is proved, the law presumes that the advances were made upon the credit of the vessel.³

The *Iosco*, Brown Adm. 495; *Young v. The Orpheus*, 2 Cliff. (U. S.) 29; 2 Parsons, Ship. & Adm. 327.

1. A steamboat was burned to the water's edge while on a voyage; her hull was then towed into port and there built upon anew, the old hull being used, but the length of the vessel increased. It was held that this was not a case of building a new vessel within the rule that a maritime lien is not accorded for building a ship, but a case of repairs to an old vessel. *Hardy v. The Ruggles*, 2 Hughes (U. S.) 78.

For work done in converting a steamer into a barge by taking out her engine and making the necessary repairs on the hull, the material man's lien is upon the hull only, not upon the engine. But other holders of liens upon the whole property may be required to exhaust their remedy against the engine before resorting to the hull. *The Buffalo*, 24 Int. Rev. Rec. 6.

A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion after she is launched and afloat, is not a contract to build a ship, and is a maritime one. *The Eliza Ladd*, 3 Sawy. (U. S.) 519.

2. Local Law Cannot Confer Jurisdiction.—In *Roach v. Chapman*, 22 How. (U. S.) 129, it was insisted for the libellants that the local law of Kentucky, by giving a lien, supplied the defect of jurisdiction arising from the nonmaritime character of a contract. The court, however, held that "the local laws can never confer jurisdiction on the courts of the United States."

The same question was raised in *The Pacific*, 9 Fed. Rep. 120, where the court said: "It is well settled that local laws can neither enlarge nor diminish the admiralty jurisdiction either by de-

claring those contracts to be maritime which are not, or those not maritime which are so by the admiralty law." But see the *Sylvan Stream*, 34 Fed. Rep. 314. See generally ADMIRALTY, vol. 1, p. 193.

3. Advances.—"The presumption of law always is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage and like services rendered to the vessel, they are made upon the credit of the vessel as well as that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. The presumption arises that such is the fact from the necessities of the vessel, and the position of the parties considered with reference to the motives which generally govern the conduct of the individuals. Moneys are not usually loaned to strangers, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties. The presumption, therefore, that advances in such cases are made upon the credit of the vessel is not repelled by any loose and uncertain testimony as to the suppositions or understandings of the parties. It can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of the vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was

known to the party making the advances, or could readily have been ascertained by proper enquiry." The *Emily Souder*, 17 Wall. (U. S.) 666.

See also *The J. F. Spencer*, 5 Ben. (U. S.) 151; *The Sarah Harris*, 7 Ben. (U. S.) 28; *The J. C. Williams*, 15 Fed. Rep. 558; *Janney v. The Belle Lee*, 12 Int. Rev. Rec. 123; *The Lucia B. Ives*, 10 Ben. (U. S.) 660; *Collins v. The Fort Wayne*, 1 Bond (U. S.) 476.

There may be a maritime lien for advances in a foreign port to discharge existing debts which are a charge on the ship. *The Tangier*, 2 Lowell (U. S.) 7; *The Emily Souder*, 17 Wall. (U. S.) 666; *The J. A. Brown*, 2 Lowell (U. S.) 464; *The Union Express*, 1 Brown, Adm. 537.

Advances as an Insurable Interest.—Such advances create an insurable interest. In *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. (U. S.) 159, Mr. JUSTICE CLIFFORD said: "Advances made on the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien upon the ship, and it is well settled law that a maritime lien is a *jus in re*, and that it constitutes an encumbrance on the property of the ship, which is not divested by the death or insolvency of the owner. Such a lien may be enforced by a process *in rem*, which is founded on a right of the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in the thing. Liens of the kind constitute an insurable interest, and it is quite clear that enough is alleged in the declaration to warrant the conclusion that the advances made in this case are properly to be regarded as constituting a maritime lien upon the bark. Contracts for repairs and supplies may be made by the master to enable the vessel to proceed on her voyage, and if it appears that it was necessary for the purpose and that they were made and furnished to a foreign vessel of the United States, to which the vessel belongs, the *prima facie* presumption is, that the repairs and supplies were made and furnished on the credit of the vessel unless it appears that the master had funds on hand or at his command which he ought to have applied to the accomplishment of those objects, and that the material men knew that fact or that such facts and circumstances were known to them as were sufficient to put them upon enquiry and to show that if they had used due diligence in that behalf they might have ascer-

tained that the master had no authority to contract for such repairs and supplies on the credit of the vessel. Whenever the necessity for the repairs and supplies is once made out it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the material men knew the same, or were put upon enquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party. Apply those principles to the case and it is clear that the objection that the plaintiffs had no insurable interest in the bark utterly fails, as it is not controverted that the advances were made to equip the vessel and to procure a cargo for her in the described voyage; and it is sufficient that such an allegation affords a *prima facie* presumption that the advances were made on the credit of the vessel, as the record fails to disclose any fact or circumstances to overcome that presumption. Such advances constitute a lien upon the ship, and such a lien gives the lender an insurable interest in the ship."

Seamen's Wages.—A maritime lien is accorded for money advanced to pay seamen's wages. *The Dora*, 34 Fed. Rep. 348.

General Average Claim.—Money advanced by the ship's agent to pay a general average claim against the ship, there having been a jettison, *held*, a maritime lien, and entitled to priority over bottomry bonds. *The Dora*, 34 Fed. Rep. 343.

Miscellaneous.—A part owner has no lien or right of priority in equity upon the ship itself for a balance of account which may be due him. *The Larch*, 2 Curt. (U. S.) 427; *The Jennie B. Gilkey*, 20 Fed. Rep. 161; *Macy v. De Wolf*, 3 Wood. & M. (U. S.) 193.

Advances of money to the owner of a vessel do not create a lien on her in favor of the lender, in the absence of an agreement for a lien upon the vessel; even though the money be applied to the payment of liens upon the vessel. *The William A. Harris*, 8 Ben. (U. S.) 210.

Advances of money for a vessel do not have a lien upon her, unless made to pay for supplies or demands which would have a lien. *The Home*, 18 Bankr. Reg. 557.

If a vessel is attached in a foreign port in a suit at common law against the owners, the money advanced to pay

4. For Services—(a) By Seamen.—The wages of seamen engaged in vessels transporting goods upon tide water, constitute a lien on the ship and freight in whatever hands they may be. It has been said that they are nailed to the last plank of the ship.¹ If,

this debt does not create a lien on the vessel, though the owners could not pay and the master could release the ship in no other way. *The A. R. Dunlap*, 1 Lowell (U. S.) 350. See also *The Superior*, 5 Sawy. (U. S.) 346.

A claim for a sum advanced by the charterers after a vessel has been seized, and while in the custody of the court, cannot be allowed as a lien on the vessel where the advancements are not necessary for the due care and preservation of the vessel, and the charterers have actual notice of the seizure. *Augustine Kobbe*, 37 Fed. Rep. 702.

A bank which has paid money on the checks of the master and owners of a vessel has no lien under the Oregon statute providing for liens for materials furnished by "mechanics, tradesmen or others." *Oreg. L. P.* 651. Although the money was used to pay debts contracted for materials. *City of Salem*, 31 Fed. Rep. 616.

The general agents of a ship were accustomed to advance money for her, and deduct the amount in remitting the freight to the owner. It was held that they had no lien on the ship, though they did not have the exclusive control of her, her master being general superintendent of the corporation owning her. *Raleigh*, 32 Fed. Rep. 633.

1. Seamen's Wages.—In *Pitman v. Hooper*, 3 Sumn. (U. S.) 50, JUSTICE STORY said: "The seamen's wages generally constitute a lien, or claim upon the ship and freight, and upon the proceeds thereof, in whatever hands they may be, which must be paid before any other claim. It has been significantly said that they are nailed to the last plank of the ship; a figurative expression which will be found used in one of the earliest maritime codes in modern times (*The Consolato del Mare*) of which we have any distinct traces, and it may be added that they adhere also to the last fragment of the freight. . . . The wages of seamen constitute, as has been justly remarked at the argument, a peculiar class of contracts; and the principles applicable to them do not belong to the ordinary contracts for hire and services. In ordinary contracts for hire and services the persons employed

do not partake of any of the risks of the owner in relation to the property. They are entitled to their full compensation for labor and services on the property although it shall be utterly lost or destroyed by accident or superior force. Not so with the contract of seamen for maritime voyages and adventures. The policy of the maritime law has in such cases subjected them to the risk of the voyage to a limited extent; for the payment of wages is ordinarily made to depend upon the earning of freight in the voyage. If freight is not earned in the voyage, in consequence of an overwhelming calamity, or an unexpected accident, the seamen generally lose their wages. But if freight is earned in the voyage, and for the voyage, whether greater or less, and whether it is actually secured by the owner, or not, makes no difference in the rights of the seamen."

A seaman may have a lien for service as such, though he served only in port. *Levering v. Bank of Columbia*, 1 Cranch C. Ct. (U. S.) 152; *The Blohm*, 1 Ben. (U. S.) 228.

Extra Wages.—The lien for wages extends to extra wages. *The Wexford*, 7 Fed. Rep. 674.

Mariners hired for a voyage, who pursuant to the contract presented themselves at the wharf where the boat lay and offered their services, but without good reason were refused admission to the boat, may sue *in rem* in admiralty for their stipulated wages, the boat having prosecuted the voyage. *The Acorn*, 32 Fed. Rep. 638.

Some roustabouts shipped for a trip from Cairo to New Orleans and return, and were discharged at New Orleans for no reason other than that there was ice above Cairo and that the boat did not care to return. The roustabouts were paid to date of discharge and were given a little money besides, but not enough to take them to Cairo. It was held that they could enforce, in admiralty, payment of their wages for the return trip and their necessary expenses in returning. *The City of New Orleans*, 33 Fed. Rep. 683.

Under the British Merchants' Shipping act, a vessel has no right to aban-

however, seamen enter into a contract to serve on a vessel relying upon the exclusive credit of the master, they cannot have a lien for their wages.¹

don a disabled seaman without payment of his wages up to the time of his being left on shore, together with provisions for his return home. The seaman, in such case, may recover the penalty given by the British statute, together with his wages, by libel against the vessel. *Harvey v. Smith*, 35 Fed. Rep. 367.

The lien of seamen for wages takes priority over claims of the United States for penalties incurred by the vessel for failure to keep posted the certificate of inspection, to have the name of the vessel painted upon the stern, or to carry sufficient life preservers, as required by statute; and it is immaterial that the seamen served with knowledge of such failures on the part of the vessel, as the statutes do not impose upon them any duty with respect thereto. *Jennie Hayes*, 37 Fed. Rep. 373.

In a libel for seaman's wages, the defence was that the service were rendered as master. It appeared that libellant had been employed for some time as a seaman, and that the master desiring to stop ashore for a few trips, he and libellant went to the custom house, and the master caused libellant to be enrolled as master. Libellant made only one trip as master, but his name continued on the enrollment as master, and he reported and cleared at the custom house. It was held that he was entitled to a lien for seaman's wages except during the one trip through which he actually served as master. *Peterson v. Nellie and Annie*, 37 Fed. Rep. 217.

Ordinary laborers were employed by the freighter of a vessel, for the purpose of excavating and loading cargo, and went out and returned on the vessel as passengers. Their contract was made independently of the vessel, and the work done by them was for the freighter and on his credit, and not for the vessel or for her credit, or on that of the cargo, but during the passage they rendered slight and occasional help in working the ship, though such service did not appear to have been in obedience to orders, or otherwise than voluntary, and the vessel had a full complement of officers and men. It was held that the vessel was liable for their wages. *Sarah E. Kennedy*, 29 Fed. Rep. 264.

Seamen who had been hired for a

voyage were, without good reason, refused admission to the vessel at the beginning of the voyage, and could not get employment elsewhere. It was held that they had a lien for wages for the voyage. *Acorn*, 32 Fed. Rep. 638; *The Alanson Sumner*, 28 Fed. Rep. 670.

Claimant had chartered his vessel for a wrecking expedition, the charterer to furnish provisions and men and pay all wages. The libellants were the former crew, who had continued as such with knowledge of the charter, and under a contract made for them by claimant with the charterer. *Held*, no express agreement not to hold the vessel liable being shown, that the libellants were entitled to a lien for their wages. *L. L. Lamb*, 31 Fed. Rep. 29.

Libellants claimed a lien for wages against defendant tug-boat. The services had been performed as hands on canal boats belonging to owners of the tug, which the tug was regularly used to tow. It was held that the lien could not be supported. *Ida Meyer*, 31 Fed. Rep. 89.

The captain and crew of a vessel abandoned her in a foundering condition, saving some property belonging to her. The vessel and the articles saved were sold for \$500, under an agreement between the creditors, which was not signed by the seamen, to share *pro rata*, and the vessel was not found. It was held that the seamen had a lien on the \$500 for their wages in full. *Hart v. Proceeds of the Oakland*, 32 Fed. Rep. 234. See also *International*, 30 Fed. Rep. 375; *Flanagan v. United States etc. S. S. Co.*, 30 Fed. Rep. 202; *Andalina, L. R.*, 12 P. D. 1; 56 L. T., N. S. 171; *Live Oak*, 30 Fed. Rep. 78; *Shelbourne*, 30 Fed. Rep. 510; *Honora Carr*, 31 Fed. Rep. 842; *Lizzie Dun*, 30 Fed. Rep. 927; *Hunter*, 11 *Sawy. (U. S.)* 426; *Rob Roy*, 30 Fed. Rep. 696; *The Bolivar*, *Olc. Adm.* 480; *The Mary*, 1 *Sprague (U. S.)* 204; *The Louisa*, 2 *Woodb. & M. (U. S.)* 48; *Levering v. Bank of Columbia*, 1 *Cranch, C. Ct. (U. S.)* 152; *The Blohm*, 1 *Ben. (U. S.)* 228; *The Guiding Star*, 9 Fed. Rep. 521; *The Alanson Sumner*, 28 Fed. Rep. 670; *Poland v. The Spartan*, 1 *Ware (U. S.)* 134; *Sheppard v. Taylor*, 5 *Pet. (U. S.)* 675; *The Ole Oleson*, 20 Fed. Rep. 384.

1. *Scott v. Failes*, 5 *Ben. (U. S.)* 82;

The claim of seamen for their wages constitutes a lien upon the vessel, the freight, and the proceeds of the sale of both.¹

The Highlander, 1 Sprague (U. S.) 510; The Sirocco, 7 Fed. Rep. 599; Fisher v. The Galloway, C. Morris, 7 Phila. (Pa.) 572; The Canton, 1 Sprague (U. S.) 437; The Bombard, 8 Ben. (U. S.) 493; The Montauk, 10 Ben. (U. S.) 455.

1. In the case of shipwreck during the voyage, the seamen, if they remain by the ship and assist in the salvage, will be entitled to receive their wages out of the fragments of the wreck, if enough is saved to pay them, even though the entire freight be lost by the total destruction and loss of the cargo. Pitman v. Hooper, 3 Sumn. (U. S.) 50.

In the case of a general average in the course of a voyage, the wages of seamen do not contribute to the loss, though the ship, cargo and freight all do, and though thereby a part of the freight for the voyage is necessarily lost. In such a case it is plain that the loss of freight does not entitle the owner to make a *pro rata* deduction of the wages. Pitman v. Hooper, 3 Sumn. (U. S.) 50.

Where a vessel is abandoned at sea, the crew, shipped for an indefinite period, have a lien on her, in the hands of salvors, for their wages due at the last port of delivery, before the abandonment. The Joseph Stewart, Crabbe (U. S.) 218.

A libellant shipped in June, 1809, as a seaman, on a voyage from Marblehead to St. Petersburg, and thence back to the United States; the outward cargo was duly delivered, a return cargo to the same amount was taken on board, and the ship sailed in June, 1810, on her homeward voyage, in the course of which she was captured by some Danish gun brigs, and afterwards condemned. The libellant continued on board the ship until her condemnation, when he was discharged. Under the treaty between the United States and the king of Denmark, of the 28th of March, 1830, providing a certain sum in full for compensation of services, detentions and condemnations by the king of Denmark, the respondent, administrator of the ship and cargo, received \$19,115 in full for his proportion of the indemnity granted, being about one-third of his loss (\$61,416). It was held that the libellant was entitled to recover of the respondent full wages, and

not simply a *pro rata* proportion, according to the amount received by the ship owner, and this though the commissioners under the treaty made no express allowance on account of the freight. Pitman v. Hooper, 3 Sumn. (U. S.) 50.

Seamen have a lien for wages upon the proceeds of the sale of articles belonging to an abandoned vessel, which were saved by the master and crew. Hart v. Proceeds of the Oakland, 32 Fed. Rep. 234.

The master of a fishing vessel hired her of the owners for the season, and undertook to pay the men, certain of whom were hired on wages. The vessel was lost during the season, and parts of her tackle, etc., were saved, and sold in Nova Scotia. It was held that the owners were liable to an action in admiralty by the men for their wages, to the extent of the proceeds of the sale of the wreck. The men had a lien on the vessel, and a fund arising out of a *res* upon which seamen have a lien can be followed in admiralty though the thing itself has been destroyed, or is out of the jurisdiction. Flaherty v. Doane, 1 Lowell (U. S.) 148.

Where the owner of a shipwrecked vessel appeared with a competent force, superseding the officers, and took the business of salvage out of the hands of the seamen, afforded the latter no subsistence, nor desired their aid, which they were willing to render, it was held that the seamen might recover wages *in rem* against the remnants of the vessel. The Massasoit, 1 Sprague (U. S.) 97.

Fishermen who are employed to go to the fishing grounds and to set the nets and clean the fish, are entitled to a lien, though they take no part in the navigation of the vessel. The Minna, 11 Fed. Rep. 759; The Ocean Spray, 4 Sawy. (U. S.) 105.

Wages of seamen in the whaling service are secured by lien upon the oil. The Antelope, 1 Lowell (U. S.) 130.

A seaman who ships for a voyage in violation of the acts prohibiting the slave trade is not entitled to his wages out of the proceeds of the forfeited vessel. The St. Jago de Cuba, 9 Wheat. (U. S.) 409. But *contra* if the seaman did not know of the illegal character of the voyage. Sheppard v. Taylor, 5 Pet. (U. S.) 675.

The lien for seamen's wages is prior and paramount to all other claims on the vessel,¹ but the claim must be asserted within a reasonable time, or a preference in its favor will not be allowed.²

The lien of seamen for wages is a personal privilege and is not assignable. If an assignment of the claim is made, the assignee has no standing in a court of admiralty to enforce it as a lien against the vessel.³ The representatives of a deceased seaman, however, may sue in admiralty for wages earned by the decedent in his lifetime,⁴ and a father may proceed *in rem* for wages of his minor son earned as a seaman.⁵

See in general *Brackett v. Hercules, Gilp.* (U. S.) 184; *The Monadnock, 5 Ben.* (U. S.) 357; *The Sailor Prince, 1 Ben.* (U. S.) 234; *Poland v. The Spartan, 1 Ware* (U. S.) 134; *Sheppard v. Taylor, 5 Pet.* (U. S.) 675.

Mere landmen are not entitled to a lien for services. *The Canton, 1 Sprague* (U. S.) 437; *The Ida Meyer, 31 Fed. Rep.* 89.

1. "The claim of mariner's wages has a priority above all other claims against the vessel, the freight and the proceeds of both into whose ever hands they come. It is a permanent lien, and secures to the mariner for his wages a preference above all other persons, and they may be enforced in admiralty against a *bona fide* purchaser, without regard to the title through which the purchaser claims." *Foster v. Steamboat Pilot, No. 2, 1 Am.L. Reg.* 403. See also *The Sailor Prince, 1 Ben.* (U. S.) 234; *U. S. v. Wilder, 3 Sumn.* (U. S.) 308; *The Charles Baylis, 25 Fed. Rep.* 862; *The City of Mexico, 28 Fed. Rep.* 207; *The Henry Warner, 29 Fed. Rep.* 601.

2. Thus a claim for three years' wages as a seaman, which is two years old, and no attempt has been made to collect it, and no excuse given for the delay, should be postponed to liens of other *bona fide* lienors. *The Nellie Bloomfield, 27 Fed. Rep.* 524.

But seamen's wages sued for during the season next after they accrue are not stale as against mortgages executed before the wages were earned. *The Live Oak, 30 Fed. Rep.* 78.

Where a seaman shipped for a part of a voyage is discharged at the termination of his engagement, without payment of wages, if he follows up the vessel, and immediately upon meeting her commences suit against her, his lien for wages is not destroyed, though

the vessel has made one or more voyages since his discharge. *Freeman v. The Jane, Crabbe* (U. S.) 178.

Seamen's lien for wages was held to be lost, rights of a *bona fide* purchaser having intervened, by several years' delay to sue, though during a considerable part of the time he did not know where she was. *The Artisan, 8 Ben.* (U. S.) 538.

When the ownership of a vessel has not been changed, and no appreciable injury has resulted to the owner, forbearance by a seaman to demand and collect his wages (here, continued for twenty-one months) does not impair his lien. *Fisher v. The Galloway, C. Morris, 7 Phila. (Pa.)* 572.

3. *Logan v. The Aeolina, 1 Bond* (U. S.) 267; *Rusk v. The Freestone, 2 Bond* (U. S.) 234; *The Gate City, 5 Biss.* (U. S.) 200.

4. In *Sims v. Jackson, 1 Wash.* (U. S.) 414, a mariner who shipped to perform a voyage from Philadelphia to the Batavia and back to Philadelphia, at a certain rate of wages per month, having performed the voyage to Batavia died there, and the vessel returned to the port from which she sailed. It was held that the administratrix of the deceased mariner was entitled to recover the wages which the intestate would have received had he lived and returned in the vessel. See also *Hart v. The Littlejohn, 1 Pet.* (U. S.) 115; *Walton v. The Neptune, 1 Pet.* (U. S.) 142; *Johnson v. The Coriolanus, Crabbe* (U. S.) 239. But see *Writer v. The Richmond, 2 Pet.* (U. S.) 263; *Natterstorm v. The Hazard, Bee Adm.* (U. S.) 441; also 2 *Am. Law J.* 359.

5. *Gifford v. Kollock, 3 Ware* (U. S.) 45; *Coffin v. Shaw, 11 L. Rep. N. S.* 463; *Lovrein v. Thompson, 1 Sprague* (U. S.) 355.

The father's right may be renounced

A seaman who is a part owner of the vessel in which he serves, is not thereby precluded from enforcing a lien in admiralty for wages.¹

by his voluntarily allowing his child the exclusive rights of the fruits of his labor; or may be forfeited by his neglecting to perform those parental duties which are the foundation of this right. *McGinnis v. The Grand Turk*, 2 Pittsb. (Pa.) 326.

The minor may sue in his own name if the father waives his privilege. *The David Faust*, 1 Ben. (U. S.) 187; *Wicks v. Ellis*, Abb. Adm. 444; *Burdett v. Williams*, 30 Fed. Rep. 697.

A father agreed to run a vessel on shares and to pay all the expenses of running her; and his minor son, being a member of his household, and living on board as a member of the father's family, acted as mate. It was held that no lien against the vessel could, under such circumstances, be acquired by either the father or son. *The Hattie Low*, 14 Fed. Rep. 880. To the same effect *The Modoc*, 20 Fed. Rep. 398.

1. Part Owners Serving as Seamen.

armed—This question was carefully considered in the case of *Foster v. Steamboat Pilot No. 2*, 1 Am. L. Reg. 403, where the court said: "It is contended that two of the libellants, though they might have been, as alleged, employed as mariners in the vessel, yet as part owners of it they could not by any known principles of law proceed by libel in admiralty for the recovery of the wages; that all the owners of the vessel were debtors for wages, and all equally liable; that the libellants could not separate themselves from the part owners and assert a separate claim against the partnership property, which, in effect, would be to claim against themselves as well as against their co-partners, nor could they claim against a *bona fide* purchaser of the partnership property under a judicial sale; that such claims for services to the partnership in a steam vessel or otherwise might be met with similar or equally good claims by other part owners, and that their separate or mutual charges and accounts can only be legally settled by the law of partnership. It was further urged that, if part owners of a vessel had in admiralty a lien for wages as mariners, the right would extend to all other admiralty liens to the exclusion of creditors, and thus open a door to fraudulent claims, which,

in most instances, it would be impossible to expose or successfully resist. The argument in this case is specious, but unsound. The owners of a steam vessel must from necessity, in a voyage of that vessel, be subject to mariner's wages: and if it should happen that one of their number should be employed as a mariner, such employment would be in a capacity distinct from, and unconnected with, the appropriate business partnership of that nature, the object of which is either to let the vessel out to freight, or for mutual adventure in vessel and cargo. As one of the crew, his name would regularly be included in the shipping articles for the voyage; and either by them or other contracts his station and rate of wages would be determined; and while subject to all the penalties and forfeitures, prescribed by the act of congress for a failure to perform his duties as a mariner, he would, as such, be entitled to the stipulated wages, and the triple remedy which the law provides for enforcing its payment—a lien upon the vessel, the freight and the proceeds of both regardless of partnership relations and liabilities, unless, by express contract, another way of securing his wages had been provided. Without such an agreement it would be fair to infer that his copartners in a vessel-regarded his right to wages as unconnected with, and beyond the control of the partnership. In pursuing the remedy of libel it would, therefore, be enough for the libellant to show, by the shipping articles or otherwise, that he shipped as a mariner, and, as such, was entitled to wages, and that his wages were due and unpaid. The act of congress, which secures this right, is in accordance with the policy and usage of maritime law, which regards with peculiar favor and tenderness the situation of seamen, by giving them a lien for wages paramount to all other claims, and a summary remedy for enforcing the right, unaffected by collateral matters or common law pleadings. But whatever doubt there may be as to the remedy, when a vessel is owned by several in strict partnership, there can be none in a case where they are merely part owners, as the respondents are alleged to be in the answer, and as they

A lien for the wages of seamen is not discharged by a sale of a vessel on execution against its owners.¹

(b) *By the Master*.—A master has no lien on the ship for his wages. This rule is based on the fact that the master trusts to the personal credit of the owner, and also on the fact that such a lien would be attended with great inconvenience and expense to the owners, if the master could enforce it abroad, for wages due him, and thus compel a sacrifice of the ship.²

must be taken to be in the absence of all controlling circumstances. The general relation of part owners of a vessel is that of tenants in common, and not as copartners; they are, therefore, not liable *in solido*, nor entitled, in the settlement of their accounts, to be governed by the principle of partnership. *Nichols v. Munford*, 4 John. Chan. R. (N. Y.) 522; 2 John. 611. There are exceptions, but this case is not one of them; and as liens may arise either from express or implied assignments, it is but a reasonable presumption, when not opposed by special or express contract, that part owners do not intend to rely solely upon the personal responsibility of each other to reimburse themselves for expenses and charges incurred upon the common property for the common benefit, but that there is a mutual understanding that they shall possess a lien *in rem*. Story's Partn. 444. The navigation of the western waters by steamboats is often attended with more than ordinary risk and loss; to lessen such risk it is not unusual for those about to engage in such business to unite in partnership with one or more persons, known to be skilful and trustworthy mariners, whose interest in the vessel, though generally small, is always sufficient to call into action the greatest amount of vigilance, ability and care of which they are capable, an advantage which it would be vain to expect from mariners bound to their duty only by the prospects of ordinary wages." See *Dowling v. The Reliance*, 1 Woods (U. S.) 284.

1. *Foster v. Steamboat Pilot No. 2*, Am. Law Reg. 403; *Taylor v. The Royal Saxon*, 1 Wall. Jr. (U. S.) 311; *Harris v. The Henrietta*, Newb. Adm. 284; *The Gazelle*, 1 Sprague (U. S.) 378; *The Julia Ann*, 1 Sprague (U. S.) 382; *McGinnis v. The Grand Turk*, 2 Pittsb. (Pa.) 326; 4 West L. Month. 80; *The Highlander*, 1 Sprague (U. S.) 510.

2. *Master*.—Following the rule of the

English admiralty, the courts of this country, from the earliest times, have held that the master should not be classed with the seamen in having the privileges against the ship for the payment of the wages. Various reasons have been assigned for this by elementary writers and learned judges. MR. JUSTICE STORY, in *Willard v. Dorr*, 3 Mason (U. S.) 91, says that it has generally been ascribed to the fact that the master, when he contracts, trusts to the personal credit of the owner, not quoting, but doubtless following, SIR WILLIAM SCOTT in *The Favorite*, 2 C. Rob. 232, who states that the master when he hires is supposed to stand on the security of his personal contract. In *The Grand Turk*, 1 Paine (U. S.) 73, LIVINGSTONE, J., remarks that, in addition to the foregoing reason, the master is not allowed a lien for his wages on account of the inconvenience and expense to which owners might be subjected if, in every dispute with the master, he could take their vessel out of their hands and thus compel them to submit to improper charges." The M. Vandercook, 24 Fed. Rep. 472. See also *The Grand Turk*, 1 Paine (U. S.) 73; *Phillips v. The Thomas Scattergood*, Gilp. (U. S.) 1; *Revens v. Lewis*, 2 Paine (U. S.) 202; *Gardner v. New Jersey*, 1 Pet. Adm. 223; *The Melita*, 3 Blat. L. Trans. 133; *The Eolian*, 1 Biss. (U. S.) 321; *The Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *The Dubuque*, 2 Abb. (U. S.) 20; *Vowell v. Bacon*, 4 Cranch U. S. (C. C.) 97; *The Island City*, 1 Lowell (U. S.) 375; *Fisher v. Willing*, 8 Serg. & R. (Pa.) 118; *The Imogene M. Terry*, 19 Fed. Rep. 463; *The J. L. Pendergast*, 32 Fed. Rep. 415; *The Hattie Low*, 14 Fed. Rep. 880.

The master of a vessel has no lien upon a vessel for services as a pilot, where he acts in both capacities. *The Eolian*, 1 Biss. (U. S.) 321.

The rule of law that the captain of a vessel has no lien upon it for his wages is not applicable to a person who, though

(c) *By Subordinate Officers.*—Subordinate officers and employes of a ship are in the same position as seamen, and have a lien for their wages.¹

calling himself captain, neither contracts directly with the owners nor has any charge for freights and moneys, but is, except in name, an ordinary seaman. *The Imogene M. Terry*, 19 Fed. Rep. (U. S.) 463.

A man being sent for by one of his friends made a journey to get employment as master of a vessel; it was held that he could not recover the expense of the journey from the owner, though the owner knew that he was so sent for, his compensation dating only from the time when the contract of the employment was made. *Kells v. Boyd*, 31 Fed. Rep. (U. S.) 631.

The libellant sued *in rem* to recover wages due him as master of a certain bark, claiming a lien under the British Merchant Shipping act, upon the theory that the bark was a British vessel. The libellant was a citizen of this country and made the contract to act as master in the city of New York with the real owner of the vessel, also a citizen of this country, in possession under a mortgage with irrevocable power of attorney. The vessel was registered in the name of a British subject, but this fact was unknown to the libellant at the time of making the contract. It was held, as between the contracting parties, the vessel was to be considered as an American vessel, and a lien of a master for wages under the laws of Great Britain did not attach. *Chisholm v. The J. L. Pendergast*, 32 Fed. Rep. 415.

One who was actually employed and served as master cannot support a lien for wages by showing that, in the application for a fishing licence, he was misrepresented as a seaman. *The John A. Morgan*, 28 Fed. Rep. 895.

Though the master of a vessel has no lien for wages, his claim being a maritime one, he may be paid from the surplus of the proceeds, as against the owner. *Adams v. Wyoming*, 2 N. J. L. J. 275.

The master of a vessel has no lien on the cargo of the vessel for his wages beyond the amount of the freight thereof; and where, for any reason, he does not unload the cargo, he is only entitled to a lien upon such of the freight as the vessel has actually earned, that being the freight less what it costs

to unload. *The Arcturus*, 17 Fed. Rep. 95.

The sailing master of a yacht is entitled to a lien for his wages. *The Carlotta*, 30 Fed. Rep. 378.

1. A purser hired for a year on a vessel making regular trips between ports has a lien for his wages for the entire year and may enforce it before the end of that year, if discharged without cause. *The Wanderer*, 20 Fed. Rep. 655.

Engineer.—Under a charter of a steam lighter, the owner had the right to name the engineer, but all wages were to be paid by the charterer. The owner nominated the engineer and fully explained to him the provisions of the charter; but no special reference was made to the question of lien. It was held that the engineer was entitled to a lien on the vessel for his wages. *International*, 30 Fed. Rep. 375; *The Murphy Tugs*, 28 Fed. Rep. 429.

The engineer and mate of an enrolled towboat, employed in towing vessels in and about a harbor, have a maritime lien upon the steamer for their wages. *The May Queen*, 1 Sprague (U. S.) 588.

Upon a libel for wages for services as engineer etc. of a tug, it appeared that the services were rendered under an oral contract in the nature of a charter of a tug by her owner to the libellant; but that this contract had been abandoned by the parties. It was held that the abandonment left the libellant at liberty to sue for wages, and that unless rights of third persons had arisen, his wages were a lien upon the tug. *The Louie Dole*, 11 Biss. (U. S.) 479.

A part owner of a vessel condemned in admiralty will not be permitted to assert a claim for his wages as engineer of the vessel against creditors who have liens against it for which he may be personally liable. *Petrie v. The Coal Bluff No. 2*, 3 Fed. Rep. 531.

Mate.—Where the owners of goods shipped on a vessel and sold by the mate while temporarily acting as master in a foreign port, brought an action *in rem* for compensation, and the mate interposed his demand for wages, which were allowed by the court as his services as mate, leaving him to an action *in personam* against the owners for his

(*d*) *By Other Persons.*—A maritime lien for services is usually accorded to stevedores, laborers and other persons upon a foreign vessel, when the services are rendered at the request of the master. It was formerly held that a stevedore's contract for loading a vessel was not within the admiralty jurisdiction, but that his contract for unloading was. The tendency now is to hold that a stevedore's contract, both for loading and unloading, if made with the master, is binding on the ship.¹

services as master, it was held that in such action the libellants could not compel the mate to apply the surplus of proceeds in his hands to his claim for wages as mate. He had a lien on that fund as against the owners for his wages as master. *The Leonidas*, Olc. Adm. 12.

Cook.—On a libel for cook's wages on a schooner, it appeared that libellant agreed generally to perform services to pay for his transportation and board. The cook was taken sick and libellant served as cook through a long and stormy voyage, the schooner being blown far out of her course. It was held that he was entitled to cook's wages, and this although the master had procured his signature to shipping articles which were not read to him and of the contents of which he was not informed, he being, moreover, unable to read. *Johnson v. Frank S. Hall*, 38 Fed. Rep. 258.

The cook of a tug had an agreement with the master to board the crew for so much a week. It was held that neither under the general maritime law nor the law of New Jersey could the cook impose a lien on the tug for the price of the provisions purchased by him. *The William A. Levering*, 35 Fed. Rep. 783.

Physician.—In *Gardner v. The New Jersey*, 1 Pet. (U. S.) 223, it was held that a physician employed by contract on board a vessel has no lien for his fees.

Quarantine commissioners have a lien for attending to sick sailors. *Platt v. The Georgia*, 34 Fed. Rep. 79.

The *ship's husband* ordinarily has no lien upon the ship for advances. *The Larch*, 2 Curtis (U. S.) 427; *The Sarah J. Weed*, 2 Lowell (U. S.) 555; *The J. C. Williams*, 15 Fed. Rep. 558; *White v. Americus*, 19 Fed. Rep. 848; *The Esteban de Antunano*, 31 Fed. Rep. 920; *The Raleigh*, 32 Fed. Rep. 633; *Minturn v. Maynard*, 17 How. (U. S.) 477; *The Tangier*, 2 Lowell (U. S.) 7; *The Cabot Abb.* Adm. 150.

1. Stevedores.—This subject was carefully considered by DEADY, J., in *The Canada*, 7 Fed. Rep. (U. S.) 119, who, in delivering the opinion of the court, said: "To my mind it is very plain that the services of a stevedore are maritime in their nature. A voyage cannot be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. Indeed, it is an essential part of such transportation. Freight is not due or earned until the cargo is at least placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service because it is or may be performed partly on shore is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect. Without the services performed by the libellants *The Canada* would have been unable to accomplish her voyage, or to commence another one. The ship was in a foreign port, and the master without funds or credit. Standing in the place of the owner, he was under obligation to deliver the cargo of iron as he did. How was he to procure the necessary labor otherwise than upon the credit of the vessel? As it turns out, the owners are insolvent, the freight is hypothecated, the master is probably unable to pay, and, unless the ship is liable, the libellants will lose their labor, for which the ship or owners have received this value from the freighters. Under these circumstances it would not only be an inconvenience but a gross failure of justice if the libellants were denied the right to recover from the vessel for the labor thus performed upon its account and credit. In my judgment the law and the right of this case are with the libellants, and I decline to follow the decisions to the contrary."

In *The Wivanhoe*, 26 Fed. Rep. 927, HUGHES, J., said: "I see no reason why

a stevedore's contract for loading, if made with the master of the vessel, is not to be deemed maritime. On the other hand, I can well perceive that if a stevedore makes a contract with one who wishes to ship merchandise on a vessel, to put the merchandise on board, both being landsmen, and neither having any other mercantile relation to the vessel, I say I see no reason why such a contract should be held binding on the ship. But where the master himself employs to put and stow his cargo on board, the contract seems to me to be as distinctly maritime as any other contract which the master may make with a landsman touching the vessel herself or her cargo."

The rule as laid down in the above cases has been applied in *The Roberts v. Windermere*, 2 Fed. Rep. 722; *The Circassian*, 1 Ben. (U. S.) 209; *The George T. Kemp*, 2 Lowell (U. S.) 477; *The Esteban de Antunano*, 31 Fed. Rep. 920; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Senator*, 21 Fed. Rep. 191; *McCarty v. The Senator*, 1 Flippin (U. S.) 609; *The Velox*, 21 Fed. Rep. 479; *The Kate Tremaine*, 5 Ben. (U. S.) 60; *The Scotia*, 35 Fed. Rep. 916. It is also to be inferred from the decision in *The Emily Souder*, 17 Wall. (U. S.) 669.

The earlier cases *contra* are *Paul v. The Bark Ilex*, 2 Woods (U. S.) 229; *Cox v. Murray*, 1 Abb. Adm. 340; *McDermott v. The S. G. Owens*, 1 Wall. Jr. C. C. (U. S.) 370; *The Amstel*, B. & H. Adm. 215; *The Joseph Cunard Olc.* Adm. 123; *The L. A. Barnard*, 2 Fed. Rep. 712.

But laborers employed by the head stevedore are not entitled to a lien upon the vessel. In the *Hattie M. Bain*, 20 Fed. Rep. 389, a libel was filed by several persons claiming wages due them for stevedore work in unloading a cargo of logwood. The head stevedore was one McAllister, by whom most of the libellants were originally employed. The testimony showed that a number of them being informed that he was not to be trusted to pay them, went to the captain and told him that they would stop work unless he would see them paid, and that the captain being in haste for the discharge of the cargo promised that he would see that they were paid. The captain admitted that on the last day he employed two of the men, but denied that he employed or promised to pay any others. BROWN, J., in delivering the opinion of the court said:

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"As respects those workmen to whom the captain's promise, if any, was collateral only to the obligation of McAllister, and who did not work on the faith of the captain's promise, no recovery can be had, for it was McAllister's debt, and it is impossible, under the present known customs, that workmen engaged by the head stevedore should not understand that they should look to him for their pay. The old law of the Consulado expressly provided that where the workmen knew the work was done by a contractor by the job the ship could not be seized. Vol. 2, ch. 54, § 83; *The Mark Lane*, 13 Fed. Rep. 800. But the Consulado also declares that if the patron (captain) promise to pay the workmen, and they work on the faith of it, though the work be let out to a contractor by the job, that promise must be made good. Chap. 54, § 85. Where the original employment is by another, and the alleged promise by the master is disputed, no liability of the ship can be admitted, unless the court is clearly satisfied that the work itself was done on the faith of the master's promise; a subsequent promise by the master to see the men paid is a mere collateral promise and insufficient. In the present case I think this is made out in regard to only the libellants, and I therefore allow as follows: . . . and I disallow the other claims." See also *The Whitaker*, 1 Sprague (U. S.) 229; *The Director*, 34 Fed. Rep. 57; *The Mark Lane*, 13 Fed. Rep. 800; *The Hattie M. Bain*, 20 Fed. Rep. 389.

Watchmen.—Where a watchman's services are connected with the voyage performed, or to be performed, and for the benefit of all interested, he may have a maritime lien for his wages. *The Erinagh*, 7 Fed. Rep. 231.

But there is no lien for wages of a watchman employed on a vessel while lying up in port. *The John T. Moore*, 3 Woods (U. S.) 61; *Phillips v. Thomas Scattergood*, 1 Gilp. (U. S.) 1; *Gurney v. Crockett*, Abb. Adm. 490; *The Harriet Olcott*, Abb. Adm. 229.

Nor is a watchman placed in charge of a vessel by the master entitled to recover for services rendered after the ship is seized by a marshal in execution of process. *The Erinagh*, 7 Fed. Rep. 231.

The shipkeeper of a domestic vessel which is being repaired for a new use has no lien on her for his wages. *The Island City*, 1 Lowell (U. S.) 375.

A watchman was employed on a

5. For Towage.—Towage is a maritime service for which a lien is accorded,¹ but the service must have been rendered on the credit of the ship and not on the personal credit of the employers.² The service must be actually rendered to carry a lien; an unexecuted contract to perform towage is not enough.³

6. For Pilotage.—The pilot has a lien for services rendered to a vessel coming in and going out of port.⁴

7. For Wharfage.—A contract for wharfage is a maritime contract. If the vessel is a foreign one, or belongs to a port of a

steamer in port, it being, among other things, his duty to move her from one anchorage to another, which he did on several occasions. He also procured labor and materials for her repair and preservation. *Held*, that he had a maritime lien on the vessel enforceable in admiralty. *The Maggie P.*, 32 Fed. Rep. 300.

Brokers and Agents.—A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man for services in shipping a crew for the vessel and for advances for their wages. But he has no lien for services in drawing a contract between the owner of horses shipped as part of her cargo and the hostlers who accompanied her to take care of the horses. *The Gustavia*, B. & H. Adm. 189; *The Crystal Stream*, 25 Fed. Rep. 575; *The J. C. Williams*, 15 Fed. Rep. 558.

In the case of *The Thames*, 10 Fed. Rep. (U. S.) 848, the court held that a shipping broker has no lien for services for procuring a charter party, on the ground that this was clearly separable as a preliminary service leading to a maritime contract, and was not of itself a maritime service. See also *the Paola R.*, 32 Fed. Rep. 174; *The Medora*, 2 Wood & M. 92.

No lien is allowed by the general admiralty law for services of an agent employed by a charterer to solicit freight; such services are not maritime. *The Crystal Stream*, 25 Fed. Rep. 575.

Compressing Cotton.—There is no maritime lien allowed for services in compressing cotton for shipment, done inland, and before any contract of affreightment charging the vessel is made. *The Paola R.*, 32 Fed. Rep. 174. See also *The Joseph Cunard*, Olc. Adm. 120.

But where a compress company contract with the master of the ship for compressing her cargo of cotton and putting it on board, there is a maritime lien for the services rendered. *The*

Wivanhoe, 26 Fed. Rep. 927. In deciding this case HUGHES, J., said: "The analogy of a contract for compressing the cotton constituting the cargo of a ship with the contract of a stevedore seems to be complete. In the case at bar. I infer from the language of libel, which is given above, that the ship had engaged to carry certain 2,023 bales of cotton to Liverpool; that in the original form of the bales it was impracticable to stow such a number of them on board, that to meet this difficulty the ship herself employed the compress company to reduce the bales to convenient size for shipping, and to put them on board; and that the libellant faithfully executed this contract. In its mere statement, the case seems to me to be clearly within the admiralty jurisdiction, irrespectively of the circumstance whether the vessel was domestic, which she was not, or foreign, which she was."

Clerks.—A clerk employed on shore to keep accounts of a vessel has no lien for his wages, either under the general law or under the Pennsylvania act of April 20th, 1858. *James Dalzell's Son & Co. v. Daniel Kaine*, 31 Fed. Rep. 746; *Constantine v. The River Queen*, 2 Fed. Rep. 731.

1. *The Mystic*, 30 Fed. Rep. 73; *The Alabama*, 30 Fed. Rep. 207; *The John Cuttrell*, 9 Fed. Rep. 777; *The Murphy Tugs*, 28 Fed. Rep. 429.

There is no lien on a vessel for services in towing her at her home port. *James Dalzell's Son & Co. v. Daniel Kaine*, 31 Fed. Rep. 746. But see *The General Cass*, 1 Brown Adm. 334; *The John Cuttrell*, 9 Fed. 777.

2. *The J. M. Welsh*, 8 Ben. (U. S.) 211.

3. *The Prince Leopold*, 9 Fed. Rep. 333.

4. *The Pirate*, 32 Fed. Rep. 486; *The Edith Godden*, 25 Fed. Rep. (U. S.) 511; *The Talisman*, 23 Fed. Rep. 111; *The Harriet S. Jackson*, 32 Fed. Rep. 110. See also *PILOTS*.

State other than that where the wharf is situated, the claim of the wharfinger is a maritime lien against the vessel, which he may enforce by a proceeding *in rem*.¹

1. **Wharfage.**—In the leading case on this subject, *Ex parte Easton*, 95 U. S. 68, MR. JUSTICE CLIFFORD said: "Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water craft of every name and description, whether employed in carrying freight or passengers or engaged in the fisheries. Compensation for wharfage may be claimed upon an express or implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation. Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses; but the great and usual object of such erections is to advance commerce and navigation by furnishing resting places for ships, vessels and all kinds of water craft, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers. Nor is the nature of the service or the character of the contract changed by the circumstances that the water craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail ships and even steamships and vessels are frequently propelled by tugs, and yet if they secure a berth at a wharf, or in a slip at the place of landing or at the port of destination, and actually occupy the berth as a resting place or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive

power. Neither canal boats nor barges ordinarily have sails or steam power, but they usually have tow lines, and it clearly cannot make any difference as to their liability for wharfage whether they are propelled by steam or sails of their own, or by tugs or horse or mule power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting place, or for the purpose of loading or unloading cargo, or receiving or for landing passengers. Goods to a vast amount are transported by such means of conveyance, and all experience shows that boats of the kind require wharf privileges as well as ships and vessels, or any other water craft engaged in navigation. *The Northern Belle*, 9 Wall. (U. S.) 526. Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of lading and unlading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured. *Wendell v. Baxter*, 12 Gray (Mass.) 494. Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers. Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat. Carrying vessels would be of little or no value unless they could be loaded, and they are usually loaded from the wharf, except in a limited class of cases, where lighters are employed, the vessel being unable to come up to the wharf in consequence of shallow water. Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port an actual delivery of the goods into the possession of the owner or consignee or at his warehouse, is not required in

8. For Salvage.—Salvors have a maritime lien for salvage upon the property sold.¹ The vessel, however, is not chargeable with the portion of salvage due from the cargo.²

9. For Damages.—A maritime lien for damages arises where an injury is committed by the negligence of the master and crew of a vessel. In such a case the person injured has a lien on the vessel in fault. It is founded on considerations of public policy for the prevention of careless navigation, and takes precedence of prior liens for money borrowed, wages, pilotage, etc.³

10. For Safe Transport.—The owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport and right delivery of the same. Such a lien, however, will not be enforced in the courts of admiralty of the United States, in favor of citizens or subjects of a foreign country whose courts

order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid, if the different consignments be properly separated, so as to be open to inspection, and conveniently accessible to their respective owners. The Eddy, 5 Wall. (U. S.) 481. These remarks are sufficient to show the wharves, piers or landing places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water craft is a foreign one, or belongs to a port of the State other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf." See also *The Kate Tremaine*, 5 Ben. (U. S.) 60; *The John Walsh*, 24 Int. Rev. Rec. 207; *The J. H. Starin*, 15 Blatchf. (U. S.) 473; *The Dora Mathews*, 31 Fed. Rep. 619; *The Mary Kate Campbell*, 31 Fed. Rep. 840; *Elwell v. Fabre*, 52 Hun (N. Y.) 70; *Woodruff v. Covered Scow*, 30 Fed. Rep. 269. See also *WHARVES AND WHARFAGE*.

1. "Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit *in rem* against the ship or cargo, or both where both are saved in whole or in part. Such a remedy is the one usually pursued, and in view of the fact that the lien is maritime and exists

quite independently of possession, it ordinarily affords the best mode of securing the payment of their salvage claims. . . . Compensation in such a case is usually enforced by a libel *in rem*, but where the parties rendering the salvage service are employed and sent out by the owners or insurers, the persons employed may proceed *in personam* against their employers for compensation, even though they were unsuccessful, unless they contracted that their right to compensation should depend upon their success as in the ordinary case of salvage service, without being antecedently employed. Employers, in such a case, are liable to those rendering service, under such circumstances, in a suit *in personam* within the last clause of the admiralty rule, but there is no authority for holding that salvors may proceed against the ship and cargo *in rem* and *in personam* against the consignees of the cargo in the same libel." *Mayflower v. The Sabine*, 101 U. S. 384.

A salvor must bear his share of a loss by a depreciation in value pending his suit. He is *sub modo* a joint owner, and, in the absence of an express contract, cannot recover on any theory of being a creditor with a lien to be satisfied at all hazards to the full extent of the proceeds in the registry. *The Carl Schurz*, 2 Flippin (U. S.) 330.

The fact that cotton is owned by the government does not exempt such cotton from a lien for salvage. *The S. L. Davis*, 6 Blatchf. (U. S.) 138. See also *SALVAGE*.

2. *The Alaska*, 23 Fed. Rep. 597.

3. *Abb. Shipp.* 533.

"Liens for reparation for wrong done

are not clothed with the power to give the same remedy to citizens of the United States, under similar circumstances.¹

are superior to any prior liens for money borrowed, wages, pilotage," etc. *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104. See SHIPPING.

1. **Safe Transport of Cargo.**—In the leading case of *The Maggie Hammond*, 9 Wall. (U. S.) 435, MR. JUSTICE CLIFFORD said: "Ship owners contract for the safe custody, due transport and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfilment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement. The *Eddy*, 5 Wall. (U. S.) 493; *Dupont v. Vance*, 19 How. (U. S.) 168; *The Bird of Paradise*, 5 Wall. (U. S.) 545; *Alsager v. Dock Co.*, 14 Meeson & Welsby 798; *Foster v. Colby*, 3 Hurlstone & Norman 715. Consequently where the lien or privilege is created by the *lex loci contractus*, says JUDGE STORY, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. Story on the Conflict of Laws (6th ed.) 428; 3 Burge's Commentaries, 770, 779. Such a lien is regarded as being in effect an element of the original contract, but in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, the admiralty courts of the United States will not, in general, entertain jurisdiction to enforce the maritime lien or privilege in favor of shipper or ship owner in a case where the libellant would not be entitled to such a remedy in the place where the contract was made or where the cause of action set forth in the libel accrued. *The Infanta*, Abb. Adm. 263; *Whiston v. Stodder*, 8 Martin's O. S. (La.) 95, 134; *The Havana*, 1 Sprague (U. S.) 402; *The Jerusalem*, 2 Gallison (U. S.) 191; *The Kenneway*, Abb. Adm. 321; *Brig Napoleon*, Olc. Adm. 208; *Brig Nestor*, 1 Sumn. (U. S.) 73; *Reed v. Hull of a New Brig*, 1 Story (U. S.) 244; *Pope v. Nickerson*, 3 Story (U. S.) 465. Where the lien exists only by some local statute, and

is not given by the maritime law, admiralty courts in another jurisdiction can no more take jurisdiction of a case not within the local statute than the courts of the country could do where the cause of action arose, but where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the federal courts by the judiciary act. Courts of justice and text writers everywhere concede that the ship, under the maritime law, is bound to the merchandise and the merchandise to the ship independent of any local usage or statute; but it is true, as suggested by the appellants, that such a lien cannot be enforced in some countries, because the courts of admiralty, which alone are competent to give effect to the same by a proceeding *in rem*, are not, as now constituted, invested with any authority, except to a very limited extent, to exercise such a jurisdiction. Maritime liens are of little or no value in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable; but the denial of such jurisdiction to her admiralty courts by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to enforce such remedies for the breach of a maritime contract. *The Rebecca*, Ware (U. S.) 188; *The Phebe*, Ware (U. S.) 263; *Abbott on Shipping* (ed. 1854) 167. Such a remedy will not in general be accorded in our courts of admiralty to the citizens or subjects of a foreign country whose courts are not clothed with the power to give the same remedy in similar controversies to the citizens of the United States, but the question whether they will do so or not is not a question of jurisdiction in any case, as it is clear they may do so if they see fit, and in some cases they will take jurisdiction to prevent loss and injustice, especially if no ob-

IV. LIEN OF THE SHIP ON THE CARGO—1. For Freight.—A ship owner, as carrier by water, has a lien upon the cargo for freight.¹ He may retain the goods until the freight is paid, but if he unconditionally delivers them to the consignee his lien is lost.²

jection is made by the consul of the nation to which the vessel belongs." See also *Pearce v. The Thomas Newton*, 41 Fed. Rep. (U. S.) 106; *The Waldo*, 2 Ware (U. S.) 161; *The Adriatic*, 16 Blatchf. (U. S.) 424; *The Invincible*, 3 Sawy. (U. S.) 176. For cases illustrating the character of the negligence which will render a ship liable for the loss or injury of the cargo, see SHIPPING.

1. Lien for Freight.—"Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usage of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is that the ship owner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the district court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the ship owner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid and is lost by an unconditional delivery to the consignee. *Bags of Linseed*, 1 Blackf. (U. S.) 108. Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is that the law will uphold the agreement and support the lien. *Mordecai v. Lindsay*, 19 How. (U. S.) 199; *The Eddy*, 5 Wall. (U. S.) 481; *The Bird of Paradise*, 5 Wall. (U. S.) 545. See also FREIGHT, vol. 8, p. 900.

2. Delivery of Goods as Waiver of Lien.—The lien of a ship owner for freight being merely the right to retain the goods until the freight is paid, is ordinarily lost by an unconditional surrender of the goods to the consignee. But if it appear that the cargo was delivered to the consignee with an understanding that the lien was to continue, a court of admiralty will consider that the ship owner still continued constructively in possession so far as to preserve his lien. Such an understanding must, however, clearly appear, or be plainly inferable from the established local usage of the port. "Courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interest if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by fault of the ship. It is his duty, and not that of the ship owner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce both as to the ship owner and the merchant. It is true that such

2. For Demurrage.—A ship owner has a lien upon the cargo for demurrage, enforceable in admiralty by proceedings *in rem*.¹

V. PRIORITY OF LIENS—1. General Principles.—As a maritime lien is an interest in the vessel itself, the proceeds of the sale of

a delivery, without any condition or qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship owner reserves the right to proceed *in rem* to enforce it if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods for the time in the warehouse, and not as an absolute delivery, and, on that ground, will consider the shipowner as still constructively in possession, so far as to preserve his lien and his remedy *in rem*." Bags of Linseed, 1 Black. (U. S.) 108. See also 151 Tons of Coal, 4 Blatchf. (U. S.) 368; Cutler v. Rae, 7 How. (U. S.) 728, 729; Dupont de Nemours & Co. v. Vance, 19 How. (U. S.) 162, 171. See generally FREIGHT, vol. 8, p. 900; SHIPPING.

1 In *Hawgood v. 1310 Tons of Coal*, 21 Fed. Rep. (U. S.) 681, DYER, J., after referring to *Fulton v. Blake*, 5 Biss. (U. S.) 371, 375, which decided that a consignee must pay damages for detention, whether demurrage was noted on the bill of lading or not, continued as follows: "Why has not the ship owner also a lien on the cargo for demurrage, and why may not such a lien be enforced in the admiralty? Demurrage is merely an allowance or compensation for the delay of detention of a vessel. The *Apollon*, 9 Wheat. (U. S.) 362. It is only an extended freight or reward of the vessel in compensation of the earnings she is improperly caused to lose. *Sprague v. West*, 1 Abb. Adm. 548; *Holt, Rule Road*, pt. 3, ch. 1. Why should the right of a ship owner be limited in the admiralty

to a common law lien, when in fact that right is dependent on the law merchant, which extends the lien or privilege of all charges, damages and expenses growing out of the affreightment? By the general maritime law, the ship is bound to the merchandise and the merchandise to the ship. It is the doctrine of the law merchant that the master or ship owner contracts rather with the merchandise than the shipper, and, as is remarked by JUDGE SHEPLEY in *Donaldson v. McDowell*, 1 Holmes (U. S.) 290. "It necessarily follows from this that the merchandise is liable for whatever the shipper is liable." It is unimportant that demurrage claim is unliquidated. Admiralty takes cognizance of many claims that are unliquidated, such as salvage claims, demands for injury to goods and claims on account for nondelivery of cargo. In the present extended jurisdiction of the admiralty and liberal recognition of the rights of parties interested in lake navigation and commerce, no sound reason is apparent why the ship owner's privilege or lien should not be extended to demurrage. The relation of the ship to the cargo and of the cargo to the ship is reciprocal. If the ship is bound to safely deliver the cargo to the consignee, without exemption from liability, except such as may be named in the bill of lading, the cargo ought to be answerable for the neglect of the consignee to duly receive it. The cargo may be labelled for the freight; why not for the extended freight which the vessel is improperly caused to lose, where as in this case, the consignee is the owner of the cargo? It may be labelled for general average and numerous other demands. "As in this country courts of admiralty have frequently exercised their jurisdiction to enforce the privilege where the cargo has been labelled for freight, general average, and other charges, there seems no just ground for making an exception and refusing a remedy for a violation of duty and right in the case of demurrage, which under circumstances like those in the present case, is as much a charge of damage which the master may lawfully demand, and for which he has a privilege against the cargo, as the

the vessel should be distributed according to the priorities of the liens themselves, and not according to priority of the proceedings to enforce them.¹

If the liens are for money advanced or for supplies, materials, or services in preparation for the same voyage, and are of the same rank, they are regarded as contemporaneous and concurrent with each other, and they will be discharged *pro rata*.²

freight itself, of which demurrage is only an extension." *Donaldson v. McDowell*, 1 Holmes (U. S.) 290. In that case, and in the case of *The Hyperion's Cargo*, 2 Lowell (U. S.) 93, it was adjudged that the ship has a privilege against the cargo for demurrage or damages, in the nature of demurrage, enforceable in the admiralty, when the cargo has not been received within a reasonable time, through fault of the consignee, although the bill of lading contains no demurrage clause; and it would, undoubtedly, have been sufficient had I simply referred to those cases, and to the reasoning of the learned judges who decided them, as quite conclusive upon the question." See also 275 Tons of Mineral Phosphates, 9 Fed. Rep. 209; *Gray v. Carr*, L. R., 6 Q. B. 522; *Francesca v. Massey*, L. R., 8 Exch. 101; *Lockhart v. Falk*, L. R., 10 Exch. 1032; *Peek v. Larsen*, L. R., 12 Eq. 378; *Fulton v. Blake*, 5 Biss. (U. S.) 371; *The M. S. Bacon*, 3 Fed. Rep. 344; *The Glover*, Brown Adm. 166; *The Orient*, 40 L. J., Adm. 29. See DEMURRAGE, vol. 5, p. 542.

1. "This rule permits all the equities of such liens to be considered and enforced instead of subordinating these equities to a mere race of diligence." *BROWN, J.*, in *The J. W. Tucker*, 20 Fed. Rep. 129.

In the case of *The Fanny*, 2 Lowell (U. S.) 508, *LOWELL, J.*, said: "The general rule in admiralty is that all lien holders of like degree share *pro rata* in the proceeds of the *res*, without regard to the date of their libels or suits, if all are pending together."

In the case of *The Lady Boone*, 21 Fed. Rep. (U. S.) 731, libellants filed a libel *in rem* against a steamboat for materials and supplies upon which a warrant of arrest was issued and the vessel seized by the marshal and the usual monition given. No claimant appeared, and on the day appointed for trial the default of all persons was entered. At the same time and before any decree was rendered in the cause,

Watson and others appeared and filed intervening petitions, claiming liens for materials and supplies. Libellant and the intervening petitioners proved their claims and a decree was entered in which the sums due the libellant and the several intervenors were ascertained, and the vessel ordered to be sold and the proceeds paid into the registry for distribution. The proceeds of the sale were not sufficient to pay in full the several sums decreed to the libellant and intervenors. *Wishon Brothers* moved the court to direct the payment of their claim in full out of the proceeds of the sale of the vessel in the registry, to the exclusion of the claims of the intervenors, upon the ground that priority in bringing suit gave them priority of right to payment; that having filed the libel on which the vessel was seized and held until she was sold, they were entitled to be paid in full before anything was paid on the claims of those who subsequently intervened. The court refused the motion, saying: "The great weight of authority supports the view that when the proceeds of the vessel are not sufficient to pay all the debts of a given rank, the creditor first filing a libel and arresting the vessel does not thereby acquire the right to have his debt paid in full, to the exclusion of other creditors, whose debts are of the same rank and equal merit, and who intervene and prove their debts before or at the time a final decree in the suit first brought is rendered." See also *The Superior*, 1 Newb. Adm. 176; *The Kate Hinchman*, 6 Biss. (U. S.) 367; *The General Burnside*, 3 Fed. Rep. 228; *The Arcturus*, 18 Fed. Rep. 748; *The Paragon*, 1 Ware (U. S.) 322; *The E. A. Barnard*, 2 Fed. Rep. 712; *The City of Tawas*, 3 Fed. Rep. 170.

2. *The Rapid Transit*, 11 Fed. Rep. 322; *The J. W. Tucker*, 20 Fed. Rep. 129; *The Paragon*, 1 Ware (U. S.) 322; *The Exeter*, 1 C. Rob. 173; *The Albion*, 1 Hagg. 333; *The Desdemona*, 1 Swab. 158; *The Saracen*, 2 Wm. Rob. 458;

If the liens are for damages by negligence or collision, and are such as cannot be treated as contemporaneous or concurrent, and there is no ground in equity for preferring the later ones, then the rule applies, *qui prior est tempore, potior est jure*.¹

The *M. Vandercook*, 24 Fed. Rep. 472.

"There are several well established cases where classes of lien holders, as between themselves, share *pari passu*, as, for instance, seamen who ship for the same voyage, salvors who are engaged in the same salvage service, men who furnish materials or supplies for the same voyage, freighters who claim under bills of lading for the same voyage, holders of bottomry bonds who act in concert with each other in making advances for repairs at the same time and place, and parties who sustain a loss by the same collision. These cases show that the rule contemplates not merely the date but the voyage. Mere subsequence in time does not give a right to priority of payment, unless one lien holder has been more efficacious than the other in preserving the ship and bringing it to its final destination." *Bump's Note to The De Smet*, 10 Fed. Rep. 490. See *The America*, 6 Law Rep. 264; *The Fanny*, 2 Lowell (U. S.) 508; *The Superior*, 2 Newb. Adm. 176; *The William F. Safford*, Lush. 69; *The Paragon*, 1 Ware (U. S.) 322; *The Exeter*, 1 C. Rob. 173; *The Constancia*, 4 Notes of Cases 285; s. c., 10 Jur. 845; *The Desdemona*, Swab. 158.

1. In the *Frank G. Fowler*, 17 Fed. Rep. 653, two collisions were caused at different times by the negligence of a tug in fulfilling contracts of towage. The district court awarded the fund paid into court by the owners of the tug to the parties injured by the later collision. On appeal to the circuit court the decree of the district court was reversed, *BLATCHFORD, J.*, saying: "This is a case where there was no priority of attachment or seizure of the vessel, although the libel for the second damage was first filed, and it is not a case where either claim can be considered as other than one sounding in damages for a tort. The contention on the part of the *Phoenix Insurance Company* is that the claims arising out of the two torts are to be paid in the inverse order of their creation, on the view that though they are claims of the same rank of privilege, it may very well be that among creditors he is to be preferred who has contributed most immediately to the

preservation of the thing;'. . . and 'that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage.' But the principle governing such cases is that 'the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination;' and 'that each foregoing encumbrance, therefore, is actually benefited by reason of the succeeding encumbrance.' This principle can have no place except where services are rendered, such as loaning money, furnishing supplies, making repairs, salvage, and claims arising out of contract generally. Such services benefit the vessel, making her better, preserve her, contribute to save her, or improve her, or keep her in running or going order for the benefit of all who have prior liens or claims on her. But a second tort or collision can have no such effect in reference to a party injured by a prior tort or collision. The second tort or collision does not benefit the vessel, or add to her value, or preserve her. It only tends to injure her, and the sufferer by the first tort or collision, in having recourse against the vessel after the second tort or collision, must take her as he finds her, damaged, perhaps, by a second collision. He ought not to lose the benefit of his lien arising out of the first tort or collision, unless the circumstances are such that in judgment of law he may fairly be held to have waived his lien, or postponed it, as regards the lien arising out of the second tort or collision. In the present case there was no waiver or postponement. No case cited declares any doctrine which sanctions the giving of priority in the present case to the *Phoenix Insurance Company*, except what is found in the case of *The America*, 6 Monthly Law Rep. (N. S.) 264. That case is not sustained by authority, nor is it sustainable on principle. There was nothing in the mere fact of the second tort to extinguish the lien arising out of the first tort, and, when both torts were of the same character, each arising out of negligence towards a tow in fulfilling a contract of towage, and each claimant

Where there are two liens for salvage, or where later improvements or advances are made for the preservation of former improvements or advances, then the rule is that such liens shall be discharged in the inverse order of their dates.¹

2. Priority of Various Claims.—The priority of one maritime lien over another depends in part upon the stage of the voyage, and in part upon the efficiency of subsequent advances or services in hastening the voyage to a conclusion, and preserving prior advances and improvements. Thus a lien for salvage is prior to all other liens; because the salvage service is usually the last rendered to the ship and preserves the interests of all prior claimants.² The wages of seamen are entitled to priority over all antecedent liens and all liens incurred during the voyage, except the lien for

arrests the vessel at the same time to respond, there is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor."

1. "Where the liens are of the same rank, there is often an equitable priority among them arising out of the character of the liens themselves, or the time when they accrued. A later lien for salvage is entitled to priority over a former salvage, because the last service preserved the benefit of the former. The same is true of successive repairs of a vessel on different voyages, or on different parts of the same voyage, or of liens on successive bottomry bonds. The later improvements or advances are for the preservation of the former, or for further improvements upon the vessel; and they have, therefore, an equitable priority. As regard such liens they shall be discharged in the inverse order of their dates. 3 Kent 197; *The Eliza*, 3 Hagg. 87; *The Rhodamante*, 1 Dods. 201; *The Bold Buccleugh*, 7 Moore P. C. 267; *The St. Lawrence*, 5 Prob. Div. 250; *The Fanny*, 2 Lowell (U. S.) 508; *The Jerusalem*, 2 Gall. (U. S.) 345."

2. Salvage.—In *The Athenian*, 3 Fed. Rep. 248, it was decided that in marshalling claims for payment from the proceeds of sale, salvage is entitled to be paid in preference to prior claims for seamen's wages. The court said: "The case being one of salvage, libellants are entitled to be paid first, even before the seamen whose wages are earned prior to these services, since it is owing to their exertions that any-

thing remains to which the lien of the seamen can attach." See also *The Selina*, 2 Notes of Cases 18; *Collins v. The Fort Wayne*, 1 Bond (U. S.) 476; *The Mary Ann*, 9 Jur. 94; *The Panthea*, 1 Asp. Mar. Law Cases 133; *The Gustav Lush*, 506; *The Sabina*, 7 Jur. 182.

But where the seamen do not abandon the ship, but stand by her, and aid in saving whatever is saved, then their lien for wages is entitled to priority over the lien of the salvors. *Dalstrom v. The E. M. Davidson*, 1 Fed. Rep. 259.

A claim for salvage of a vessel has priority over a claim for repairs and supplies. *The M. Vandercook*, 24 Fed. Rep. 472.

Salvage claims for property salvaged on the high seas, and brought by the salvors within the limits of the United States, are entitled to priority over the claims of the government for duties. *Merritt v. One Package of Merchandise*, 30 Fed. Rep. 195.

Where salvage services are rendered in getting a vessel off a reef, in the distribution of proceeds they are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of her cargo; and this priority is not ousted by the fact that one of the salvors had the promise of a third party to pay him if he could not collect from the vessel. *The Spaulding*, 1 Browne Adm. 310.

The fact that the salvor held a mortgage upon the vessel, not due, the mortgagors being the owners and in possession, does not deprive him of his preference. He cannot be considered in the light of an owner. *The Barney Eaton*, 1 Biss. (U. S.) 242.

Claim for salvage in pulling one ves-

salvage.¹ Material men who furnish materials at a later stage of the voyage are entitled to priority over those who furnished materials at an earlier stage.² Liens for reparation for wrong done are superior to any prior liens for advances, wages, towage and bottomry.³ A lien for repairs is entitled to priority over an antecedent bottomry bond;⁴ and a later bottomry bond is entitled to

sel away from the other after a collision was held superior to the claim of the other vessel for her damages sustained by the collision. The *Jeremiah*, 10 Ben. (U. S.) 326.

See generally SALVAGE.

1. *Priority of Lien of Seamen*.—As seamen perform the final service in bringing the ship to its destination their lien is the last to attach, and is consequently the first to be paid. The *Sailor Prince*, 1 Ben. (U. S.) 234; The *Augustine Kobbe*, 39 Fed. Rep. 559; The *Jennie Hayes*, 37 Fed. Rep. 373; The *Aina*, 40 Fed. Rep. 269; The *Live Oak*, 30 Fed. Rep. 78; The *Charles L. Baylis*, 25 Fed. Rep. 862; The *City of Mexico*, 28 Fed. Rep. 207; United States *v. Wilder*, 3 Sumn. (U. S.) 308; *Hart v. Oakland*, 32 Fed. Rep. 234; The *Dora*, 34 Fed. Rep. 343; The *Amos D. Carver*, 35 Fed. Rep. 665; The *Andalina*, L. R., 12 P. D. 1; The *Superior*, Newb. Adm. 176; The *America*, Newb. Adm. 195; The *Rodney*, 1 B. & H. Adm. 226; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236; *Logan v. The Aeolian*, 1 Bond (U. S.) 267; *Hatton v. The Melita*, 3 Hughes (U. S.) 494; The *Paragon*, 1 Ware (U. S.) 322; The *Leonidas*, Olc. Adm. 12; The *Virgin*, 8 Pet. (U. S.) 538; The *Hilarity*, 1 B. & H. Adm. 90; The *Madonna D'Ibra*, 1 Dod. 37; *Furniss v. The Magoun*, Olc. Adm. 55; The *Kammerhevie Rosenkrantz*, 1 Hagg. 62; The *William F. Safford*, Lush. 69; The *City of Tawas*, 3 Fed. Rep. 170; The *Athenian*, 3 Fed. Rep. 248; The *John T. Moore*, Woods (U. S.) 61; *Miller v. The Alice Getty*, 9 C. L. N. 315; The *Island City*, 1 Lowell (U. S.) 375; *Rusk v. The Freestone*, 2 Bond (U. S.) 234; The *St. Lawrence*, 5 Prob. Div. 250; The *Sidney Cove*, 2 Dod. 13; The *Union*, Lush. 128; The *Louisa Bertha*, 1 Eng. L. & Eq. 665; The *Mary Ann*, 9 Jur. 94; The *Janet Wilson*, Swab. 261; The *Mary H. Rech*, 9 Ben. (U. S.) 187; The *Orient*, 10 Ben. (U. S.) 620; The *Samuel J. Christian*, 16 Fed. Rep. 796.

The lien of seamen for wages takes priority over claims of the United States for penalties incurred by the

vessel for failure to keep posted the certificate of inspection, to have the name of the vessel painted upon the stern, or to carry sufficient life preservers, as required by statute; and it is immaterial that the seamen served with knowledge of such failures on the part of the vessel, as the statutes do not impose upon them any duty with respect thereto. *Jennie Hayes*, 37 Fed. Rep. (U. S.) 373. See generally SEAMEN.

2. The *Omer*, 2 Hughes (U. S.) 96; *Hatton v. The Melita*, 3 Hughes (U. S.) 494; The *Fanny*, 2 Lowell (U. S.) 508.

A lien for repairs or supplies is entitled to priority over antecedent claims for salvage—*Collins v. The Fort Wayne*, 1 Bond (U. S.) 476; and an antecedent claim for disbursement, pilotage and towage. The *Rodney*, 1 B. & H. Adm. 216.

3. "The maritime lien of damages, originating in the wrong of the master and crew of the vessel in fault, and founded on considerations of public policy for the prevention of careless navigation, takes precedence . . . of liens *ex contractu*. It absorbs, in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage and bottomry, leaving them to be enforced by proceedings against the person of the owners." *Abb. Shipp.* 533; *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104; The *M. Vandercook*, 24 Fed. Rep. 472; The *Grapeshot*, 22 Fed. Rep. 123; The *Young America*, 30 Fed. Rep. 789; The *R. S. Carter*, 38 Fed. Rep. 515; *Maria and Elizabeth*, 12 Fed. Rep. 627.

4. The *Aina*, a foreign vessel, lost her master by death. The mate in charge put into New York in distress. The mate being without funds, libellants, at the mate's request, took charge of the vessel and advanced money for expenses. The vessel was condemned as unworthy of repair, whereupon she was libelled by the crew, by libellants and by the holder of the bottomry bond. It was held that proper advances gave a lien prior to such bond. The *Aina*, 40 Fed. Rep. 269.

priority over an antecedent bond.¹ Maritime liens are preferred to domestic liens created by statute.²

In the case of the *Emily Souder*, 17 Wall. (U. S.) 666, the facts were as follows: In June, 1865, an American steamer, the *Emily Souder*, owned by residents of New York, and mortgaged to persons living there, whilst on a voyage to that port from Rio Janeiro lost her propelling screw and put into the port of Maranh, on the coast of Brazil, in distress. She was towed into port by another steamer for which she had signalled. The captain was without adequate funds to make the repairs required and furnish the vessel with supplies necessary to enable her to proceed on her voyage, or to pay the expenses of her towage into port, and of pilotage, custom house dues, fees of the consul of the port and expense of medical attendance upon the sailors. Both he and the owners of the vessel were unknown in Maranh, and without credit there. Under the circumstances the captain borrowed of the libellants the necessary funds to enable him to pay these several expenses, and gave them drafts on the owners of the vessel in New York for the amount. The court decided that the liens for the advances made at Maranh had priority over existing mortgages to creditors at home. MR. JUSTICE FIELD, in delivering the opinion of the court, said: "The fact that the vessel was, at the time the advances were made, under mortgage to the claimants, does not subordinate the lien of the libellants to the claim of the mortgagees. Funds furnished in a foreign port, under the circumstances and for the purposes mentioned in this case, have priority as a lien upon the vessel over existing mortgages. Advanced for the security and protection of the vessel, they were for the benefit of the mortgagees as well as of the owners. If liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as having any certain value, or as affording any reliable security."

Where a mortgagee permits a mortgagor to retain possession of the vessel, this will subject the vessel to such liens as may accrue under the mortgagor's management. *The Live Oak*, 30 Fed. Rep. 78.

The master of a vessel in a foreign port gave a note against the vessel for supplies, payable after arrival, and on her arrival in Boston she was libelled for the amount. Thereupon, by agreement with the owner that the lien should continue, she was taken to New York and there libelled. It was held that the note and costs at both places took precedence of a prior mortgage. *Bolten v. James L. Pendergast*, 30 Fed. Rep. 717.

The lien of a material man for repairs made to a foreign ship will be preferred, in point of right, to a bottomry interest, though the latter is prior in point of time, if it appears that the repairs were indispensable. *The Jerusalem*, 2 Gall. (U. S.) 345; *The Uncle Tom*, 10 Ben. (U. S.) 234; *Reeder v. The George's Creek*, 3 Am. Law Reg. 232; *The Charlotte Vanderbilt*, 19 Fed. Rep. 219; *The Norfolk*, 2 Hughes (U. S.) 123; *The George Prescott*, 1 Ben. (U. S.) 1; *Miller v. The Alice Getty*, 4 N. Y. W. Dig. 471; *Adams v. The Wyoming*, 2 N. J. L. J. 275; *Augustine Kobbe*, 37 Fed. Rep. 696; *The Mystic*, 30 Fed. Rep. 473.

A bottomry bond is entitled to priority to liens for supplies and repairs where, prior to its execution, the owner of the vessel was notified to assent to the bond or to raise the necessary funds by other means. *The Thomas Fletcher*, 24 Fed. Rep. 375.

A hypothecation of a vessel by her owner to secure a pre-existing debt, which in its origin gave no lien on the vessel, gives no priority to such hypothecation over a prior maritime lien on the vessel. *The Native*, 14 Blatch. (U. S.) 34.

A bottomry bond is in general entitled to priority over antecedent liens. *The Selina*, 2 Notes of Cases 86; *The William F. Safford*, Lush. 69; *The Aline*, 1 W. Rob. 111; *Furniss v. The Magoun*, Olc. Adm. 55; *The Mary*, 1 Paine (U. S.) 671; *The Duke of Bedford*, 2 Hagg. 294; *The Constancia*, 4 Notes of Cases 285; s. c., 10 Jur. 845. See also *BOTTOMRY*, vol. 2, p. 492.

1. *The Sydney Cove*, 2 Dod. 2; *Furniss v. The Magona*, Olc. Adm. 55; *The Constancia*, 4 Notes of Cases 285; s. c., 10 Jur. 845. See also *BOTTOMRY*, vol. 2, p. 493.

2. "The maritime law of the country

Certain miscellaneous cases of priority amongst liens are stated in the note.¹

is a part of the federal system, administered alone by the federal courts, and a concession of right to interfere with it in any respect by the States is difficult to reconcile with reason. That they may interfere, however, to some extent, as by creating liens for supplies furnished, and repairs made in home ports, is well settled, though the fact is rarely referred to by the courts without an expression of regret that it is so. *The Gen. Smith*, 4 Wheat. (U. S.) 438; *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Orleans v. Phebus*, 11 Pet. (U. S.) 175; *The St. Lawrence*, 1 Black (U. S.) 522; *The Lottawanna*, 21 Wall. (U. S.) 558. No further interference, however, has been permitted, and no instance is found in which such statutory liens have been allowed to displace or supersede liens created by the maritime law. They are but *quasi* maritime, have uniformly been considered by the courts, and are recognized and allowed only after all maritime liens proper are paid. The creditors holding them are creditors of the State, and it is permitted to direct the order in which their claims shall be paid. To allow State legislation a greater effect would be to concede the right to alter and change the maritime law of the nation in a most material respect. The right so to change and alter has been most emphatically denied (as in principle it must be) whenever the subject has been mentioned. *The Lattawanna*, 21 Wall. (U. S.) 580; *The St. Lawrence*, 1 Black (U. S.) 522; and other cases therein cited." See also *The Superior*, Newb. Adm. 176; *The St. Joseph*, 1 Brown Adm. (U. S.) 302; *The Harrison*, 2 Abb. C. C. (U. S.) 74; *The Favorite*, 3 Sawy. (U. S.) 405; *The City of Tawas*, 3 Fed. Rep. 170; *The John T. Moore*, 3 Woods (U. S.) 61; *Scott's Case*, 1 Abb. C. C. (U. S.) 336; *The Athenian*, 3 Fed. Rep. 248; *Collins v. The Fort Wayne*, 1 Bond (U. S.) 476; *The Lillie Laurie*, 4 Woods (U. S.) 312; *The John Richards*, 1 Biss. (U. S.) 106; *The Guiding Star*, 18 Fed. Rep. 263; *The Unadilla*, 8 Ben. (U. S.) 478; *The Rapid Transit*, 11 Fed. Rep. 322; *Stapp v. The Swallow*, 1 Bond (U. S.) 189. But see *The General Burnside*, 2 Fed. Rep. 228; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236; *The Dan Brown*, 9 Ben. (U. S.) 309.

Lien of Statutory Mortgage.—The lien of a mortgage on a vessel, duly recorded according to United States Rev. Stat., section 4192, is inferior to all strictly maritime liens, but is superior to any subsequent lien for supplies furnished in the home port, given by State legislation. *Reeder v. The George Creek*, 3 Hughes (U. S.) 584; *The Emily Souder*, 17 Wall. (U. S.) 666; *The Granite State*, 1 Sprague (U. S.) 277; *Scott's Case*, 1 Abb. C. C. (U. S.) 336; *Baldwin v. The Brandish Johnson*, 3 Woods (U. S.) 582; *Hatton v. The Melita*, 3 Hughes (U. S.) 494; *The Josephine Spangler*, 9 Fed. Rep. 773; *Miller v. The Alice Getty*, 9 C. L., N. 315; *The Favorite*, 3 Sawyer (U. S.) 405; *The Hendrick Hudson*, 17 Law Rep. 93; *Zollinger v. The Emma*, 3 Cent. Law J. 285; *The Woodward*, 32 Fed. Rep. 639; *The Grace Greenwood*, 2 Biss. (U. S.) 131.

If the mortgagee allows the mortgagor to remain in possession of the vessel, then his mortgage, although it is recorded at the custom house where the vessel is registered or enrolled, is postponed to liens under the State laws. *The Hiawatha*, 5 Sawy. (U. S.) 100; *The Wm. T. Graves*, 14 Blatchf. (U. S.) 189; *The Island City*, 1 Lowell (U. S.) 375; *The Raleigh*, 2 Hughes (U. S.) 44; *Strodes v. The Collier*, 9 Pitts. Law J. 73; *The St. Joseph*, 1 Brown Adm. (U. S.) 302; *Miller v. The Alice Getty*, 9 C. L., N. 315; *Whittaker v. The J. A. Travis*, 7 C. L., N. 275; *The Canada*, 7 Fed. Rep. 730; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236.

1. As Between Different Voyages.—In the *Augustine Kobbe*, 39 Fed. Rep. 559, it was held that maritime liens incurred upon the last voyage should be preferred to those incurred on prior voyages; that a charterer, with knowledge of existing liens, should be postponed to them for his damages accruing from the breaking up of the voyage, but that money advanced by him for the necessities of the vessel should stand on an equal footing with the liens.

Foreign Laws.—On the question of the priority of maritime liens against an Italian vessel, it was held that, as between those on board, the provisions of the Italian Code should be observed by comity, and that while, as to liens arising under contracts made by the

Priority of Various Claims. MARITIME LIENS. Priority of Various Claims.

master in the United States, the law of the latter country would prevail over the Italian law, there being in fact, no difference between the Italian law and the general maritime law, distribution should be made in the following order, viz.: Libellant's costs, court dues, pilotage, provisions, seamen's wages in full, and, ratably from the balance, towage bills and other liens, the master's lien for wages being postponed. *The Olga*, 32 Fed. Rep. 329.

In distributing the proceeds of sale of an Italian vessel sold by an order of the court in proceedings to enforce a bottomry bond given in Algiers on vessel and cargo, on which bond the master was not personally liable, the lien of the master for his wages, secured to him by Italian law, was held paramount to the claim of the owners of the cargo, American citizens and assignees of the bill of lading made in Italy to Italian resident or order. *The Angela Maria*, 35 Fed. Rep. 430.

In *The Velox*, 21 Fed. Rep. 479, the code of the Netherlands was held applicable to questions of priority of liens upon the proceeds of a Dutch vessel, whose voyage from Japan to New York and back had been broken up by a sale of the vessel in New York, as between the liens of the master and seamen shipped for such voyage, and liens for supplies and stevedore's services furnished in New York.

On a petition of intervention filed by the master and seamen of a foreign vessel to establish the priority of their liens over those of domestic and material men. *Held*, that in case of conflict between the maritime lien of a foreign country and the United States the latter must govern, and that, under it, the master had no lien on the vessel, as against material men, for wages or advances, and that he was estopped from setting up such a claim as would defeat, to that extent, their claims where he represented himself to be a part owner on obtaining the credit which they gave him. *The Graf Klot Trautvetter*, 8 Fed. Rep. 833.

Stevedore's Lien.—In the *Director*, 34 Fed. Rep. 57, a stevedore's lien was held to be entitled to priority in the proceeds of the sale of the vessel, a claim for towage and a claim for breach of the charter party sharing next, *pro rata*, and, lastly, the carpenter's claim for recaulking and copping after the cargo was removed.

Money advanced by the ship's agent

to pay a general average claim against the ship, there having been a jettison, is a maritime lien and entitled to priority over bottomry bonds. *The Dora*, 34 Fed. Rep. 343.

Maritime Liens Preferred to Domestic Liens.—In the distribution of the proceeds of sale of a vessel, maritime liens are to be preferred over domestic liens created by State statutes for insurance premiums. *The Woodward*, 32 Fed. Rep. 639.

Towage bills are entitled to priority over mortgages and home port supply claims. Such liens are next in rank, but subordinate to the lien for wages. *The Mystic*, 30 Fed. Rep. 73.

Money advanced on the credit of the vessel to pay off liens of a maritime nature, and actually used for such purposes, is entitled to the same rank as the liens paid off. So also with money subsequently borrowed to pay off the claim for such moneys advanced. *The Thomas Sherlock*, 22 Fed. Rep. 253.

In *The Rodney*, B. & H. Adm. 226, the court in disposing of the proceeds of a vessel marshalled the different claims as follows: (1) seamen suing for wages; (2) material men; (3) a consignee, for money advanced for towage, pilotage, light, money and port duties; each claim carrying with it its own costs.

In general a wharfinger has a lien on a foreign ship for wharfage, which should have priority over a bottomry lien. But if a wharfinger has made an express personal contract with the ship owner, the court will not give his claim a priority over a bottomry interest which had previously attached to the ship. *Johnson v. The McDonough*, Gilp. (U. S.) 101.

Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs. But a claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage. *Porter v. The Sea Witch*, 3 Woods (U. S.) 75.

Workmen and material men (having a lien on a vessel which has been taken in execution and sold under a judgment in favor of the United States, are entitled to payment out of the fund, in preference to the United States. *Phillips v. The Thos. Scattergood*, Gilp. (U. S.) 1.

Where a boat was seized on a libel for home supplies, and claims against her were filed for foreign and home

VI. WAIVER, DISCHARGE AND EXTINGUISHMENT OF LIENS—1. By Laches.—Delay to enforce a maritime lien, where the creditor has had a reasonable opportunity to do so, constitutes a waiver of the lien as against subsequent purchasers, or encumbrancers in good faith and without notice, unless such delay is satisfactorily explained.¹ But where the ownership of the vessel has not been

supplies and repairs, for insurance premiums, for material and labor furnished in the construction of the boat, for a mortgage and borrowed money, and the boat was sold, on distribution of the proceeds it was held that after paying costs the fund should be distributed as follows: (1) seamen's wages; (2) foreign and, since the State statute made them liens, home supplies, repairs and insurance; (3) building claims; (4) mortgage claims; (5) claims for borrowed money to which no liens attach. *The Guiding Star*, 18 Fed. Rep. 263.

1. **Laches.**—Thus a vessel was repaired at Chicago in the spring of 1880, and was soon afterwards taken to Lake Erie. In the spring of 1881 she was sold to a person residing in Buffalo, who had no notice of the claims for repairs, and continued to run upon the lower lakes. The creditor was thereupon informed of such sale soon after it took place, and of the fact that she was navigating the lower lakes, but made no attempt to enforce his claim until December, 1882. The court held that he should have endeavored to seize the vessel at Buffalo, or some other port which she frequented, as soon as he was informed that she had been sold, and that his claim was stale. *BROWN, J.*, in delivering the opinion of the court, said: "Where a vessel leaves a port of repair upon a long voyage, and does not return, and, in the meantime, it is impossible, or very difficult, to ascertain her whereabouts, there is certainly reason for saying that a creditor would not be chargeable with laches, as against innocent parties, even by the lapse of several years, if he had reasonable expectation of her return. But I find it quite impossible to say that, as a universal rule, the creditor may wait until her return to the port of repair, even though that be her home port, or a port which she has been in the habit of frequenting, without losing the benefit of his lien. A rule of this kind would be particularly inequitable upon the lakes, where the arrival and departure of vessels at all lake ports, from Chicago to Ogdensburgh, are noticed in the prin-

cipal daily papers, and for four months in the year the entire shipping of the lakes is laid up by the ice to await the opening of navigation. I think that a reasonable opportunity to enforce a lien is given, within the meaning of the law, whenever the creditor is able, by the exercise of reasonable diligence, to ascertain the whereabouts of the debtor vessel. Each case must be governed largely by its own circumstances." *The C. N. Johnson*, 19 Fed. Rep. 782.

In *Fisher v. Schooner Galloway*, *C. Morris*, 7 Phil. (U. S.) 572, *MCKENNAN, J.*, said: "Staleness is not susceptible of a precise definition of uniform application. It is predicable of the peculiar circumstances of each particular case. It does not operate to discharge the debt, but to deny to the creditor the enforcement of some security or form of liability, which the law holds him to have lost by laches. Simple forbearance does not constitute it; but the reason on which it rests is, that the creditor has unreasonably delayed the collection of his debt, so that some special equity or interest would be injuriously affected by the allowance of his claim. Hence it is that it has been generally, if not always, interposed to protect a purchaser of a vessel, or a person having a like equity against the lien of debts previously existing, the collection of which had been so long delayed that the privileged hypothecation of the vessel for their security had been waived." See also *The Dubuque*, 2 Abb. (U. S.) 20; *The John Lowe*, 2 Ben. (U. S.) 394; *The Theodore Perry*, 8 Cent. L. J. 191; *The Frank*, 25 Fed. Rep. 287; *The Ship Mary*, 1 Paine (U. S.) 180; *The Scow Bolivar*, *Olc. Adm.* 477; *The Eastern Star*, *Ware* (U. S.) 185.

Holders of liens equalling or exceeding the whole value of the vessel must enforce them with diligence; after a comparatively short period of inactivity such liens will be postponed on the ground of laches, in favor of subsequent maritime liens acquired without notice. *The Young American*, 30 Fed. Rep. 789.

changed, and no appreciable injury has resulted to the owner, forbearance to enforce a lien will not ordinarily be attended by a loss of the specific remedy against the vessel.¹

Unless due diligence is used to prosecute a lien for towage it cannot be enforced against a purchaser in good faith and without notice. The Frank, 25 Fed. Rep. 287.

Where a vessel is sold and the proceeds paid into the registry, the shares of the different owners of the surplus are equitably liable *pro rata* for the payment of any additional liens upon it. If a person having such liens purposely delays filing his claims against the remnants until the share of some of the owners have been drawn out, and then files it in order to charge the whole upon the remaining shares, such withholding is equivalent to a release of the shares withdrawn and a discharge of the lien *pro tanto*; the remaining shares are only chargeable with their due proportion of the claim filed. *Re Wright*, 16 Fed. Rep. 482.

A forbearance by seamen to libel a vessel at the port where they are discharged, before the end of the voyage, does not amount to a waiver of their lien as against a subsequent *bona fide* purchaser. The Mary, 1 Paine (U. S.) 180.

Ordinarily the lien of a material man will not be upheld beyond the termination of the voyage for which the supplies are furnished. The Boston, B. & H. Adm. 309. See in general The Hercules, 1 Brown Adm. 560; Paul Boggs, 1 Sprague (U. S.) 369; Anderson v. The Solon, Crabbe (U. S.) 17; Packard v. The Louisa, 2 Woodb. & M. (U. S.) 48; Winterport Granite etc. Co. v. The Jasper, 1 Holmes 99; Cole v. The Atlantic, Crabbe (U. S.) 440; The D. M. French, 1 Lowell (U. S.) 43; The Hercules, 1 Brown Adm. 560; The Wexford, 7 Fed. Rep. 674; Macy v. De Wolf, 3 Woodb. & M. 193; Clark v. The Leopard, 4 L. Rep. 153; The Utility, B. & H. Adm. 218.

1. Fisher v. Galloway, C. Morris, 7 Phila. (U. S.) 572.

A seaman's lien for wages is not lost by delay in enforcing it, where no third person has acquired any right to the vessel and the owner has not been injured by the delay. The Canton, 1 Sprague (U. S.) 437.

In The Martino Cilento, 22 Fed. Rep.

859, it was held that where there is no change in the ownership of a vessel nor any question of priority as respects subsequent lienors, a claim against a vessel for damages caused by negligence will not be barred by an inexcusable delay of two years for no other reason than the possible loss of some testimony that might have been obtained by the respondents if the suit had been brought sooner. BROWN, J., in delivering the opinion of the court, said: "It is urged that the claim should not be entertained on account of the lapse of two years before the libel was filed, most of the bark's witnesses in the meantime having passed beyond reach. It is shown that the bark during these two years had been in New York four different times, remaining from two to three weeks each time, and that the libellant, therefore, had opportunity to commence his suit earlier. For the libellant, it is shown, quite soon after the damages arose, he placed his claim in the hands of his proctors, who reported to him that they were unable to find the bark; that he was afterwards absent from the State about a year, and that he caused the arrest of the vessel upon her first arrival here that became actually known to him. I do not know of any precedent for holding, nor do I think it would be reasonable to hold, that a claim is barred under such circumstances for no other reason than for the possible loss of some testimony that might have been obtained by the respondents if the suit had been brought sooner. There has been no change in the ownership of the vessel, and there is no question of priority as respects subsequent lienors. In a suit *in personam* the owners would clearly be liable; and any loss or inconvenience through the difficulty of procuring all the evidence they might desire would be felt as such in a suit *in personam* as in this suit *in rem*. The difficulty arising from the partial loss of testimony through the discharge of seamen are of constant occurrence in admiralty causes; but these difficulties alone have never been deemed a sufficient ground for limiting a libellant's lien to the period of his first or second opportunity of enforcing it."

2. **By Judicial Sale of the Vessel.**—A judicial sale of a vessel under a decree in admiralty in a proceeding *in rem* will pass title to the vessel divested of all maritime liens.¹

3. **By Private Sale.**—Where a master is justified by necessity in selling his vessel, and does so in good faith, prior liens will be transferred to the proceeds, and the vessel cannot be held liable in the hands of the purchaser.²

1. **Effect of Judicial Sale.**—Thus where an American vessel was sold by the maritime court of Ontario the sale was held to discharge a lien for necessities furnished in Cleveland, Ohio, notwithstanding the court had declined to enforce such lien against the vessel for want of jurisdiction. The court held that in such a case the lien holder is remitted to his remedy against the proceeds of sale, and that his claim will be allowed wherever a lien for it exists by the law of the place where the contract was executed. The *Trenton*, 4 Fed. Rep. 657.

A and B were, with others, part owners of a vessel on which they served as mariners. The vessel was sold on execution out of a State court on a judgment against all the owners. It was held that the sale discharged the lien of A and B as seamen, and they could not libel the vessel in the hands of the purchaser at sheriff's sale for wages due prior thereto, notwithstanding the former part ownership. *Callantine v. The Pilot*, 2 Wall. Jr. C. C. 592.

When a note has been taken in payment for repairs to a vessel and judgment had thereon, and the vessel has been taken in execution under that judgment and sold for less than will satisfy it, there can be no lien against the vessel for the balance under the general admiralty law. *The Mary Morgan*, 28 Fed. Rep. 196.

Where a material man has a lien upon a vessel under the general maritime law of the United States, he may enforce that lien by a suit in the United States court, although the vessel may have been subsequently seized and sold under a State statute. *The Golden Gate*, Newb. Adm. 296. See in general *Hill v. The Golden Gate*, 6 Am. Law Reg. 308; *Williams v. Armroyd*, 7 Cranch (U. S.) 424; *The Tremont*, 1 W. Rob. Adm. 163; *The Mary*, 1 Cranch (U. S.) 126; *The Amelie*, 6 Wall. (U. S.) 18; *The Granite State*, 1 Sprague (U. S.) 277; *The Helena*, 4 Rob. Adm. 4; *Grant v. McLachlin*, 4 Johns. (N. Y.) 34.

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2. **Effect of Private Sale.**—In the case of the *Amelie*, 6 Wall. (U. S.) 18, a vessel owned in Amsterdam was sold in Port au Prince after a careful survey by five persons, one, the British Lloyds agent; another, the agent of the American Underwriters, and the remaining three captains of vessels temporarily detained in port—the whole appointed by and acting under the authority of the consul of the country where the vessel was owned. The five surveyors unanimously agreed that the vessel was not worth repairing, and advised the sale of it. The court held that the sale divested all liens. MR. JUSTICE DAVIS, in delivering the opinion of the court, said: "The sale of a ship becomes a necessity within the meaning of the commercial law when nothing better can be done for the owner, or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and to sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed. If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary. And he should never sell when in port with a disabled ship with-

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Where a vessel has been sold at private sale, but not by necessity, prior liens will not in general be divested, if there has been no want of diligence in enforcing them.¹

out first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings strong evidence in justification of his conduct.

. . . It is insisted, even if the circumstances were such as to justify the sale and pass a valid title to the vendee, he, nevertheless, took the title subject to all existing liens. If the position were sound it would materially affect the interest of commerce; for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all the parties interested, and is bound to do the best for them that he can, in the condition in which he is placed, and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interest of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, and is the agent of all, he sells as well for the lien holder as the owner. The very object of the sale, according to the uniform current of the decisions, is to save something for the benefit of all concerned, and if this is so, the proceeds of the ship, necessarily, by operation of the law stand in the place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it be the purpose of the sale to save something for the parties in interest, does not sound policy require a clear title to be given the purchaser in order that the property may bring its full value? If the sale is impeached,

the law imposes on the purchaser the burden of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, nor be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title divested of all liens, and that the liens are transferred to the proceeds of the ship, which, in the sense of the admiralty law, becomes the substitute for the ship."

A sale cannot be held to be fraudulent when it appears by the clear weight of testimony that a vessel was driven ashore and filled with water and running ice, and was regarded as a substantial wreck not only by the master, but by the agents and surveyors of the underwriters and other disinterested persons. *The Raleigh*, 32 Fed. Rep. 633; *s. c.*, 37 Fed. Rep. 125.

1. In *the Tonawanda*, 27 Fed. Rep. 575, the libellants furnished wharfage and cooperage materials for the ship *Tonawanda* of Philadelphia at Jersey City, at the request of A. & Co., who had been the ship's agent in New York, and who were dealt with as such, when in fact, although unknown to the libellants, they were the owners of the ship. Payments were promptly sought of A. & Co., and, upon their promise to pay, the *Tonawanda* was allowed to sail for Europe. She returned to Philadelphia twice, but of these visits libellants knew nothing. On her subsequent return to Philadelphia she was attached. This was two years after the expenses were incurred. In the meantime the ship had been bought by the respondents. It was held that, as the expenses had been incurred in a foreign port, the unpaid charges became a lien, to which the libellants were still entitled, as the facts did not show them to have been guilty of negligence. In delivering the opinion of the court, BUTLER, J., said: "It was the libellants' duty to exercise reasonable vigilance to enforce payment. Had the vessel returned to Jersey City, and they known it, or under such circumstances that they should have

4. By Taking Commercial Paper.—The lien upon a vessel is not necessarily extinguished by the acceptance of commercial paper, unless such paper was expressly accepted as an absolute payment.¹

known it, and been permitted to depart without payment, the lien would have been lost. While she was abroad, of course, no amount of vigilance would have accomplished anything, except to ascertain her whereabouts. The libellants were not required to follow her then. The only time when she was in reach were the two occasions when she visited Philadelphia in 1883. The libellants were ignorant of these visits; otherwise they should have attached her there. The only question, therefore, is, should this ignorance be ascribed to carelessness, want of proper vigilance? This is certainly a serious question—one about which there is room for doubt. The libellants could have ascertained the fact, of course, either by keeping a constant watch upon the vessel's movements, or upon the entries at the port of Philadelphia. Did their duty, however, require this? Is such a course, under similar conditions, customary? I think not. When all the circumstances are considered, I think the libellants must be held to a higher degree of vigilance than is usually exercised or required, to visit them with the consequences of remissness, for failing to discover these visits. Certainly they were not bound to enquire into the proposed movements of the vessel when she left their dock, nor to hunt her up while treating with her supposed agents for payment. To do this would have been unusual, and to require it would be unreasonable. They expected payment from the agents, and, as is customary and proper, first exhausted their efforts in that direction. As soon as they ascertained, or could well ascertain, that the lien must be resorted to, they sought for and found the vessel. When she next visited the country they attached her. I think no more was required. Although a good deal of time elapsed between the creation of the lien and the attachment, I am not satisfied that the libellants are blamable respecting it. While the holders of such liens should be held to a proper degree of vigilance as against innocent purchasers, unreasonable activity and haste should not be required. It must not be overlooked that the purchaser always has it within his power to protect himself by his contract."

Where the purchaser of a vessel had information sufficient before or at the end of his purchase, to put him on enquiry as to any liens which might exist against the vessel, the fact that the proceedings were not instituted against the vessel until after the purchase does not operate as a waiver of the lien which originally existed. *The Louie Dole*, 14 Fed. Rep. 862.

The lien for seaman's wages can be enforced against the vessel in the hands of a *bona fide* purchaser of her, if she was sold without the knowledge of the seaman, and he pursues his claim at the first opportunity after his debt has accrued. *The Bolivar*, Olc. Adm. 480.

The lien accorded by the maritime law, for a maritime tort (such as a collision) upon the offending vessel, is a proprietary interest, which travels with the vessel. It may be enforced, notwithstanding she has sailed into another jurisdiction where no remedy by seizure is allowed, and has there been sold, by private transfer, to a purchaser in good faith and without notice. *The Avon*, 1 Brown Adm. 170.

See in general *The Eliza Jane*, 1 Sprague (U. S.) 152; *The Atalanta*, 1 Brown Adm. 489; *The Superior*, 5 Sawy. (U. S.) 346; *Compare The Hercules*, 1 Brown Adm. (U. S.) 560; *The Chusan*, 2 Story (U. S.) 455; *The Bolivar*, Olc. Adm. 474; *The General Jackson*, 1 Sprague (U. S.) 554; *The Paul Boggs*, 1 Sprague (U. S.) 369; *The Detroit*, Brown Adm. 141; *The Bristol*, 11 Fed. Rep. 156; *The Canary No. 2*, 22 Fed. Rep. 532; *The St. Mary*, 2 Blatchf. (U. S.) 329; *The Mary Elizabeth*, 2 Sawy. (U. S.) 491; *The Granite State*, 1 Sprague (U. S.) 277; *The Union Express*, 1 Brown Adm. 537; *Anderson v. The Solon*, Crabbe (U. S.) 17.

1. *The St. Lawrence*, 1 Black (U. S.) 522; *The Kimball*, 3 Wall. (U. S.) 37; *The Bird of Paradise*, 5 Wall. (U. S.) 545; *The Pride of America*, 19 Fed. Rep. 607; *The Alabama*, 22 Fed. Rep. 449; *Borland v. Zittloesen*, 27 Fed. Rep. 131; *Baker v. Draper*, 4 Cliff. (U. S.) 420; *The Betsey and Rhoda*, 2 Ware (U. S.) 112; *Murray v. Lazarus*, 1 Paine (U. S.) 572; *Sutton v. The Albatross*, 2 Wall. Jr. C. C. (U. S.) 327;

But where the lien is sought to be enforced the note or bill must be surrendered.¹

5. By Taking Collateral Security.—A maritime lien may be waived by an express contract on the part of the creditor, to look to other security.²

Raymond v. Ellen Stewart, 5 McLean (U. S.) 269; The Active, Olc. Adm. 286; Page v. Hubbard, 1 Sprague (U. S.) 335; Palmer v. Priest, 1 Sprague (U. S.) 512; Moore v. Newbury, 6 McLean (U. S.) 472; Moore v. The Fashion, Newb. Adm. 49; The St. Lawrence, 1 Black (U. S.) 522; The Napoleon, 7 Biss. (U. S.) 393; Strodes v. The Collier, 3 West L. Month. 521; Logan v. The Æolian, 1 Bond (U. S.) 267; The Pride of America, 19 Fed. Rep. 607; The Guy, 9 Wall. (U. S.) 758; The Gen. Meade, 20 Fed. Rep. 923; The Eclipse, 3 Biss. (U. S.) 99; The Sarah J. Weed, 2 Lowell (U. S.) 555; The Harriet, 1 Sprague (U. S.) 33; The Eastern Star, 1 Ware (U. S.) 185; The Illinois, 2 Flip. (U. S.) 383.

In The St. Lawrence, 1 Black (U. S.) 522, the Supreme Court of the United States laid down the rule "that by the principles of the maritime law a lien is not lost by the acceptance of notes unless the claimant can show that the lien holders agreed to receive the notes in lieu of the original claim."

The master of a vessel in a foreign port, being without money sufficient to pay for necessary repairs and supplies and defray other expenses, borrowed the necessary funds and gave to the lenders drafts on the owners of the vessel for the amount, payable thirty days after sight, which drafts were accepted on presentation, out were protested for nonpayment. It was held that the drafts were only conditional payment, and did not discharge and satisfy the original debt. The Emily Souder, 17 Wall. (U. S.) 666.

Where the libellants furnished materials to a vessel in New York, took therefor the negotiable promissory note of one of the owners, on time, it was held that under the *lex loci*, which declared a note taken for a debt to be a conditional payment, there was no waiver of the maritime lien. The Chusan, 2 Story (U. S.) 455.

The mere fact that upon an advance to meet the necessities of a master, made while the vessel is in a foreign port, bills of exchange are drawn for the reimbursement of the lenders, does not

deprive them of their lien. The reimbursement must have been made in some mode, even though the lien upon the vessel was the libellant's reliance. Why not by paying their drafts drawn on the owners? The Acme, 7 Blatchf. (U. S.) 366.

1. Carter v. The Byzantium, 1 Cliff. (U. S.) 1; Ramsey v. Allegre, 12 Wheat. (U. S.) 611; The Napoleon, 7 Biss. (U. S.) 393; Harris v. The Kensington, 8 Am. L. Reg. 144; Marshall v. Bazin, 7 N. Y. Leg. Obs. 342; The Eclipse, 3 Biss. (U. S.) 99.

2. **Collateral Security.**—Moore v. The Fashion, Newb. Adm. 49; Taylor v. The Commonwealth, 14 Am. L. Reg. (U. S.) 86; Stielman v. The Buckeye State, Newb. Adm. 111; The Maggie Jones, 1 Flip. (U. S.) 635.

A maritime lien will not be considered as waived by anything less than an express contract. Attaching the vessel under a State law, and settling that proceeding on receiving notes secured by a mortgage on the vessel, which have since become worthless, does not constitute a waiver of such lien, but a libel may still be sustained. The Gate City, 5 Biss. (U. S.) 200.

Though a lien for repairs is presumed to be waived by taking a mortgage upon real estate, parol evidence is admissible to show that the mortgage was received as collateral security, and with no intention of waiving a lien. The Theodore Perry, 8 Cent. L. J. 191.

A lien for supplies furnished in a foreign port, created by an hypothecation of a vessel in a form of a mortgage, is not lost by taking another security for the claim. The Hilarity, B. & H. Adm. 90.

The fact that the master gave his personal security does not relieve the vessel or her owners from liability, nor does the holding of bills of sale absolute on their face preclude the material man from attaching the vessel, if it can be clearly shown that such bills of sale were intended to be held merely as collateral security. The Ellen Holgate, 30 Fed. Rep. 125.

A material man having a considerable claim against a vessel on an ac-

6. **By Destruction of the Vessel.**—A lien for supplies on a vessel which is afterwards taken to pieces, and a portion used in the construction of a new vessel will not follow and attach to the latter.¹

7. **By Departure of the Vessel.**—In general a maritime lien is not extinguished by the vessel's proceeding to sea.² An exception to the rule is in the case of wharfage, where the lien is lost by a departure of the ship from its moorings.³

8. **By Assignment of the Claim.**—A material-man may assign his claim against the vessel, and the lien is not thereby lost. If the assignment is absolute, the assignee may proceed in admiralty in his own name, against the vessel.⁴

VII. LIENS ON VESSELS AT COMMON LAW.—At common law a shipwright has a lien for repairs and work done on a ship, so long as she remains in his possession. If, however, the owner retains possession during the repairs, or if after the repairs are made, the shipwright voluntarily yields up the possession his lien is gone. Such a lien being of a maritime nature may be enforced in admiralty.⁵

count running through several months, some items of which were not maritime, took cash for part of the amount, and notes at short dates for the residue, and a mortgage on the vessel to secure the notes. It was held that the cash payment must be applied to the extinguishment of the items not maritime; the notes having been taken at short dates did not waive the lien of the amounts for which they were taken; the mortgage being recent and not prejudicial to other maritime liens, and attended by no act inconsistent with the rights of other maritime conditions, did not waive the maritime lien. *The D. B. Steelman*, 5 Hughes (U. S.) 210.

Neither the taking of notes for the debts nor the taking of a deed of trust to one of the creditors is a waiver of a maritime lien. *The Illinois*, 2 Flip. (U. S.) 383.

1. *Strodes v. Collier*, 3 West L. M. 521.

2. *The Active*, Olc. Adm. 286; *Knox v. Ninetta*, Crabbe (U. S.) 534.

3. *Johnson v. McDonough*, Gilp. (U. S.) 101; *Russel v. The Asa R. Swift*, Newb. Adm. 553. See also *WHARVES AND WHARFAGE*.

4. *The Sarah J. Weed*, 2 Lowell (U. S.) 555; *The General Jackson*, 1 Sprague (U. S.) 554.

In the case of *Carrol v. T. P. Leathers*, Newb. Adm. 432, it was decided that if A holds a lien against a vessel for materials furnished, and the master requests B to pay the account of A, the lien originally held by the latter is not

by such payment transferred to B, and he has no right of action *in rem* in the admiralty.

5. **Common Law Liens.**—In the leading case of *The General Smith*, 4 Wheat. (U. S.) 438. MR. JUSTICE STORY said: "A shipwright who has taken a ship into his own possession to repair it is not bound to part with the possession until he is paid for the repairs, more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself." See also *The Marion*, 1 Story (U. S.) 68.

A common law possessory lien may be acquired for repairs where the vessel is lawfully delivered into the possession of the shipwright by part owners having the lawful custody and control of her, though such repairs, if beyond what is necessary, are not binding upon the interests of nonassenting part owners. *The Two Marys*, 16 Fed. Rep. 697.

The master of a vessel having surrendered her into custody of libellant, a shipwright, for repairs, he being understood by both parties to be responsible for her care and safety, although the master, who was also the owner, stayed by the vessel most of the time, and retained the cook and mate, who slept on board, the presence of the master and the retention of the cook and mate not being with the intent to retain the custody of the vessel, but to

VIII. LIENS UNDER STATE LAWS—1. In General.—A State law may give a lien for repairs and supplies, furnished to a domestic vessel in a home port, and such a lien may be enforced in admiralty¹ The lien on a domestic vessel depends upon the local

help in repairing and lessen expenses: *Held*, that the libellant had such actual possession of the vessel as would give him a common law lien. The B. F. Woolsey, 7 Fed. Rep. 108.

1. "It seems to be settled in our jurisprudence that so long as congress does not interpose to regulate the subject, the rights of a material man furnishing necessities to a vessel in her home port may be regulated in each State by State legislation. State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they enforce it upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. But the district courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the State laws. The practice may be somewhat anomalous, but it has existed from the origin of the government, and, perhaps, was originally superinduced by the fact that prior to the adoption of the constitution liens of this sort created by State laws had been enforced by the State courts of admiralty; and as these courts were immediately succeeded by the district courts of the United States, and in several instances the judge of the State court was transferred to the district court, it was natural, in the infancy of federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the State courts had done, without due regard to the new relations which the States had assumed towards the maritime law and admiralty jurisdiction. For example, in 1784 the legislature of Pennsylvania passed a law allowing persons concerned in building, repairing, fitting out and furnishing vessels for a voyage, to sue in admiralty, as

mariners sue for wages. Two cases, those of *The Collier*, and *The Enterprise*, arising under the law, and coming before the admiralty court of Pennsylvania, are reported in Judge Hopkinson's works. No doubt other cases of the same kind occurred in the courts of other States. But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. It is true that the inconveniences arising from the often intricate and conflicting State laws creating such liens induced this court, in December term, 1858, to abrogate that portion of the twelfth admiralty rule of 1844 which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings *in personam* only in such cases. But we have now restored the rule of 1844, or, rather, we have made it general in its terms, giving to material men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists, but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem* if credit is given to the vessel." *The Lottawanna*, 21 Wall. (U. S.) 558, 559.

See also *The Edith*, 94 U. S. 518; *The Harrison*, 2 Abb. (U. S.) 74; *The Ella B.*, 26 Fed. Rep. 111; *The Helen Brown*, 28 Fed. Rep. 111; *The Whistler*, 30 Fed. Rep. 199; *The City of Salem*, 31 Fed. Rep. 616; *James Dalzell's Son & Co. v. The Daniel Kaine*, 31 Fed. Rep. 746; *The John Farron*, 14 Blatchf. (U. S.) 24; *The Kate Hinchman*, 7 Biss. (U. S.) 238; *The Eliza Ladd*, 1 N. Y. Week. Dig. 517; *Baldwin v. The Braddish Johnson*, 3 Woods (U. S.) 582; *The B. F. Woolsey*, 7 Fed. Rep. 108; *The N. W. Thomas*, 1 Biss. (U. S.) 210.

A State law may impose a lien on a vessel for tolls, in consideration of her use of river and harbor improvements, and such lien may be enforced by an action *in rem*. *The St. Joseph*, 7 N. Y. Week. Dig. 35.

A State law cannot confer jurisdiction on a court of admiralty by attach-

statutory law, and is in effect an element of the original contract.¹

The lien given by a statute of a State applies to boats navigating the waters of the State on contracts made within the State.²

The lien of a pilot conferred by State laws is enforceable in admiralty,³ so also is a lien for towage services given by State

ing a lien to a nonmaritime contract. Admiralty will enforce such State liens only as are given on maritime contracts. The Guiding Star, 18 Fed. Rep. 263; The J. F. Warner, 22 Fed. Rep. 342; The Canary No. 2, 22 Fed. Rep. 532; The Kingston, 23 Fed. Rep. 200; The Alanson Sumner, 28 Fed. Rep. 670; The Robert Fulton, 1 Paine (U. S.) 620; The Samuel Stronge, Newb. Adm. 187; The General Tompkins, 9 Fed. Rep. 620; The Theodore Perry, 8 Cen. L. J. 191; The Alida, 1 Abb. Adm. 165; The Infanta, 1 Abb. Adm. 263; Parmlee v. The Charles Mears, Newb. Adm. 197.

The fact that the proceeding is pending in a federal court held in a different State from that whose law created the lien does not defeat it. White v. The Cynthia, 2 Fed. Rep. 112; affirmed, 10 Fed. Rep. 232.

If the State statute giving a lien prescribes a limit of time within which it may be enforced, the federal courts must observe that limitation. The Edith, 94 U. S. 518; affirmed, 11 Blatchf. (U. S.) 415, which affirmed 5 Ben. (U. S.) 432.

The State law must clearly give a lien on the vessel, not merely define a liability of her owners, in order to warrant the district court in entertaining a libel *in rem*. Wick v. The Samuel Strong, 6 McLean (U. S.) 587.

1. The Kate Tramaine, 5 Ben. (U. S.) 63; The Maggie Hammond, 9 Wall. (U. S.) 435. In the latter case, MR. JUSTICE CLIFFORD said: "Where the lien or privilege is created by the *lex loci contractus*, says Judge Story, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. Such a lien is regarded as being in effect an element of the original contract." The Stephen Allen, Blatchf. & H. (U. S.) 178; Clinton v. The Hannah, Bee (U. S.) 419; The General Smith, 4 Wheat. (U. S.) 438; The St. Jago de Cuba, 9 Wheat. (U. S.) 400; The Robert Fulton, 1 Paine (U. S.) 620; The Island City, 1 Low. (U. S.) 375; The Lady Franklin, 1 Biss.

(U. S.) 557; Wooley v. The Peruvian, 3 Ware (U. S.) 154; The John Richards, 1 Biss. (U. S.) 106; The Belfast, 7 Wall. (U. S.) 624; Leon v. Calceran, 11 Wall. (U. S.) 185; Vose v. Cockroft, 44 N. Y. 415; The Josephine, 30 N. Y. 10; The Plymouth, Newb. (U. S.) 194; Wick v. Samuel Strong, 6 McLean (U. S.) 543; Webster v. Andes, 18 Ohio 187; Waverly v. The Clements, 14 Ohio 28; The Ferry Steamers Norfolk and Union, 2 Hughes (U. S.) 123; The Raleigh Cannon, and Astoria, 2 Hughes (U. S.) 41; The Alida, Abb. Adm. (U. S.) 160; Fox v. Holt, 4 Ben. (U. S.) 236; Macy v. DeWolf, 3 Wood. & M. 203; Boyland v. Victory, 40 Mo. 244; Francis v. Harrison, 1 Sawy. (U. S.) 355; The Hilarity, Blatchf. & H. (U. S.) 92; The Zodiac, 1 Hagg. Adm. 32.

2. Ashbrook v. Golden Gate, Newb. (U. S.) 297; James v. The Pawnee, 19 Mo. 517. Thus a sloop of tonnage required to take out a licence under the act of congress employed in navigating the Hudson between Albany and New York, may be proceeded against by attachment under the New York statute authorizing the arrest of ships or vessels for debts. Walker v. Blackwell, 1 Wend. (N. Y.) 557. See also The Joseph E. Coffee, Olc. (U. S.) 405; The Farmers' Delight v. Lawrence, 5 Wend. (N. Y.) 564; Hancox v. Dunning, 6 Hill (U. S.) 494. In *Wisconsin* it has been held that a statute for the collection of demands against domestic vessels does not confer a maritime lien, and that the district court has no jurisdiction to enforce a liability created by such statute. Celestine, 1 Biss. (U. S.) 1.

3. *Pilots*.—Thus where a pilot licensed under a State statute had tendered his services to pilot a vessel out of port, and such services were refused, his claim to half-pilotage fees allowed by the statute became perfect. Steamship Company v. Joliffe, 2 Wall. (U. S.). See also Port Wardens, 6 Wall. (U. S.) 34; *Ex parte* McNeil, 13 Wall. (U. S.) 241; Hunt v. Mackey, 12 Met. (Mass.) 346; The California, 1 Sawy. (U. S.) 463; The American, 1 Low. (U. S.) 177; The Alaska, 3 Ben. (U. S.) 392; The

statute.¹ Reference to the various State statutes and decisions under them appear in the note.²

2. Divestment of State Liens.—As a general rule a lien provided by statute ceases when the vessel is permitted to depart from the port where the repairs were made or supplies furnished. This

Robert J. Mercer, 1 Sprague (U. S.) 284; The Mary Gratwick, 2 Sawy. (U. S.) 344; Smith v. Smith, 8 Met. (Mass.) 329; Nickerson v. Mason, 13 Wend. (N. Y.) 64.

1. Towage.—The General Cass, 1 Brown Adm. (U. S.) 392; The Detroit, 1 Brown 141; The W. J. Welsh, 5 Ben. (U. S.) 74; The Kate Tramaime, 5 Ben. (U. S.) 60; The Sarah Jane, 2 Am. Law Rev. 455; The Belfast, 7 Wall. (U. S.) 624; The Eng. Mut. Mar. Ins. Co. v. Durham, 11 Wall. (U. S.) 1; The Celestine, 1 Biss. (U. S.) 3; Davis v. Child, 2 Ware (U. S.) 74; Macy v. DeWolf, 3 Wood. & M. 203; People's Ferry Co. v. Beers, 20 How. (U. S.) 402.

2. Alabama.—Code 1876, § 3465.

Arizona.—R. S. 1887, § 2287.

California.—3 Codes and Stat. 1885, § 8137, Civil Procedure; Crawford v. The Caroline Reid, 42 Cal. 469; Edgerly v. The San Lorenzo, 29 Cal. 418.

Connecticut.—G. Stat. 1888, §§ 3041-3044.

Florida.—Dig. Laws 1881, ch. 143, § 18.

Georgia.—Code 1882, § 1982; Kirkpatrick v. Bank of Augusta, 30 Ga. 465; Cape Fear Steamboat Co. v. Torrent, 46 Ga. 585.

Illinois.—Annot. Stat. 1885, ch. 12, § 1; The E. P. Dorr v. Waldron, 62 Ill. 221; The Montauk, 47 Ill. 335; Johnson v. Chicago & P. E. Co., 105 Ill. 462.

Indiana.—Rev. Stat. 1881, §§ 5277-5280.

Kentucky.—Gen. Stat. 1883, p. 984; The Rapid Transit, 11 Fed. Rep.

Louisiana.—R. Civ. Code 1870, art. 3237; The Canary No. 2, 22 Fed. Rep. 532; Hyde v. Culver, 4 La. An. 9; Wickham v. Levistones, 11 La. An. 702; Owens v. Davis, 15 La. An. 22; Bank v. Bark Jane, 19 La. An. 1.

Maine.—Rev. Stat. 1883, ch. 91, § 8; Hull of a New Ship, Ware (U. S.) 565; Hull of a New Brig, 1 Story (U. S.) 244; The Kearsarge, Ware (U. S.) 546; Hayford v. Cunningham, 71 Me. 128.

Maryland.—R. Code 1878, p. 701.

Massachusetts.—Pub. Stat. 1882, ch. 198, §§ 14-17; Foster v. Richard Bus-

teed, 100 Mass. 409; McDonald v. The Nimbus, 137 Mass. 360; Briggs v. Light Boats, 11 Allen (Mass.) 157; Rogers v. Currier, 13 Gray (Mass.) 129; Barstow v. Robinson, 2 Allen (Mass.) 605; Young v. The Orphans, 119 Mass. 179; Jones v. Keen, 115 Mass. 170; Donnell v. The Starlight, 103 Mass. 227; Hawes v. Mitchell, 15 Gray (Mass.) 234; Dunham v. Johnson, 135 Mass. 310; The Helen Brown, 28 Fed. Rep. 111; The Huron, 29 Fed. Rep. 183; Young v. The Orphans, 119 Mass. 179; Story v. Buffum, 8 Allen (Mass.) 35; McMonagle v. Nolan, 98 Mass. 320.

Michigan.—Annot. Stat. 1882, §§ 8236-8279; Gould v. Jacobson, 58 Mich. 288.

Minnesota.—Code, § 1209.

Mississippi.—Rev. Code 1880, § 1395; Archibold v. Bank, 64 Miss. 523.

Missouri.—2 Rev. Stat. 1879, § 4225.

New Hampshire.—Gen. L. 1878, p. 334.
New Jersey.—Supp. Rev. 1886, p. 427; Edwards v. Elliott, 36 N. J. L. 449; Baeder v. Carnie, 44 N. J. L. 208; Randall v. Roche, 30 N. J. L. 220.

New York.—3 Rev. Stat. 1882, p. 2404-2410; Happy v. Mosher, 48 N. Y. 313; Sheppard v. Steele, 43 N. Y. 52; King v. Greenway, 71 N. Y. 413; Mott v. Lansing, 57 N. Y. 112; Squires v. Abbott, 61 N. Y. 530; The Whistler, 30 Fed. Rep. 199; The Kingston, 23 Fed. Rep. 200; The Arctic, 22 Fed. Rep. 126; Onderdonk v. Voorhes, 36 N. Y. 358.

North Carolina.—Code 1883, vol. 1, § 1804.

Ohio.—Code, § 1220; Johnson v. Ward, 27 Ohio St. 517; The Guiding Star, 9 Fed. Rep. 521.

Oregon.—Laws 1876, p. 9.

Pennsylvania.—Brightly's Purdon Dig. 1883, p. 124; Dalzell v. The Daniel Kane, 31 Fed. Rep. 746; The Venture, 26 Fed. Rep. 285.

South Carolina.—Gen. Stat., § 2389.

Tennessee.—Code 1884, §§ 2751, 4293.

Texas.—Rev. Stat. 1879, p. 461.

Vermont.—R. L. 1880, § 1981.

Washington.—Code 1881, ch. 136; Waddell v. The Daisy, 2 Wash. Ter. 76.

West Virginia.—Acts 1882, ch. 64, §

rule, however, does not apply where a short excursion is made beyond the limits of the State, for the mere purpose of testing machinery, and where there is an immediate return to port.¹

MARK.—(a) A sign, traced on paper or parchment, which stands in the place of a signature; usually made by persons who cannot write.² It is most often the sign of the cross made in a little space left between the Christian name and surname, and the word *his* is usually written above the mark, and the word *mark* below it.³

(b) A label, token or impression; a sign, badge, index; as, post mark, trade mark.⁴

Wisconsin.—Rev. Stat. 1878, § 3348; *Weston v. Morse*, 40 Wis. 455.

1. The *New York* statute (2 R. S. 493, § 2) provides that "when the ship or vessel shall depart from the port at which she was when such debt was contracted, to some other port within this State, every such debt shall cease to be a lien at the expiration of twelve days after the day of such departure; and in all cases such lien shall cease immediately after the vessel shall have left this State." See *Johnson v. McDonough, Gilp.* (U. S.) 103; *Packard v. Louisa*, 2 Wood. & M. (U. S.) 58; *Leland v. Medora*, 2 Wood. & M. (U. S.) 98; *Spring v. S. C. Ins. Co.*, 8 Wheat. (U. S.) 268; *Leonard v. Huntington*, 15 Johns. (N. Y.) 290; *James v. Bixby*, 11 Mass. 34; *Stewart v. Hall*, 2 Dow. 29.

The vessel must leave upon a voyage or employment in the pursuit of trade or business. *The Alida*, Abb. Adm. (U. S.) 172; *Hancox v. Dunning*, 6 Hill (N. Y.) 494; *The Joseph E. Coffee, Olc.* (U. S.) 407; *The Sam Slick*, 1 Sprague (U. S.) 292; *Davis v. A New Brig. Gilp.* (U. S.) 473.

2. Bouv. Law Dict.

3. 2 Bla. Com. 305.

Marksman.—One who signs by means of a mark. 2 Bla. Com. 305; *Grayson v. Atkinson*, 2 Ves. Sr. 454.

Under the Statute of Frauds, 29 C. II, ch. 3, §§ 5 and 6, the making of a mark by the deviser, to a will of real estate is a sufficient signing; and it is not necessary to prove that he could not write his name at the time. *Baker v. Denning*, 8 Ad. & E. 94; In the goods of *Field*, deceased, 3 Curt. 753; *Meehan v. Rourke*, 2 Bradf. Surr. (N. Y.) 385. *Flannery's Will*, 24 Pa. St. 502 and cases cited; *St. Louis Hospital Ass'n v. Williams Adm.*, 19 Mo. 609; *Horton v. Johnson*, 18 Ga. 396.

It is not necessary to the validity of a deed that the words "her mark" shall accompany the cross of the grantor in a deed, who signs by making her mark, when it appears that it was made by her, or, being made by some other person, that she adopted it as hers. *Sellers v. Sellers*, 3 S. E. Rep. (N. Car.) 917; see also *State v. Byrd*, 93 N. Car. 624; *Tatom v. White*, 95 N. Car. 453.

Under the laws of Louisiana, and the decisions of the courts of that State, a "mark" for the name, to an instrument, by a person who is unable to write his name, is of the same effect as a signature of the name. *Zacharie v. Franklin*, 12 Pet. (U. S.) 151; see also *Madison v. Zabriskie*, 11 La. Rep. 251.

This principle is fully settled by many cases. Among others, *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144.

4. *Adams v. Heisel*, 31 F. R. 280.

Ear Mark.—A mark placed upon a thing by which to identify it. *Anderson's Law Dict.*

Trade Mark.—A trade mark is the name, symbol, figure, letter, form or device adopted and used by a manufacturer, or merchant, in order to designate the goods that he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise. *Upton on Trade Marks*, p. 9.

Form of Barrel as a "Trade Mark."—A barrel of peculiar form, dimensions and capacity, irrespective of any marks or brands impressed upon or connected with it, cannot become a lawful trade mark, or a substantive part of a lawful trade mark. *Moorman v. Hoge*, 2 Sawy. (U. S.) 78. See generally **TRADE MARK.**

MARKET—MARKETABLE TITLE—MARKET OVERT.

(c) To point out, settle, define, describe, with or without visible boundaries.¹

(d) To determine by marks on the ground.²

(e) To note or enter upon a record.³

MARKET.—See note 4.

MARKETABLE TITLE.—A marketable title in equity is one in which there is no doubt involved either as to matter of law or fact.⁵

MARKET OVERT.—An open or public market; a place appointed by law or custom for the sale of goods and chattels at stated times in public.⁶ In England, a sale of anything vendible in-market overt is good as between the parties, and binding on all who have a property in the thing.⁷ The doctrine has never been recognized in the United States.⁸

1. *Allen v. Smith*, 12 N. J. L. 165.

"Mark and Lay Out the Bounds and Rules," etc.—The legislature, in requiring the court of common pleas to "mark and lay out the bounds and rules of the prison in their several counties," did not intend to use the word "mark" in a literal sense; they meant by it to point out, to settle, to define, to describe; and the bounds therefore may be sufficiently *marked* and laid out by course and distance, without fixing any visible marks or boundaries on the ground. *Allen v. Smith*, 7 Halst. (N. J.) 160.

2. As to mark a boundary line. *Keller v. Young*, 78 Pa. St. 170.

Where there is a conflict between the marks made on the ground and the draft of the survey, the line is to be determined by the marks. *Keller v. Young*, 78 Pa. St. 166.

3. As to mark for use. Indicate upon the record of a suit or judgment for whose benefit the same is maintained or exists. *Anderson's Law Dict.*

4. In *Milliman v. Neher*, 20 Barb. (N. Y.) 37, the words "market the crops" were held to be equivalent to "sell the crops."

5. *Dalzell v. Crawford*, 1 Parsons' Sel. Cases in Eq. 45. It should be such as dealers in real estate, savings banks and trust companies would be willing to take and invest in. *Vought v. Williams*, 46 Hun (N. Y.) 638. See also **SPECIFIC PERFORMANCE.**

6. *Bouv. Law Dict.*

7. 2 Bla. Com. 449.

Our ordinary markets bear no resemblance to market overt. The reason

why a sale of stolen property, made in *market overt*, conveyed a title to the purchaser is understood to be that, as the market was held at stated intervals, in particular places, and known to the whole community, those who had lost property by theft or otherwise could be present and make known their loss; failing to do so, and as by the publicity of the transaction, every assurance was given to purchasers that the sale was honest and fair, it was but just the purchasers should be protected in the title thus acquired. *Fawcett, Isham & Co. v. Osbourn, Adams & Co.*, 32 Ill. 426.

8. In *Ventress v. Smith*, 10 Pet. (U. S.) 175, it was said this doctrine of *market overt*, which controls and interferes with the application of the common law, has never been recognized in any of the United States, or received any judicial sanction. See also *Easton v. Worthington*, 5 S. & R. (Pa.) 130; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 480; *Bryant v. Whitchen*, 52 N. H. 158; *Dame v. Baldwin*, 8 Mass. 519; *Roland v. Gundy*, 5 Ohio 202; *Coombs v. Gordon*, 59 Me. 111.

Marketable Security.—By the stamp act 1870 (33 and 34 Vict., ch. 97, § 2), and the Customs and Inland Revenue act, 1888 (51 & 52 Vict., ch. 8, § 13), a "marketable security" is defined as meaning "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." *Texas Land & Cattle Co. Lim. v. Comms. of Inland Revenue*, 16 Ct. of Sess. Cas. 69.

MARKETS.

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I. Definition.—A market, in the general sense of the word, may be defined as a public place for the sale of commodities.¹

1. *Ketchum v. City of Buffalo*, 14 N. Y. 356.

It is a franchise or liberty derived from the crown and arising from the king's grant or prescription, which supposes an ancient grant to have a market. A market is a privilege within a town to have a market. *Ketchum v. Buffalo*, 21 Barb. (N. Y.) 204, 296; *Caldwell v. Alton*, 33 Ill. 419, 85 Am. Dec. 282.

In *Smith v. Newbern*, 70 N. Car. 14, 16 Am. Rep. 766, the court declared a market to be a public place, appointed by local authorities, where all sorts of things necessary for the subsistence or for the convenience of life are sold. And in *Caldwell v. Alton*, 33 Ill. 416, 419, 85 Am. Dec. 282, it was described as a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.

In *New Orleans v. Morris*, 3 Woods (U. S.) 103, 107, markets were defined as places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require sanitary regulations and thus fall within the police powers of cities. And it was accordingly held that a place known as a market bazaar, where articles other than perishable food products were exposed for sale, was not a market in such a sense as to be properly devoted to public use, and therefore exempt from execution under a judgment against the city.

Blackstone defines a market to be a franchise derived from the crown by grant or prescription, which presumes a grant. 2 Black. Com. 37.

In *Cincinnati v. Buckingham*, 10 Ohio 257, 261, the court declared the component parts of a municipal market to be, (1) a place for the sale of provisions and articles of daily consumption; (2) convenient fixtures; (3) a system of police regulations fixing market

hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller; and (4) proper officers to preserve order and enforce obedience to rules. *State v. Fernandez*, 39 La. An. 538.

A place remains a public market although the market building has been erected by private individuals under a contract with a municipal corporation by which the persons erecting the building are entitled to receive the rents of the stalls and other charges for a term of years, the building thereafter becoming the property of the city. *Le Claire v. City of Davenport*, 13 Iowa 210, overruling *Davenport v. Kelly*, 7 Iowa 102.

A market place does not necessarily or usually mean an uncovered space of ground dedicated to market purposes, but usually a market house. *Smith v. City of Newbern*, 70 N. Car. 14. See also *Mayor etc. of Savannah v. Wilson*, 49 Ga. 476.

"All fairs are markets, but all markets are not fairs." Bracton 1, 2, c. 24; Co. Litt. 22; Crabb's Law of Real Property, § 679.

Public Markets.—In *State v. Fernandez*, 39 La. An. 538, the court held, that when the legislature (*Louisiana*) removed or exempted public markets from the operation of the statute known as the "Sunday Law" (act 18 of 1886, *Louisiana*) they meant those public markets, wherever situated in the State, within the limits of which stores would not be kept, the like of which are required to be closed beyond those limits.

"Market Garden."—A portion of a market garden, to the extent of one acre, was covered in with glass by means of several greenhouses, under which fruit and flowers were cultivated for the market. Held, that the portion of the ground covered by glass was

II. Right to Establish Markets.—In some cases, the right to establish markets has been treated as a branch of the sovereign power.¹ But in *Pennsylvania* the court declared that by the common law of that State every municipal corporation which is vested with power to make by-laws and establish ordinances in promotion of the public welfare, may fix the times and places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest.²

III. Market Lands and Houses.—The power to establish a market implies authority to purchase the land necessary therefor and to erect the necessary buildings.³ And when the charter authorizes a city to "appoint market places and regulate the sale," an implied power exists to build a market house, a market house being reasonably necessary and conducive to the enjoyment of the market place.⁴

Where the owner of lands sought to be acquired for market purposes has petitioned for the appointment of commissioners to assess compensation, he will be estopped from attacking the validity of the order appointing the commissioners on the ground of the alleged unconstitutionality of the statute and noncompliance with the statutory conditions.⁵ And where the city, by an ordinance authorized by its charter, has provided for the issuance of bonds to furnish funds for building a market house, and by the

none the less a "market garden" within the meaning of section 211 of the Public Health act, 1875 (38 & 39 Vict., ch. 55), and as such was only liable to be rated at one fourth of its net annual value. *Purser v. Worthing Local Board*, 35 W. Rep. 519.

1. See *First Municipality v. Cutting*, 4 La. An. 336; *Pierre Cougot v. New Orleans*, 16 La. An. 21; *Bowling Green v. Carson*, 10 Bush (Ky.) 64.

2. *Wartman v. Philadelphia*, 33 Pa. St. 202.

Farming Out Revenues.—Construction of a contract by which the city of New Orleans transferred to an individual the right to collect the revenues of the city accruing from the meat market, and admissibility of evidence in an action for damages for a violation of the contract. *Kaiser v. New Orleans*, 17 La. Ann. 178.

3. *Ketchum v. Buffalo*, 14 N. Y. 356, *affirming* 21 Barb. (N. Y.) 204; *People v. Lowber*, 28 Barb. (N. Y.) 65; *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282. But compare *State v. Patterson*, 34 N. J. L. 163.

The power to purchase land for a public market is not affected by a limitation contained in the charter as to the yearly

value of the real estate which the corporation may hold. *People v. Lowber*, 28 Barb. (N. Y.) 65; 7 Abb. Pr. (N. Y.) 158.

Power of the city councils, after the passage of the consolidation act of February 2, 1854, to make contracts for the purchase of sites for market houses. *Twitchell v. Philadelphia*, 33 Pa. St. 212.

Dedication for Market Purposes.—If a municipal corporation has acquired real estate in fee, the fact that it was purchased for the purpose of erecting a market house, and the further fact that the property was so used will not make it trust property for use only for market purposes, nor will the use of the property for market purposes for a period of forty years be sufficient to establish a dedication of the land to the public for market uses. *Gall v. City of Cincinnati*, 18 Ohio St. 563.

4. *Smith v. Newbern*, 70 N. Car. 14; 16 Am. Rep. 766. In *Wade v. Newbern*, 77 N. Car. 460, it was held that when a city has power to build a market house, it has also authority to hire a building for market purposes.

5. *In re Cooper's Application*, 93 N. Y. 507; 2 Am. & Eng. Corp. Cas. 419.

terms of the bonds the revenue of the market is appropriated to payment of the interest on the bonds and to the creation of a sinking fund for their redemption, the city cannot divert to other purposes the revenues derived from the market house.¹

It has been held that a market house is not a *locus publicus*,² and although destined to public use it would appear that it is not necessarily public property.³ Accordingly a market house may be owned jointly by a city and by a private individual, and at the suit of one of the parties thereto a partition sale may be decreed.⁴

In Iowa it has been held that a city may authorize an individual to erect a market building upon private property and lease stalls therein, and may treat such building as a public market, prohibiting sales at other places.⁵ A similar method of providing for the erection of public market houses seems to have existed in other places without having been called in question.⁶

IV. Markets in Streets—Nuisances.—The erection of market buildings along the centre of a street is illegal and constitutes a nuisance, although the city causes space for the passage of vehicles to be left along the sides of the streets.⁷ And a municipal corporation may be restrained at the instance of a property owner from allowing the streets in the vicinity of his residence to be used as a market place to his annoyance and detriment.⁸

1. *Fazende v. Houston*, 34 Fed. Rep. 95. See also *Houston v. Voorhies*, 70 Tex. 356; 22 Am. & Eng. Corp. Cas. 271.

2. *New Orleans v. Guillotte Heirs*, 14 La. An. 888.

3. *Davis v. Municipality No. 2*, 14 La. An. 885.

4. *New Orleans v. Guillotte Heirs*, 14 La. An. 888.

A contract between a city and a market house association, giving the latter for twenty-one years exclusive market privileges in the city and exemption from city taxes in consideration of the erection of a market house, in which the city was to have certain rights—construed and sustained. *Palestine v. Barnes*, 50 Tex. 538.

5. *Le Claire v. Davenport*, 13 Iowa 210 (overruling the earlier case of *Davenport v. Kelly*, 7 Iowa 102).

6. See *Harney v. St. Louis*, 90 Mo. 214; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164.

But in *Michigan*, a contrary view has been adopted, and it has been held that a contract by which the plaintiff contracted to build a market house, and to put it under the control of the village authorities for a period of ten years in consideration that they would pay over the rents to him, appoint a person to

superintend it, and permit no other market house to be erected or used, or certain articles specified to be sold elsewhere in the city during the said period, was against public policy and void. *Gale v. Village of Kalamazoo*, 23 Mich. 244, 9 Am. Rep. 80 *aff'd* 1 Mich. N. P. 5. This case was decided upon the grounds that, by the contract, the village bound itself for the period of ten years to maintain a market house, and thereby abrogated its inherent right to abandon the market house if it should be found desirable for the interests of the village, and also upon the ground that, as the plaintiff was to have an unlimited right to control the occupation of the market house through the power given him to determine the rents to be paid by lessees, he was thus vested with a practical monopoly of the public markets.

7. *State v. Mobile*, 5 Porter (Ala.) 279; *Wartman v. Philadelphia*, 33 Pa. St. 202, 210; *Harrisburg's Appeal* (Pa. 1887), 19 Am. & Eng. Corp. Cas. 603.

8. *McDonald v. Newark*, 42 N. J. Eq. 136; *Atwater v. Newark*, 7 N. J. L. 176. See also *Higgins v. Princeton*, 8 N. J. Eq. 309; *State v. Laverick*, 34 N. J. L. 201. *Certiorari* has been allowed to remove an ordinance and resolution regulating the use of a public street as

But it would appear that if it is not proposed to erect market buildings in a street, the city may permit the market to be held there provided no injury is caused to abutting lot owners. The right to so use the street is sustained upon the ground that the inconvenience to the public occasioned by the temporary obstruction of the streets is more than counterbalanced by the increased facilities afforded for the sale and purchase of the necessities of life.¹

If a city propose to erect market buildings on a public street, a bill for injunction in the name of the city upon the relation of the attorney general and taxpayers, will lie to restrain the nuisance.² And in *New Jersey* it has been held that the legislature could not authorize a market to be held in a public street without providing compensation to the proprietors of the lands fronting on the street.³

Where a place had been used as a market to which persons resorted to expose articles for sale, it was held to be a sufficient answer to an indictment for a nuisance that the same had been enjoyed as a market place for more than twenty years without interruption.⁴

V. Municipal Regulations.—A city may, under the power to regulate markets, adopt such regulations as are necessary for the preservation of peace and good order and the health of the city, but these regulations must be of a police and sanitary character; and not an attempt to restrain trade under the color of regulating it.⁵ An ordinance requiring all persons selling hay or other produce and delivering the same within the city limits to pay a fee of five cents, is unreasonable and illegal.⁶ The validity of an

a market, on the ground that the city council could neither authorize nor regulate a public nuisance. *Anon.*, 9 N. J. Law Jour. 241. But the court will not maintain a suit to enjoin the holding of a market on a public street except it is shown that the property owner has suffered special damage thereby. The mere fact that a dwelling house would be less eligible if a market place were erected is not sufficient to support a bill for an injunction. *Higgins v. Princeton*, 8 N. J. Eq. 309.

1. *Denehey v. Harrisburg*, 2 Pearson (Pa.) 330; *Harrisburg's Appeal* (Pa.), 19 Am. & Eng. Corp. Cas. 603, 609.

2. *Harrisburg's Appeal* (Pa.), 19 Am. & Eng. Corp. Cas. 603.

3. *State v. Laverick*, 34 N. J. L. 201.

4. *Rex v. Smith*, 4 Esp. 111.

5. *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282; *Peoria v. Calhoun*, 29 Ill. 317; *Bloomington v. Wahl*, 46 Ill. 489. See also *Winsboro v. Smart*, 11 Rich. (S. Car.) 551.

Extent of the powers of the metro-

politan board of health over markets. Mayor etc. of New York *v. Schultz*, 31 How. (N. Y.) Pr. 385.

Regulation of private markets after they had been leased for the year. *New Orleans v. Stafford*, 27 La. An. 417.

Penalty for carrying on a private market in contravention of the city ordinances. *Jacobs v. Levy*, 27 La. An. 619.

Under the charter of Richmond the city council may require one who resides outside the city limits, but rents a stall in the market house, to take out a licence for using his carts and horses to bring meats from his house to his stall, and pay a tax on the licence. *Frommer v. Richmond*, 31 Gratt. (Va.) 646.

Power of the city corporation to pass an ordinance prohibiting the sale of beef in the western moiety of the market house, between Seventh and Eighth streets. *Mayor v. Davis*, 6 Watts & S. (Pa.) 269.

6. *Kip v. Patterson*, 26 N. J. L. 298.

ordinance regulating the sale of goods within the city limits is for the court, and not for the jury.¹

It has been held in some cases that an ordinance by a municipal corporation which prohibits the selling of marketable articles elsewhere than in the public market during market hours, is an exercise of the police power of the municipality and is not in restraint of trade, and is therefore valid.² But the validity of such an ordinance has not been uniformly recognized.³ Under the power to regulate markets, a municipality cannot adopt an ordinance prohibiting hawking and peddling in the streets except by parties who have attended market during regular market hours on the market days. Such an ordinance is partial in its operation and is invalid.⁴ But it has been held that where a municipal corporation is authorized to licence and regulate the sale of meats and vegetables, a regulation which prohibits the keeping of a stall for the sale of these articles outside of a public market without obtaining a licence is not invalid.⁵

When the limits of a market are defined by ordinance and do not extend to the whole city, ordinances regulating the use of the market are only effectual within the market limits.⁶ And under the

1. *Peoria v. Calhoun*, 29 Ill. 317.

2. *Ex parte Byrd*, 84 Ala. 17; *Shelton v. Mobile*, 30 Ala. 540; 68 Am. Dec. 143; *Le Claire v. Davenport*, 13 Iowa 210; *Davenport v. Kelly*, 7 Iowa 102; *Bowling Green v. Carson*, 10 Bush (Ky.) 64; *State v. Gisch*, 31 La. An. 544; *New Orleans v. Stafford*, 27 La. An. 417; *Gossigi v. New Orleans (La.)*, 4 So. Rep. 15; *St. Louis v. Webber*, 44 Mo. 547; *St. Louis v. Jackson*, 25 Mo. 37; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Bush v. Seabury*, 8 Johns. (N. Y.) 418; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Winsboro v. Smart*, 11 Rich. (S. Car.) 551; *Badkins v. Robinson*, 53 Ga. 613; *Ex parte Canto*, 21 Tex. App. 61; 57 Am. Rep. 609; *Commonwealth v. Brooks*, 109 Mass. 355; and see *St. Louis v. Jackson*, 25 Mo. 37.

3. See *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789; *Bloomington v. Wahl*, 46 Ill. 489; *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282; *St. Paul v. Laidler*, 2 Minn. 190. The New Orleans ordinance exacting twenty-five cents for every load of supplies for sale by one not occupying a market stall, is intended to raise a revenue, and, either as a tax or a licence, is unconstitutional. *State v. Blaser*, 36 La. An. 363.

4. *Danville v. Peters*, 8 Luz. L. Reg. (Pa.) 273.

But although such an ordinance is

void, an ordinance regulating the general market system and providing for the time of selling particular articles in the streets is valid. *Milton v. Hoagland*, 3 Pa. Co. Ct. Rep. 283.

5. *Ash v. People*, 11 Mich. 347; 83 Am. Dec. 740. But compare *City of St. Paul v. Laidler*, 2 Minn. 190; 72 Am. Dec. 89.

Some courts have held that a power "to regulate and manage markets" is sufficient to sustain an ordinance prohibiting the sale of meats elsewhere than in the public market. *Ex parte Byrd*, 84 Ala. 17; *Ex parte Canto*, 21 Tex. App. 51; 57 Am. Rep. 609. But compare *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789; *Burlington v. Dankwardt*, 73 Iowa 170.

A legislative enactment authorizing a city to prohibit sales of vegetables and farm products "during market hours" does not authorize a general prohibition against their sale, except by licensed vendors. *State v. St. Paul Municipal Court*, 32 Minn. 329.

6. But strangers who come within the market limits are subject to the ordinances. *Buffalo v. Webster*, 10 Wend. (N. Y.) 99.

The power to restrain hawkers and peddlers from using the streets of the city for the purpose of traffic is not necessarily connected with the power to regulate a market. The prohibition

power to regulate markets, it has been held that a municipal corporation may require persons selling fresh meat outside the market limits to procure a licence and pay a fee therefor.¹

Under a statute which provides that towns may establish markets and provide for the weighing of coal, hay, or other articles for sale, the municipality may erect scales, appoint a weighmaster and regulate the use of the scales by ordinance.² And when the charter authorizes the city to regulate the place and manner of selling hay, the city may forbid under penalty the exposing of any hay for sale in certain places without first having it weighed by the attendant of some established city hay scale, from whom a certificate of the weight must be obtained.³

But under the right to make necessary regulations under the police power, a city cannot levy a tax for revenue, and a charge levied for purposes of revenue upon persons selling articles within the corporate limits, and without the market-house is illegal.⁴

Where a city is authorized by charter to establish and regulate the markets and to prevent huckstering, it cannot adopt an ordinance defining a huckster to be "any person not a farmer or butcher who shall sell or offer for sale any commodity not of his own produce or manufacture." The city cannot include persons as hucksters who do not fall within the ordinary meaning of that term.⁵

VI. Use of Market—Sales.—All persons are entitled to enter a public market for the purpose of buying, but not necessarily for the purpose of selling; right to sell is usually confined to stall holders.⁶ And by-laws regulating markets must not be so re-

of peddling may be justified under power to prevent nuisances. *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282.

1. Such licence fee is not a tax, but is reasonable compensation which the city is entitled to ask from those who do not sell in the public markets, for the additional labor of its officers and the expense occasioned thereby. *Ash v. People*, 11 Mich. 347; 83 Am. Dec. 740. But in *State v. Municipal Court of St. Paul (Minn.)*, 5 Am. & Eng. Corp. Cas. 321, and *St. Paul v. Traegar*, 25 Minn. 248, it was held that a city cannot require persons making sales of vegetables and farm products on the city streets to procure a licence under the authority of an act empowering the passage of ordinances prohibiting such sales "during market hours." A licence fee may be exacted by a city from keepers of private markets, although persons engaged in the same business in the public markets are not subject thereto. *New Orleans v. Du Barry*, 33 La. An. 481; 39 Am. Rep. 273.

2. *Davis v. Anita*, 75 Iowa 325; 18 Am. & Eng. Corp. Cas. 502.

3. *Yates v. Milwaukee*, 12 Wis. 752.

4. *Mestayer v. Corrige*, 38 La. An. 707; *State v. Blaser*, 36 La. An. 363. See also as to licences *St. Louis v. Freivogel*, 95 Mo. 533; *Vosse v. City of Memphis (Tenn.)*, 2 Am. & Eng. Corp. Cas. 16. In *Frommer v. Richmond*, 31 Gratt. (Va.) 646, it was held that a city council might, under the powers conferred upon it by charter, require a person who resided outside the city limits but rented a stall in the market house, to take out a licence for using his vehicles to bring meats from his house to his stall and pay a tax on the licence.

5. *Mays v. City of Cincinnati*, 1 Ohio St. 268.

6. *Davis's Heirs v. New Orleans*, 16 La. An. 404; *Hughes v. Farmers' Assoc.*, 1 Phila. (Pa.) 338.

But a city authorized to maintain a market house cannot exclude the public therefrom during market hours and devote the building to other purposes.

strictive as to prevent a frequenter of it from resorting to it.¹ The municipality may, however, limit the sales to perishable articles necessary to the daily support of the inhabitants of the city, and may prohibit the selling of other articles,—*e. g.*, groceries.²

A corporation may, however, adopt a by-law providing that part of the market shall be used for sale by wholesale only, and imposing a penalty for selling by retail in that part.³ But although a corporation may impose fines and other penalties, it has no power to enact that if fruit is found in a market in baskets not marked in a prescribed manner, both fruit and baskets shall be forfeited.⁴

An ordinance prohibiting wagons containing perishable produce from remaining in streets within the limits of a market more than twenty minutes during market hours, unless permitted to do so by the market superintendent, is reasonable, and is not an undue restraint of trade.⁵ So, too, the city may require that persons occupying stands shall satisfy the clerk of the market that the articles are the produce of their own farms, or some farm not more than three miles distant from the dwelling house.⁶ And it may provide that any person who shall occupy a market stall without authority of law for the purpose of selling meat or provisions, shall be subject to a penalty.⁷

VII. Occupation of Stalls and Stands.—The right to occupy a market stall pursuant to the permission of the clerk of markets, or of the city, is not a right of property of which the courts can take cognizance. It is merely a licence.⁸ Where the mode of renting a market stand is provided for by ordinance, the right to occupy it cannot be acquired by possession. Every seller must be deemed to hold his stand by contract with the city subject to

Magistrates of Edinburgh *v.* Blackie (Eng.), 16 Am. & Eng. Corp. Cas. 534.

1. *Worthy v. Nottingham Local Board*, 21 L. T. 582.

2. *First Municipality v. Cutting*, 4 La. An. 335.

But an ordinance which prohibits sales of any articles in a public market maintained by a city, pursuant to statutory authority, except from stands leased or occupied by the sellers, and confines farmers and gardeners with their vehicles to other markets where the accommodation is inadequate, is void as infringing the rights of the farmers and gardeners to the use of the public market, and prohibition will lie to restrain proceedings for violating such ordinance. *Hughes v. City of Detroit*, 75 Mich. 574; 27 Am. & Eng. Corp. Cas. 622.

3. *Strike v. Collins*, 54 L. T., N. S. 152.

4. *Phillips v. Allen*, 41 Pa. St. 81; 82 Am. Dec. 486.

If the sale of beef is prohibited in a
14 C. of L.—30

certain part of the market, although such space is devoted to the use of farmers for the sale of their farm produce, the flesh of an ox raised on a farm and slaughtered by a farmer cannot be sold in that part of the market. *Philadelphia v. Davis*, 5 Watts & S. (Pa.) 269.

5. *Com. v. Brooks*, 109 Mass. 335.

But when the power conferred upon the city to pass bylaws and ordinances imposing a penalty is confined to such ordinances as have penalties attached which do not exceed \$20 for one offence, an ordinance prescribing a penalty of not less than \$1 nor more than \$5 "for every hour" that a person shall keep his wagon within the limits of the market after notice from the clerk of the market to remove it, is unauthorized and void. *Com. v. Wilkins*, 121 Mass. 356.

6. *Com. v. Rice*, 9 Metc. (Mass.) 253.

7. *State v. Leiber*, 11 Iowa 407.

8. *Barry v. Kennedy*, 11 Abb. (N.Y.) Pr. N. S. 421.

market regulations, and not adversely to its authority.¹ But an action may be maintained by the owner of a market for stallage without showing any contract in fact between him and the occupier of the stall.²

A lease of a stall in a city market for a period of one year is not a disposal or sale of real estate belonging to the city within the meaning of the provisions of a charter having reference to such real estate, and is not governed thereby.³ And when by ordinance it is provided that market stalls shall be leased at public auction to the highest bidder above a fixed minimum price, who should then become the tenant at a fixed yearly rent, the person acquiring right to stalls only acquires the privilege of a choice in the tenancy, and in the event of the market being torn down he has no claim to the return of the premium paid.⁴

If a difficulty arises between the holders of contiguous stands it is the duty of the market clerk to interpose and determine their respective rights, and if necessary to call the police to his aid in preserving order and peace in the market.⁵

A grant by a city of a lease of a market stall does not amount to a contract by it to prevent unlicensed sales by other persons, the breach of which will excuse the payment of rent, although it is the duty of the officers of the city to prevent such sales.⁶

1. *Hatch v. Pendergast*, 15 Md. 251; *Rose v. Baltimore*, 51 Md. 256.

A bylaw of a city providing that no inhabitant of a city, or of any town in the vicinity thereof, not offering for sale the produce of his own farm, shall, without the permission of the clerk of the market, be suffered to occupy any stand for the purpose of vending commodities, in certain streets which by bylaws are a part of the market, is a sanitary police regulation, and not void as making a distinction between the inhabitants of the city and its vicinity, and those of distant towns, nor as being in restraint of trade. *Nightingale's Case*, 11 Pick. (Mass.) 168. An ordinance requiring persons occupying stands in the market place to pay the sum of twenty-five cents for every market day's occupation, is lawful and may be enforced by fine and judgment before the mayor. *Cincinnati v. Buckingham*, 10 Ohio 257. As to the right of the farmer of the revenues of the market to eject a person occupying a stall, see *Douat v. Beombay*, 15 La. An. 377.

Licence Tax.—In *Delcambre v. Clere*, 34 La. An. 1050, it was held that a charge of a specified amount for the daily privilege of occupying a butcher's stand is a licence or tax; that the power of municipal corporations to tax or li-

cence occupations must be expressly conferred by law; and that such corporations may under their police powers regulate or suppress private markets, but cannot impose a tax for revenue.

2. Mayor etc. of *Newport v. Saunders*, 3 B. & Ad. 411.

3. *Dubque v. Miller*, 11 Iowa 583.

But where a municipal corporation under a general power to lease, sell or dispose of market stalls for any term it may think proper, sells a stall in a public market without limitation of time, and without any special ordinance authorizing the sale and prescribing the term, such sale confers no absolute property, but only the right of exclusive enjoyment and possession for market purposes during the existence of the market, and is not in excess of the powers of the city. *Rose v. Mayor etc. of Baltimore*, 51 Md. 256; 34 Am. Rep. 307.

4. *Woelpper v. Philadelphia*, 38 Pa. St. 202.

Constitutionality and effect of the ordinance of the city council of Charleston of 1835, authorizing the commissioners of the market to vacate the lease of any of the market stalls. *City Council v. Goldsmith*, 2 Spears (S. Car.) 428.

5. *Hatch v. Pendergast*, 15 Md. 251.

6. *Peck v. Austin*, 22 Tex. 261.

VIII. Removal and Discontinuance.—In *Michigan*, it has been held that a grant of authority to maintain a public market being a franchise for public purposes, a city, which by its charter has received the power of maintaining such a market, and has acquired property and issued bonds in payment thereof, cannot of its own free act discontinue such market, even though the market building be erected upon land owned by the city, but must continue the same and collect and apply the income provided from such franchise in the manner prescribed by the statute.¹ But in other States it has been held that a power conferred in general terms upon the authorities of a city to establish and regulate markets is a continuing power. The fact that the city council had at one time exercised it by establishing a market place and erecting a market house in a particular locality, will not prevent it from afterwards abandoning that site and removing the market to another. Such a removal, if made in the reasonable exercise of the discretion vested in the city by law, will not be restrained by injunction at the suit of a taxpayer.²

IX. Actions Against Municipality for Negligence.—Where a municipality receives toll for the use of space in a public market, a duty is imposed upon it to keep the market in a safe condition.³

MARKET VALUE.—A price established by public sales in the way of ordinary business.⁴

1. *Taggart v. Detroit* (Mich.), 22 Am. & Eng. Corp. Cas. 177. It was also held in this case that the public have such an interest in the continuance of a public market as confers upon the attorney general the power of bringing a suit in equity to restrain a municipal corporation from wrongfully discontinuing it. See *New Orleans v. Heirs of Guillotte*, 12 La. An. 818.

2. *Gall v. Cincinnati*, 18 Ohio St. 563. See also *Wartman v. Philadelphia*, 33 Pa. St. 202; *Magistrates of Edinburgh v. Blackie* (Eng.), 16 Am. & Eng. Corp. Cas. 535; *Wortley v. Nottingham Local Board*, 21 L. T., N. S. 582; *Mayor etc. of Dorchester v. Ensor*, L. R., 4 Ex. 335. But it would appear that under a grant of authority to maintain a market, the removal will be bad unless the public have the same privilege in the new market as in the old. *Rex v. Starkey*, 7 A. & E. 95.

3. In the case of *Lax v. Corp. of Darlington*, L. R., 5 Ex. Div. 28; 48 L. J., Q. B. 143, the plaintiff sued the borough of Darlington to recover damages for injury to a cow in the public market place. The defendants were the owners of the market, and in the market place they had erected a statue

around which it had placed a railing as a fence. Plaintiffs attended the market with their cattle and occupied a particular site for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself and subsequently died from the injuries. The jury found that the railing was dangerous. It was held that the defendants, having received toll from the plaintiffs, invited them to come to the market with their cattle, and a duty was imposed on them to keep the market in a safe condition, and that therefore an action would lie for the loss sustained by the plaintiffs.

Obstruction of Street.—In *Black v. Cleveland*, 3 West Law Monthly (Ohio) 96, it was held that a municipal corporation is not liable to an individual for damages sustained by him in driving along a street appropriated to market uses occasioned by the street being obstructed by market teams, wagons and marketmen.

4. *Murray v. Stanton*, 99 Mass. 348; *Meixell v. Kirkpatrick*, 6 Pac. Rep. 241. The "market value" is such a sum of money as the property is worth in the market to persons generally who would pay the just and full value. *Esch*

Definition.

MARKET VALUE.

Definition.

v. Chicago, M. & St. P. R. Co., 39 N. W. Rep. (Wis.) 129; *Low v. R. Co.*, 3 Atl. Rep. (N. H.) 739; 5 Am. & Eng. Encyc. of Law 31.

By "market value" is meant such a price as the vendor could obtain after ample time taken to effect a sale. *Railway v. Woodruff*, 5 S. W. Rep. (Ark.) 792.

The question is, what is the value of land sought to be condemned for any purpose, not what it is worth to the Railroad Co. *Stinson v. R. Co.*, 6 N. W. Rep. (Minn.) 784.

The "market value" is what the land was worth at the time it was condemned, not what it was worth at the time of the location of the improvements. *Stafford v. City of Providence*, 10 R. I. 567. See EMINENT DOMAIN, vol. 6, p. 567.

Where There Is No Evidence of Value, the Face Value Is Deemed to be the "Market Value."—In *Meixell v. Kirkpatrick*, 29 Kan. 679, BREWER, J., observes: "We do not doubt that a municipal bond so far resembles an ordinary chose in action that where no evidence of value is offered, its face value is to be deemed the *market value*, but we think that it must be also conceded that such securities have become so abundant, and so much received as an article of ordinary commerce, that they possess, strictly speaking, a 'market value,' and, when such market value is shown, that it is to be deemed as the measure of damages for any conversion. 'Market value' signifies a price established by public sales, or sales in the way of ordinary business."

Proof of Market Value.—See *Bullard v. Stone*, 8 Pac. Rep. (Cal.) 17.

"Market Value" of Leases.—In *Lawrence v. Boston*, 119 Mass. 126, on the trial of a petition under the St. of 1871, ch. 382, § 7, *Massachusetts*, by the lessee of a part of a building, for the assessment of damages occasioned by the taking of the land on which the building stood by the city, the court instructed the jury as follows: "The value of the leases is their market value. 'Market value' means the fair value of the property as between one who wants to purchase and one who wants to sell any article, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that

price which the property would bring when forced off at auction, under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. The fact, therefore, that one of these lessees, Lawrence, as has been argued by his counsel, did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of *market value*, because it is not a case of one who wants to sell and one who wants to buy. If Lawrence had wanted to go out, the question is, what would his lease have brought? Not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or of less value to him than its value upon the market. The question for you to consider is, if Lawrence wanted to sell this lease, what could he have obtained for it upon the market, from parties who wanted to buy and would give its fair value?"

In *Dwight v. County Commissioners*, 11 Cush. (Mass.) 201, the court said: "The *market value* is a near and perhaps the closest approximation to the true value." See also *Edmunds v. Boston*, 108 Mass. 235; *Cobb v. Boston*, 112 Mass. 181; *Jacksonville & Southeastern R. Co. v. Walsh*, 106 Ill. 253; *Green v. City of Chicago*, 97 Ill. 370; *Everett v. Union Pac. R. Co.*, 59 Iowa 243; *Chicago & Evanston R. Co. v. Jacobs*, 110 Ill. 414; *King v. Minneapolis Union R. Co.*, 32 Minn. 224.

In *Green v. The City of Chicago*, 97 Ill. 370, the "market value" was spoken of as the minimum of compensation.

What is meant by the market value is not the price that the land would bring at a forced sale, but what it, or land similarly situated, would bring at a sale after due notice and under fair conditions. *Somerville & Easton R. Co. v. Doughty*, 22 N. J. L. 495; *Fall River Print Works v. City of Fall River*, 110 Mass. 428; *Howard v. City of Providence*, 6 R. I. 514; *Gardner v. Brookline*, 127 Mass. 358.

In *Everett v. Union Pac. R. Co.*, 59 Iowa 243, the court said in charging the jury, "Market value is what it would bring when sold as such property is ordinarily sold in the community where it is situated."

In *Kiernan v. C. I. Y. & C. R. Co.*, 123 Ill. 188 and *R. R. Co. v. Moore*, 15

MARQUE.—See LETTER OF MARQUE.

N. E. Rep. 164, it was *held* that "the price fixed should be the price at which a sale could be made in the market for cash. It has been objected, in *Brown v. Calumet River R. Co.*, 18 N. E. Rep. 284, that such a rule made a distinction between a *cash* value and a *market* value, but the objection, after consideration, was overruled.

Depreciating in Market Value.—The makers of a promissory note deposited in pledge with the payee certain certificates of shares in a corporation, and also a life policy of insurance of one of the makers of the note, calling for \$5,000. The certificates of stock proved to be counterfeits and worthless. The contract of the parties provided that on default of payment of the note at maturity the pledgee might sell the pledge, and also "in event of said security, or any part thereof, depreciating in market value," that the pledgee might, either before or after maturity of the note, sell the pledge, either at public or private sale, and waived any and all notice of the sale to the pledgors. *Held*, that the words "depreciating in market value" had no reference to the security of the certificates of stock, for, being worthless, their value could not depreciate; and that a sale by the pledgee before the maturity of his debt did not pass the absolute title, but that the pledgors might redeem the same by payment of the note when due. *Nat. Bank of Ill. v. Baker*, 128 Ill. 534.

The "market value" is the price at which goods can be replaced for money in the market; not the retail value or price for which they are sold at retail. *Wehle v. Haviland*, 69 N. Y. 448.

A "market value," as signifying a price established by public sales, or sales in the way of ordinary business, as of merchandise, is not necessary to the assessment of damages, or the appraisal of property which is the subject of a judicial valuation. Property is often the subject of such legal valuation, for which no proof of value in the market could be given, because it is not brought into the course of trade, and is not known in the market, and therefore is incapable of any estimate in that mode. In such cases the real value is to be ascertained from such elements of value as are attainable. *Murray v. Stanton*, 99 Mass. 345.

Circumstances Peculiar to Plaintiff.—Plaintiff sent goods by the railroad

company defendant to his travelling salesman at Cardiff. Through defendant's negligence, the goods were delayed until the traveller had left Cardiff. In consequence, plaintiff lost the profits which he would have derived from a sale at Cardiff. *Held*, that in the absence of notice to the defendant of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. The court held that "the market value of the goods was their value in the market independently of any circumstances peculiar to the plaintiff, and that the profits that would have been made by the sale of the goods at Cardiff through the plaintiff's traveller being present could not be recovered." *Great Western R. Co. v. Redmayne*, L. R., 1 C. P. 329. See also *Borries v. Hutchinson*, 18 C. B., N. S. 445; *Hadley v. Baxendale*, 9 Ex. 341. Query whether knowledge by carrier of purpose would entitle to damages for delay, in the absence of contract to that effect. *Wood's Mayne on Damages* 400 (*263).

Resale of Land.—A co-owner of land, selling the same representing that he has the authority of all the other owners, is liable to the vendee in case the others disavow his sale. The damages is the difference between the contract price and the market price, besides costs. In case of sale to another vendee by the lawful owners, the sum obtained on the effectual sale is *prima facie* evidence of the market price. *Godwin v. Francis*, L. R., 5 C. P. 295. The rule of *Flureau v. Thornhill*, 2 W. Bl. 1078, "is confined to the single case of failure of title." *Engell v. Fitch*, L. R., 4 Q. B. 665; *Godwin v. Francis*, L. R., 5 C. P. 308. See *Sikes v. Wild*, 4 B. & S. 421. *Bad faith* was once thought to render the proposed vendor liable for loss of the bargain. 1 *Sutherland on Damages* 150. See the cases reviewed in *Wood's Mayne* 53. Difference between sum bid at auction sale of land and that bid at resale is a proper criterion against the first bidder who refused to comply with his bid. *Gardner v. Armstrong*, 31 Mo. 535. See also *Springer v. Berry*, 47 Me. 330. The market value of the land at the time of a breach of contract of sale, with interest from that date, is the true rule of damages in action for such breach. *Brinckerhoff v. Phelps*, 24 Barb. (N. Y.) 100.

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I. PRELIMINARY MATTERS RELATING TO MARRIAGE—1. *Definitions.*—*Marriage* is the legal status or condition of husbands and wives (see HUSBAND AND WIFE, vol. 9, p. 520), just as infancy is the legal status or condition of persons under age. *A marriage* is the combination of acts by which a man and a woman become husband and wife.¹

1. In Stewart's *Marriage and Divorce*, ch. 11, are found the following definitions: *Marriage*: The legal conditions under which man and woman may lawfully cohabit and have legitimate children. The conditions are precedent, continuing and subsequent. *A Marriage*: Those legal conditions which must exist or be performed before man and woman may lawfully co-

habit constitute a marriage. *Valid and Invalid*: A marriage is valid when all these conditions exist or are performed; invalid when one or more of them is wanting. *Legal and Illegal*: A marriage is legal when all the provisions of law relating thereto have been complied with; illegal when one or more of them has been omitted. *Valid and legal*: A marriage if legal

must be valid, but a valid marriage may be illegal. *Void, voidable and prohibited*: A void marriage is not a marriage at all; it is invalid and illegal. A voidable marriage is one which is valid until duly avoided, or void until duly confirmed; thus it may be valid or invalid, and it is illegal. A prohibited marriage is a valid marriage, in respect to which some one has done or omitted something prohibited or commanded by law, sometimes under penalty; it is simply illegal. *Husband, Wife, Children*: After a valid marriage between them, man and woman are husband and wife, and their offspring are legitimate or legal children. *The married state*: Those continuing conditions which determine the legal position of husband and wife with regard to each other, their children and the rest of the community, constitute the status of marriage, or the marriage or married state. *Dissolution*: The married state may come to an end wholly by the death of one of the parties; partially by the act of one or both the parties; and wholly or partially by act of law. *Decrees of nullity and of divorce*: A decree separating parties validly married is a decree of divorce; a decree declaring a void marriage void, or making a voidable marriage void, is a decree of nullity. *Results of dissolution*: After dissolution, the parties, or the survivor, have special rights and liabilities; the conditions subsequent of marriage apply. *Divisions*: Marriage laws thus fall into three great divisions: (1) the formation of marriage; (2) the marriage state; (3) the dissolution of marriage.

Some other definitions are as follows: "Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law. And such contract is good and valid if the parties (1) were at the time of making it willing to contract, (2) able to contract, and (3) actually did contract in the proper forms and solemnities required by law." 1 Black. Com. 439. "A contract." "The most beneficial institution of society." 2 Kent Com. 75, 76. "It is a present and perfect consent the which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only." Swinburne, Esq. 4. "A civil contract regulated and prescribed by law, and endowed with civil

consequences." Story Conf. L. 108. "A contract according to the form presented by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife." Shelford M. & D. 1. "A lawful coupling and joining together of a man and woman in an individual state or society of life, during the lifetime of one of the parties; and this society of life is contracted by the consent and mutual good will of the parties toward each other." Ayliffe Paregon Jur. 359. "Marriage is, first, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of marriage having been once accomplished, the word comes afterwards to denote the relation itself." Schouler Dom. Rel. 22; Hus. & W. 11. "The civil status of one man and one woman united in law for life, under the obligation to discharge to each other and the community those duties which the community by its laws holds incumbent on persons whose association is founded on the distinction of sex." 1 Bish. M. & D. 3. "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations." Hart's Cal. Civ. Code 55. "Union of one man and one woman so long as they shall both live, to the exclusion of all others, by an obligation which, during that lifetime, the parties cannot of their own volition or act dissolve, but which can be dissolved only by the authority of the state." PERKINS, J., 19 Ind. 57. "Is to be considered in law as a civil contract, to which the consent of parties is essential; the marriage ceremony may be regarded either as a civil contract or as a religious sacrament; but the marriage relation shall only be entered into, maintained or abrogated as provided by law." Kan. Rev. L. 1881, 3121. Is a civil contract to which the consent of the parties is essential." Rev. Laws of Ark. 1874, 4171; Col. 1877, p. 611; Ind. 1881, 5324; Iowa 1880, 2185; Minn. 1878, p. 623; Mo. 1879, 3264; Neb. 1881, p. 341; Nev. 1873, 195; N. Y. 1881, p. 2331;

More generally, marriage is the set of legal terms or conditions under which a State allows its people to live in sexual union. In all countries one finds the intercourse of the sexes regulated and a system of marriage more or less complex adopted, the nuptials being accompanied by more or less ceremony and the durability and nature of the union varying greatly.¹ In international law, all the various systems of marriage are not recognized, the line being drawn, seemingly, at polygamous and incestuous unions, which are not regarded as marriages at all. (See CONFLICT OF LAWS, vol. 3, p. 601, *n.* 2.)

Many disputes have arisen over the definition of marriage, and some of these are discussed in the notes, where there will also be found a list of general authorities on the subject of this title.²

Marriage is not a contract, nor is the relation of husband and wife a contractual relation;³ but there are many contracts which are connected with marriage, which will now be discussed. (See also UNLAWFUL CONTRACTS RELATIVE TO MARRIAGE, vol. 9, p. 918.)

Wash. 1881, 2380; Wis. 1878, 2328. For other definitions and discussions see Mr. Bishop's work, 1 *Mar. & D.*, ch. 1.

1. Herbert Spencer, *Data of Sociology*, vol. 1, pt. 3; *Encyc. Brit.*, vol. 15, p. 565; *Duntze v. Levett*, 3 Eng. Ec. 360, 495, 502; *Maguire v. Maguire*, 7 Dana (Ky.) 181.

2. Bishop on Marriage and Divorce has a world wide reputation; Stewart on Marriage and Divorce contains a brief logical statement of the law with a great number of authorities; Schouler on Husband and Wife is sometimes cited.

3. **Marriage Not a Contract.**—The consent of the parties is essential to a valid marriage, but, as will appear further on, it is only one of several essentials, and does not alone make a marriage. Marriage is constantly referred to as a *civil contract*, but in such cases it is intended to emphasize the word *civil* and not the word *contract*, and to mark the fact that under modern law marriage is not controlled by the peculiar mandates and dogmas of particular churches or sects. That the distinctive rights and obligations of married persons arise, not from any contract between them, but by law, is seen from the following facts:

(1) The obligations and rights of husband and wife are not only mutual, but also to and against the community. *HUSBAND AND WIFE*, vol. 9, p. 789;

1 *Bish. M. & D.*, § 4; *Niboyet v. Niboyet*, 4 L. R., P. D. 11; *Maguire v. Maguire*, 7 Dana (Ky.) 181.

(2) Except as to property the parties cannot by contract before marriage settle their rights and obligations. *MARRIAGE SETTLEMENTS*, *post*; *Duntze v. Levett*, Serg. 68; 3 Eng. Encyc. 360, 385, 397; *Lindo v. Belisaris*, 1 Hog. Con. 216; *Holmes v. Holmes*, 4 Barb. (N. Y.) 205; *Sandford v. Sandford*, 5 Day (Conn.) 353; *Crane v. Meginnis*, 1 Gill & J. (Md.) 463; *Harding v. Alden*, 9 Greenl. (Me.) 140.

(3) Nor can they after marriage by contract merge or modify them. *HUSBAND AND WIFE*, vol. 9, p. 789; *MARRIAGE SETTLEMENTS*, *post*; *Ditson v. Ditson*, 4 R. I. 87.

(4) These rights and obligations may change with a change of residence. *Dicey Domicil*, Rules 46, etc. *CONFLICT OF LAWS*, vol. 3, p. 499.

(5) They may change by a change of law. *DIVORCE*, vol. 5, p. 746; *Townsend v. Griffin*, 4 Har. (Del.) 440.

(6) Disregard of them gives no right of action for breach of contract. 1 *Bish. M. & D.*, § 4.

(7) They may be put an end to by divorce, although the contract was for life, without impairing the obligation of any contract. *DIVORCE*, vol. 5, p. 746.

The latest of this subject from high authority is found in *Maynard v. Hill*, 125 U. S. 190; 31 L. Ed., p. 659, Mr. JUSTICE FIELD saying: "It is also

2. **Contracts to Marry.**—See title BREACH OF PROMISE, vol. 2, p. 520.

3. **Contracts Not to Marry.**—Any promise not to marry at all, or not to marry except after an unreasonable time or upon unreasonable conditions, is against public policy and void.¹

to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the supreme court of Maine in *Adams v. Palmer*, 51 Me. 481, 483. Said that court, speaking by CHIEF JUSTICE APPLETON: 'When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the Sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.' And again: 'It is not a

contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.' And the chief justice cites in support of this view the case of *Maguire v. Maguire*, 7 Dana (Ky.) 181, 183, and *Ditson v. Ditson*, 4 R. I. 87, 101. In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to those uncontrollable by any contract which they can make when formed, this relation is not more a contract than 'fatherhood' or 'sonship' is a contract."

1. **Contracts Not to Marry.**—*Strathmore v. Bowes*, 1 Ves. Jr. 22; *Linker v. Smith*, 4 Wash. (C. C.) 224; *Robinson v. Buck*, 71 Pa. St. 386; *Bunell v. Witherow*, 29 Ind. 123; *Logan v. Simmons*, 3 Ired. Eq. (N. Car.) 487; *Baker*

4. **Contracts to Bring About Marriage.**—*Marriage Brocage Contracts*, see title BROKER, vol. 2, p. 598; title ILLEGAL CONTRACTS, vol. 9, p. 919.

5. **Contracts in Restraint of Marriage.**—Contracts,¹ or clauses in contracts,² having a tendency to prevent the marriage of some person affected, are frequently held to be void, as against public policy,³ to try to prevent marriage having been called the blackest of all political sins.⁴ The effect of the contract or clause may depend very largely upon its form, whether it is a condition or a limitation, whether it is a condition subsequent or precedent, whether it is general or aimed at a particular marriage; whether it affects realty or personalty, and what provisions it makes in case of its breach.⁵ The law upon these subjects cannot be said to be well settled,⁶ but it is perfectly practicable by putting the

v. Chase, 6 Hill (N. Y.) 482; *Gregory v. Winston*, 23 Gratt. (Va.) 102.

For a general discussion of the subject see vol. 8, p. 654, of this work.

The rule as above stated applies even to the mutual exclusive promises of engaged parties. *Hall v. Wright*, El. B. & E. 788.

So a bond of a widow not to marry again. *Baker v. White*, 2 Vern. 215.

But a promise not to marry any person belonging to a particular country (*Perrin v. Lyon*, 9 East 170) or religious sect (*Duggan v. Kelly*, 10 Irish Eq. 295) may be valid unless it amounts to an unreasonable prohibition.

See CONTRACTS IN RESTRAINT OF MARRIAGE.

1. See CONTRACTS NOT TO MARRY, above.

2. It is with these that we have mostly to deal.

3. See tit. ILLEGAL CONTRACTS, vol. 9, p. 918.

4. *Lowe v. Peers*, 4 Burr. 2225.

5. See notes 1, 2, p. 475; notes 1, 2, 3, p. 476; notes 1, 2, 3, 4, p. 477; note 1, p. 478.

6. *Arthur v. Cole*, 56 Md. 101 (1880.). "This is a subject that has been fruitful of discussion, and, indeed, of conflicting decisions."

In *Hartley v. Rice*, 10 East, p. 22 (Eng. King's Bench 1808), "the plaintiff declared in assumpsit upon a wager made on the 25th of November, 1799, whereby he betted with the defendant 50 guineas that he, the plaintiff, should not be married in six years; stating that in consideration that the plaintiff promised to pay the defendant 50 guineas in case he, the plaintiff, should be married within that time, the defendant promised to pay the

plaintiff the like sum if the plaintiff should not be married within that time. LORD ELLENBOROUGH, C. J.: On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to show that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. Wagers in general are seldom indifferent in their tendency, and this certainly is not so. GROSE, J.: Every contract in restraint of marriage is illegal, as was said by LORD HARDWICKE: But this is endeavored to be distinguished from former cases, as not being a total and indefinite restraint of marriage; that, however, must depend upon the duration of the party's life. If good for six years, why not for a longer period? LE BLANC, J.: This case is presented to us stripped of all particular circumstances, and therefore must be determined by the general rule of law. Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years; but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law; and nothing is stated here to show it to be otherwise in the particular instance."

In *Waters v. Tazewell*, 9 Md. 291, a

provision against marriage in a proper form to secure its efficiency,¹ and a few general *rules* may be laid down as follows: (1) A limitation, as distinguished from a condition, is valid.² (2) A

deed conveying leasehold property in trust for the sole and separate use of a *feme covert* contained a provision that in case the husband should survive the wife, he and his assigns should have the rents, issues and profits during his natural life only, to and for his own use and benefit, provided he should continue unmarried after the death of his wife then living, and from and immediately after his death, then over. On page 309 the court say: "Unqualified restrictions on marriage are discouraged on grounds of public policy, and instead of aiding them by applying liberal rules of construction, the courts have been disposed to construe them strictly, in such manner as will favor the persons on whom the restraints are laid. We, therefore, cannot adopt the views of the appellant's counsel, so as to consider the gift over, after the husband's decease, as taking effect upon his second marriage; or that his life estate terminated upon the occurrence of that event. 1 Story's Eq., §§ 279, 280, 283, 286 to 290, and notes; 1 Jarm. on Wills 841, 842, 843."

1. Stewart on Marriage and Divorce, § 31. "The law is in a state of change and uncertainty, but a settler can always carry out his intentions by putting the condition in the form of a limitation. See *Arthur v. Cole*, 56 Md. 100, and cases cited therein."

2. In *Arthur v. Cole*, 56 Md. at 102, "The doctrine that conditions in restraint of marriage are void, was derived from the civil law, and though it still prevails, and is everywhere recognized and enforced with greater or less strictness, some of the English judges in recent cases have suggested that the reason upon which the doctrine was originally founded has ceased to exist. *Allen v. Jackson*, 1 Ch. Div. (Law Rep. 399); *Jones v. Jones*, 1 Queen's Bench Div. (Law Rep. 279). But no case has yet gone to the extent of repudiating the doctrine altogether, though the tendency of modern decisions perhaps, is not to extend it, nor to strive to bring within its operation cases which, by fair and just construction fall under the well recognized distinctions and exceptions. One of these distinctions sustained by the great preponderance of authority, is that between a limita-

tion and a condition subsequent, or, in other words, between the language by which the duration of an estate or interest is prescribed, and that by which an estate previously created is cut down, defeated or divested. One of the cases in which this distinction is forcibly stated is *Heath v. Lewis*, 3 De G. McN. & G. 954. In that case a testator bequeathed an annuity to an unmarried woman 'during the term of her natural life, if she shall so long remain unmarried.' The annuitant, after enjoying the annuity for some years, married, and the question was whether the annuity was determined by her marriage. LORD JUSTICE KNIGHT BRUCE said: "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth), is perhaps not creditable to the English law—that if a man give an annuity to a woman who has never married, for life, and afterwards declare that if she shall marry the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be; and the question argued before us has been, to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady 'during the term of her natural life, if she shall so long remain unmarried,' this language being the technical and proper language of limitation as distinguished from condition, long known to the English law and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married."

The facts in *Arthur v. Cole*, 56 Md. 100, from which case the above has been taken are well stated in the head notes as follows: "W. H. C., in consideration of one dime and of natural love and affection, conveyed by deed

condition against a particular marriage, if reasonable, is valid;¹ but if it practically amounts to a general prohibition against marriage, it is treated as a general condition, and is void.² (3) A condition precedent is valid.³ (4) An absolute condition subse-

certain leasehold property 'to his two sisters, M and E, 'to have and to hold the same unto the said M and E as tenants in common so long as they both shall live, and from and after the death of either of them, then unto the survivor so long as she shall live and no longer; or so long as they both shall remain unmarried; and from and after the marriage of either of them, then unto the one remaining unmarried, so long as she shall live, and no longer.' M married, and E who remained unmarried took exclusive possession of the premises. Upon an ejectment brought by M and her husband to recover an undivided moiety of the premises, it was *held*:

(1) That the purpose of the brother evidently was, not to restrain the marriage, or promote the celibacy of his sisters, but to give them a small property as a home or support, until they should severally marry and have husbands to maintain them.

(2) That there was nothing immoral or illegal in this purpose, and it was carried out by this deed without infringing any rule of law.

(3) That the weight of authority fully sustained the validity of the grant."

See also *Morley v. Rennoldson*, 2 Hare 570; *Webb v. Grace*, 2 Phill. Ch. 701; *Jones v. Jones*, 1 Law R., Q. B. C. 279; *Vance v. Campbell*, 1 Dana (Ky.) 229; *Otis v. Prince*, 10 Gray (Mass.) 581; *Hotz's Est.*, 38 Pa. St. 422; *Pringle v. Dunkley*, 14 Sm. & M. (Miss.) 16; *Bennett v. Robinson*, 10 Watts (Pa.) 348; *Little v. Birdwell*, 21 Tex. 597.

1. In *Graydon v. Graydon*, 23 N. J. Eq. 229, at page 234, "The only disposition of any rest or residue of his estate is that contained in that part of the eighth clause which directs his executors, in case of John's marriage to A. I. Cameron's daughter, to dispose of his estate as if John had died in his lifetime intestate, and without issue, but subject in other things to the provisions of the will. . . . It is further contended that this condition is void, because it is in restraint of marriage, and because it requires John to do an illegal and im-

moral act; to violate his engagement with his present wife, made and entered into before he knew of this provision in his father's will, and, in fact, before the will was executed. . . . I am of opinion that the condition is certain and is a legal and valid condition, and makes void the bequests to John."

The testator in the case of *Randal v. Payne*, 1 Brown's Chancery Reports (English 1779), devised subject to this contingency: "If either of the devisees should marry into the families of Rivington or Gosling, and have a son, I give all my estate to him for life with remainder over; if not, to Randal. The devisees married, but not into the favored families. Randal files his bill, but dismissed, for the devisees have their whole lives to perform the condition."

Conditions that a grantee shall not marry a resident of a particular country (*Perrins v. Lyon*, 9 East 170, English), or an adherent of a particular religious sect (*Duggan v. Kelly*, 10 I. R. Eq. 295), or against marriage except with particular ceremonies (*Houghton v. Houghton*, 1 Molloy 611), or before a particular age (*Collier v. Slaughter*, 20 Ala. 263; *Shackelford v. Hall*, 19 Ill. 212), may be valid.

2. In *Maddox v. Maddox*, 11 Gratt. (Va.) 804, "A member of the Society of Friends, by his will, gives a legacy of a remainder after a life interest, to his niece M, 'during her single life, and forever, if her conduct should be orderly, and she remain a member of the Society of Friends.' When M arrived at a marriageable age, there were but five or six unmarried men of the society in the neighborhood in which she lived, and during the life estate she married a man not a member of the society. *Held*, the condition is an unreasonable restraint upon marriage, and is void." See also *Kelly v. Monck*, 3 Ridge P. C. 205.

3. In *Hemmings v. Munkley*, 1 Brown Chancery Reports 304 (English, 1783), the testator gave a portion of his estate "to his daughter Rachael, on her attaining her age of twenty-eight years, or day of marriage, which shall first happen, provided his daughter should

quent is void.¹ A condition subsequent is valid as to personalty if there be a gift over,² otherwise void.³ A condition subsequent is good as to real estate if the provision is not intended to prevent marriage but to provide for the grantee until marriage.⁴

marry with the approbation of his said executors, etc. Rachael married without the consent of the executors." LORD LOUGHBOROUGH decided that the above provision was a condition precedent, and as it had not been complied with the estate did not vest in Rachael. See also *Fry v. Porter*, 1 Ch. Cases 138; *Reynish v. Martin*, 3 Atk. 330; *Collier v. Slaughter*, 20 Ala. 263.

But this is denied as to personalty in the absence of a limitation over. *Gough v. Manning*, 26 Md. 347; *Maddox v. Maddox*, 11 Gratt. (Va.) 804.

1. In *Waters v. Tazewell*, 9 Md. 292, "A deed conveying leasehold property in trust for the sale and separate use of a *feme covert*, contained a provision that in case the husband should survive the wife, he and his assigns should have the rents, issues and profits 'during his natural life only, to and for his own use and benefit, provided he should continue unmarried after the death of his wife then living, and from and immediately after his decease, then over. Held, that this proviso, being a general restraint upon marriage by means of a condition subsequent, was void, and the husband's life estate was not terminated by a second marriage." See also *Bellairs v. Bellairs*, L. R., 18 Eq. 510.

2. In *Cornell v. Lovett*, 35 Pa. St. 100, "A testator directed a sum of money to be secured on his real estate, upon the sale thereof by his executors, and the annual interest of it to be paid to his widow during her life or widowhood; and provided that if she should marry again, such yearly bequest should cease and terminate; and the principal sum so secured should be distributed, with the residue of his estate, among the grandsons of the testator; the widow accepted under the will, and subsequently contracted a second marriage. Held, that the condition was not void, and that on the marriage of the widow her right to the annual payment of such interest determined." On page 102 the court said: "The English cases in regard to conditions subsequent in restraint of marriage seem to have settled down to this, that if there is no limitation over on breach of the condition, nor throwing of the legacy into the residuum disposed of, or if the legacy

is simply reduced on the happening of the event, or the disposition over is none other than the law itself would have made, had there been none, then the restraint shall be considered as *in terrorem* only, is void, and the bequest absolute. 3 Meriv. 120; 3 Atk. 364-7; 2 Vent. 352; 2 Bro. C. C. 431, 489. Nor will a mere residuary bequest amount to a disposition over; for there may be a residue without the particular legacy, and therefore *non constat*, that the testator designed it to form parcel of the residue, and pass with it to the residuary legatee. There may be a disposition of the residue, and still none of the legacy." See also *Morley v. Rennoldson*, 2 Hare 579; *Gough v. Manning*, 26 Md. 347, and note 3 below.

3. In *Parsons v. Winslow*, 6 Mass. 169, there was "a devise to the testator's wife of an annuity 'during her widowhood and life' was held to cease upon her second marriage, by the testator's intention; but it was further held that such intention being *in terrorem*, and against the policy of the law as in restraint of marriage, it could not take effect, and that the wife was entitled to the annuity during her life, notwithstanding her second marriage, the same not being expressly devised over, except to the residuary legatee, who was the heir at law to the testator." See also *Otis v. Prince*, 10 Gray (Mass.) 581; *Maddox v. Maddox*, 11 Gratt. (Va.) 804, and note 2 above.

4. *Jones v. Jones*, Law Reports, 1 Q. B. Div. 279. "D made his will as follows: 'I give, devise and bequeath unto my sister Mary, her daughter Elizabeth, and Sarah, the daughter of David Jones, all my landed property, together with all my goods, chattels and effects, to possess and enjoy the same jointly during their lifetime; and when any one or some of the before mentioned parties shall depart this life, I give, devise and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime; provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise if she shall alter her present state of single woman,

In some States conditions in restraint of marriage are said to be always valid as to real estate, because the heir can enter and enforce the forfeiture.¹ (5) These rules apply equally, whether the provision be against a first or a second marriage,² of a woman or a man.³

and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed by the other mentioned parties, share and share alike.' *Held*, that the estate of Mary Davies in the land ceased on her marriage; for that the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Davies while she was unmarried; and the question whether the clause amounted to a condition or a limitation was immaterial, as the authorities upon such a distinction did not apply to a devise of realty." See also *Arthur v. Cole*, 56 Md. 100, and *Gough v. Manning*, 26 Md. 347.

1. In *Com. v. Stauffer*, 10 Pa. St. 350, at 354, "This action is brought for surplus proceeds of land devised to the testator's widow for life, on condition not to marry, but sold by order of the orphans court for payment of his debts. She did marry shortly after the sale; and the question is, whether a subsequent condition in general restraint of marriage, when annexed to a devise of land, is void for reason of public policy. When annexed to a legacy, the decisions of the ecclesiastical courts, followed in chancery, have certainly established that it is; and so the rule is held in Pennsylvania, both at law and in equity, as is shown by *McIlvain v. Gethen*, 3 Whart. (Pa.) 575, and *Hoopes v. Dundas*, 10 Pa. St. 75. But it is said in 2 *Powell on Dev.* 282, that the rule of the ecclesiastical courts in legatory cases are inapplicable to devises of land, or money charged upon it; and that it owes its existence, in any case, to the ecclesiastical judges, who borrowed most of their rules from the civil law. The same thing is repeated in 1 *Jarm. on Wills* 836, and fortified by references to *Reeves v. Herne*, 5 Vin. 393, pl. 46; *Harvey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Atk. 330; *Stackpole v. Beaumont*, 3 Ves. 96; and the cases collected in Mr. Sanders' note to *Harvey v. Aston*, to which may be added the great case of *Fry v. Porter*, 1 Mod. 308. The ground on which these precedents stand is the indisputable fact that devises of land are governed, not by the Roman, but by the common law." See

also *Phillips v. Medbury*, 7 Conn. 568.

2 In *Allen v. Jackson*, Law Rep., 1 Ch. Div. 399, at 403, "It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed by way of forfeiture to a marriage is therefore void. *That is the law both as to man and woman*; but it has been most distinctly settled that with regard to the second marriage of a woman, that law does not apply, that whether the gift be a gift to a widow by a husband or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid. Now, there is no act of parliament which has provided, and there is no decision of any court whatever which has established, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man; and, in the absence of any decision to the contrary, I am myself unable to see any principle whatever upon which the distinction can be drawn between them. . . . The case before us seems to me to show what immense mischief one would be doing if one were to introduce a different rule of law in the case of a widower to that in the case of a widow. Now, in the case of a widow, it has been considered to be very right and proper that a man should prevent his widow from marrying again." See also *Newton v. Marsden*, 2 Johns. & H. 356; *Barton v. Barton*, 2 Vern. 308; *Marples v. Bainbridge*, 1 Madd. 590; *Snider v. Newsom*, 24 Ga. 139; *Holmes v. Field*, 12 Ill. 424; *Gough v. Manning*, 26 Md. 347; *Dumey v. Schoeffler*, 24 Mo. 170; *Phillips v. Medbury*, 7 Conn. 568; *Beekman v. Hudson*, 20 Wend. (N. Y.) 53; *Holtz Estate*, 38 Pa. St. 422; *Little v. Birdwell*, 21 Tex. 597.

3. See note 2 above.

The recent cases (1888) of *Rowland*

6. Contracts Providing for Marriage Property Rights.—See title MARRIAGE SETTLEMENTS.

7. Contracts in Evasion of Marriage Rights.—As set forth under title HUSBAND AND WIFE (vol. 9, p. 789), husbands and wives acquire valuable rights by marriage in each other's property, and contracts, gifts, conveyances and settlements made by one of the parties before marriage so as to evade the marriage rights of the other may be fraudulent and void. In order to have such a contract, gift, conveyance, etc., set aside or declared void, the injured party need only show (1) that there was an actual engagement of marriage at the time of the conveyance, etc.,¹ and (2), that the fact of the conveyance, etc., was not known until after such engagement of marriage had been consummated by marriage.² This

v. Rowland (South Carolina), *Squier v. Harvey* (Rhode Island), and *Beshore v. Lytle*, 114 Ind. 8, show that conditions in restraint of second marriages are valid and not against public policy.

In *Bostick v. Blades*, 59 Md. 231, there was "a devise by a wife of her real estate to her husband for life 'if he shall not marry,' but in the event of his marriage, to her brother in fee, is valid; and the husband having married again, the brother is entitled to recover in ejectment the estate so devised. There is no substantial distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. They are alike valid and effectual."

1. Evasion of Marriage Rights.—In *Gainor v. Gainor*, 26 Iowa 337, at page 340, it is laid down that "a voluntary settlement or conveyance of property by a wife or husband, prior to marriage, will be held fraudulent as to the marital rights of the one to whom she or he may afterward be joined in matrimony, only when made in contemplation of marriage, and pending a treaty of marriage between the parties. See 1 Leading Cases in Equity, 444; notes to *Countess of Strathmore v. Bowes*; *Hill on Trustees*, p. 163."

The master of rolls in *Downes v. Jennings*, 32 Beacon (English Chancery 1863), at page 293, said: "The first question is one of fact, viz, whether this settlement was executed in contemplation of the marriage, which was solemnized seven weeks afterwards? If this be answered in the affirmative, then arises the second question, which is one of law, viz, whether having regard to the contents of this settlement, it can properly be considered to be one

in fraud of the marital right? If this should be decided in favor of the plaintiff, then the time suffered by him to elapse before filing the bill remains to be considered. The first question depends, in my opinion, on whether the evidence establishes first, that the plaintiff and Mrs. Marshall were ever engaged to marry previous to their actual marriage; secondly, whether, if they were, this engagement, or rather an active intention on their part to marry, was subsisting at the time when this settlement was executed; and thirdly, whether, when this settlement was executed, the intended marriage was then settled to take place immediately or within some short space from that time." See also *Wilson v. Daniel*, 13 B. Mon. (Ky.) 348; *Williams v. Carle*, 10 N. J. Eq. 543, 552; *Gregory v. Winston*, 23 Gratt. (Va.) 102; *Robinson v. Buck*, 71 Pa. St. 386; *Tucker v. Andrews*, 13 Me. 124; *Jenny v. Jenny*, 24 Vt. 324; *Waters v. Tazewell*, 9 Md. 291. See note 2, *a*, p. 480.

2. In *St. George v. Wake*, 1 Mylne & Keen (English Chancery 1833) 610, at page 616, "As there is no evidence that the transaction was concealed from the plaintiff, and as there is no allegation in the bill of such concealment, or of the plaintiff's ignorance before the marriage of the assignments having been made, it is to be presumed that the plaintiff had notice of the assignments previously to the marriage; and if a person is acquainted before his marriage with the fact of an assignment of property made by his intended wife, such assignment cannot be said to be a fraud upon his marital right. If he still thinks fit to marry the lady, he cannot reasonably complain that he is deceived or defrauded." *Wrigley v.*

rule applies both to wives¹ and to husbands,² and is not affected

Swanson, 18 Law J. Ch. 396, 400 (English Chancery); *Cole v. O'Neill*, 3 Md. Ch. 174; *Fletcher v. Ashley*, 6 Gratt. (Va.) 332; *Prather v. Burgess*, 5 Cranch (C. C.) 276; *Cheshire v. Payne*, 16 B. Mon. (Ky.) 618; *Poston v. Gillespie*, 5 Jones Eq. (N. Car.) 258. See note 2. *a. infra*.

1. See case of *St. George v. Wake*, 1 Mylne & Keen (English Chancery) in note 2, p. 479. See also *Wrigley v. Swanson*, 18 Law J. Ch. 396, 400.

In *Freeman v. Hartman*, 45 Ill., at page 59, Mr. JUSTICE LAWRENCE remarked: "It is a settled rule that a voluntary conveyance by a woman on the eve of her marriage, of property which her intended husband knew her to own made without his knowledge is void as against him, because in derogation of his marital rights and just expectations. *Strathmore v. Bowes*, 1 Ves. 22; *England v. Downs*, 2 Beav. 522; *Logan v. Simmons*, 3 Ired. Ch. 487; *Tucker v. Andrews*, 13 Me. 125. The case before us falls within this principle. The deed was made but three days before the marriage, and without the knowledge of Hartman, the intended husband." See also *Tucker v. Andrews*, 13 Me. 124; *McAfee v. Ferguson*, 9 B. Mon. (Ky.) 475; *Manes v. Durant*, 2 Rich Eq. (S. Car.) 404; and *Gainor v. Gainor*, 26 Iowa 337, in note 1, p. 479.

2. See *Gainor v. Gainor*, 26 Iowa 337, in note 1, p. 479; *Gibson v. Carson*, 3 Ala. 421; *Dearmond v. Dearmond*, 10 Ind. 191; *Leach v. Duvall*, 8 Bush (Ky.) 201; *Cranson v. Cranson*, 4 Mich. 230; *Smith v. Smith*, 6 N. J. Eq. 515; *Jenny v. Jenny*, 24 Vt. 324.

In *Butler v. Butler*, 21 Kan. 521, at page 524, the court say: "It is doubtless true that at common law it was the disposition of courts to hold that a voluntary conveyance of all her property by a woman engaged to be married, made without the knowledge of her intended husband, was a fraud upon his marital rights, and might, after the marriage, be avoided by him. See in support of this view the valuable list of authorities in brief of counsel for plaintiff in error. Whether the same rule obtained when the husband just before marriage made such a conveyance of his property is not so clear. See 1 *Bright's Husband and Wife*, p. 356; 1 *Leading Cases in Equity*; *White & Tudor's notes*, p. 618.

The reason for the supposed differ-

ence in the rule grew out of the different rights each acquired in the property of the other and the different obligations assumed by each to and for the other by that relation. We deem it unnecessary to enter into any discussion of these matters, for the constant tendency has been to do away with these differences and give to each the same rights in the property of the other. Of course, when each acquires by marriage the same rights in the property of the other, and is under the same obligations to and for the other, then that which would be a fraud if done by one will under the same circumstances be a fraud if done by the other."

In line with the above quotation are *McKeogh v. McKeogh*, 4 I. R. Eq. 338; *Banks v. Sutton*, 2 P. Wms. 700; *Swannock v. Lifford*, Co. Litt. 208 *a*, note 1; s. c., 1 Amb. 6.

The case of *Fisher v. Schlosser*, 41 Ohio St. 147, was decided on a similar principle of law. There a case for breach of promise of marriage was pending between L S and J F, which fact was known to M E W. Then J F married M E W and in consideration thereof settled \$25,000 on her. At the suit of L S, this conveyance was held fraudulent.

a. But a distinction has been made in some cases where the grantor gives property to those who have a legal or moral claim upon the grantor. In *Downes v. Jennings*, 32 Beav. (English Chancery), at page 295, the master of the rolls said: "The greatest length any case has gone, that I am aware of, is the case of *Hunt v. Matthews*, 1 Vern. 408, where a widow, before her second marriage, assigned the greatest part of her estate as a provision for her children by the first marriage. In that case the court held that she was justified in providing for such children before she placed herself under the power of a second husband. Assuming that, in that case, the settlement was made after the treaty for marriage, it is difficult to reconcile it with LORD THURLOW's observations in *Strathmore v. Bowes*, 1 Ves. Jr. 28. But, even in that case, the settlement was confined to the children of the first marriage who were unprovided for. But the settlement before me cannot be treated in so favorable a light. By this deed present and contingent benefits are

by separate property statutes.¹ The burden of proof is upon the

given to persons whom she was not bound to benefit by any legal or moral tie."

To the same effect is the case of *Butler v. Butler and Austin*, 21 Kansas at page 527: "Again, the conveyance was meritorious, and to those having claims upon the grantor. It was to his minor children, and as a provision for them. Surely the duty of a father to his minor children by a deceased wife is as great as that to a woman he is hoping to wed. It was not an absolute rule that an antenuptial voluntary conveyance was fraudulent and void. In *Schouler Dom. Rel.*, p. 270, it is said: "From the decisions it would appear that some alienation of the wife's property without her intended husband's knowledge will be allowed to stand. The facts are always open to enquiry, and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means." LORD THURLOW held that such a conveyance being made by the absolute owner of the property was *prima facie* good, and that the facts and circumstances must be shown indicating an intention to deprive the husband of that which he might rightfully and reasonably expect to obtain by the marriage, before it could be adjudged fraudulent and void. *Strathmore v. Bowes*, 1 Ves. Jr. 22. CHANCELLOR KENT, in his Commentary, vol. 2, p. 175, says: "If the settlement be upon children of a former husband and there be no imposition practiced upon the husband, the settlement would be valid without notice;" citing *King v. Cotton*, 2 P. Wms. 674; *Jones v. Cole*, 2 Bailey (S. Car.) 330; see also *Lyles v. Lyles*, Harper (S. Car.) Eq. 228.

The settlement need not have been actively concealed. *Strathmore v. Bowes*, 1 Ves. Jr. 22; *England v. Downs*, 2 Beav. 22; *Taylor v. Pugh*, 1 Hare 608.

And the notice to him must (perhaps) be actual. *O'Neill v. Cole*, 4 Md. 107. If he hears of some settlement, this puts him on enquiry, and is tantamount to notice. *Wrigley v. Swainson*, 38 Law J. Ch. 396; *Spencer v. Spencer*, 3 Jones (N. Car.) Eq. 404. *Contra*, *Johnson v. Peterson*, 6 Jones (S. Car.) Eq. 12, unless upon enquiry he is, on behalf of the settler, falsely

informed. *Prideoux v. Lonsdale*, 4 Giff. 159. Notice binds him, though he is a minor. *Slocombe v. Glubb*, 2 Bro. C. C. 545.

This rule does not apply to *bona fide* transactions on valuable consideration. *Blanchet v. Foster*, 2 Ves. Sr. 264; *Freeman v. Hartman*, 45 Ill. 57; *Gregory v. Winston*, 23 Gratt. (Va.) 102. Nor to cases where the injured party by some unequivocal act has ratified the settlement. *England v. Downs*, 2 Beav. 522; *Maber v. Hobbs*, 2 Younge & C. 317; *Duncan's Appeal*, 43 Pa. St. 67.

Nor where a man has put it out of the woman's power to hold off for a settlement by seducing her. *Taylor v. Pugh*, 1 Hare 608, 614-616.

Nor where the complaining party has been guilty of laches. *Loader v. Clarke*, 2 Mac. & G. 382; *Butler v. Butler*, 21 Kan. 521.

For a further discussion of this subject see Stewart on Marriage and Divorce, § 44.

An interesting discussion on the subject of conveyances made during coverture to defeat marriage rights will be found in *Robbitt v. Gaither*, 67 Md. 94.

1. *Baker v. Jordan*, 73 N. Car. 145, was a case where on the day before her marriage, unknown to her intended husband, Catherine Baker conveyed to her stepmother all of her property. It was argued that inasmuch as the constitution of 1868 had changed the property rights of a husband from what they had been at the common law, and had declared that all property of a married woman should remain hers just as much as if she were a *feme sole*, that therefore the husband could not have been defrauded by any conveyance made. But the court held otherwise at page 147. "We do not concur in this proposition. A husband is entitled since the constitution of 1868, and the marriage act, to the society of the wife, is under an obligation to support her and the children, and for that purpose is entitled to her services and to contribution from the profits of her estate. He has a right to live in his wife's house and to ride her horse if she own one. The plaintiff was surprised by the fact that his wife had been induced to give away all the estate she owned and to which he with reason looked for aid in supporting her. He was deceived, and the question is,

party alleging the fraud,¹ and the proceedings and principles are much the same as have been discussed under the title FRAUDULENT CONVEYANCES (vol. 8, p. 748).

II. ESSENTIALS OF A MARRIAGE—1. **Essentials in General.**—There are four elements which have been deemed essential to a marriage, and which will be particularly discussed in the succeeding sections of this part of this article, to wit:

a. Competent Parties.—Each of the parties must have the capacity to marry the other.² Thus, a man may not be able to marry a certain woman either because he is not old enough to marry anyone, or because she is too nearly related to him or is not of the same color.

b. A Contract of Marriage.—The parties must mutually agree to be thenceforth husband and wife.³ No one can be married without his or her consent, no matter how competent the parties may be or what formalities they go through.

c. A Marriage Celebration or Marriage Formalities.—The parties must go through certain formalities, sometimes religious and sometimes civil.⁴ That is to say, the State, for the protection of the people, generally prescribes formalities, and does not leave marriage free to be formed as an ordinary partnership.

d. A Consummation.—The parties must become husband and wife in fact, must assume marriage rights, duties and obligations.⁵ In the notorious Sharon divorce case, no marriage was found because the parties had simply lived together as man and mistress, although they had agreed in writing to be husband and wife.⁶

As will hereafter be set forth fully, the absence of one or more of these elements may not render the marriage invalid; and, as a general rule, absence of any formality whatever and of any consummation of the marriage, will not prevent the parties from being husband and wife, whatever other results may be entailed upon them.⁷ For a marriage which is valid may be invalid in certain respects, or it may be a prohibited or voidable marriage.

2. Valid, Void, Voidable and Illegal Marriages.—A legal marriage is one with respect to which all the provisions of the law have

was he defrauded of any right to which he was entitled as husband? We think he was."

1. See *Geyer v. Mobile Bank*, 21 Ala. 414; *Freeman v. Hartman*, 45 Ill. 57; *Cole v. Van Riper*, 44 Ill. 58; *Robinson v. Buck*, 71 Pa. St. 386; *Bunuel v. Witherow*, 29 Ind. 123; *Gainor v. Gainor*, 26 Iowa 337; *Tucker v. Andrews*, 13 Me. 124; *Smith v. Smith*, 6 N. J. Eq. 515; *Westerman v. Westerman*, 25 Ohio St. 500; *Duncan's Appeal*, 43 Pa. St. 67; *Gregory v. Winston*, 23 Gratt. (Va.) 102.

2. **Capacity**, discussed *post*, II, §§ 4-5, *g*.

3. **Consent**, discussed *post*, II, § 6, *a*, *b*, *c*. Consent of the parties is the very es-

sence of a marriage, and no one can be married without it. *Rundle v. Pegram*, 49 Miss. 751; *State v. Worthingham*, 23 Minn. 528, 533; *Clark v. Field*, 13 Vt. 460. But the most honest belief of the parties that they are married will not be sufficient to make them so. *White v. White*, 105 Mass. 325.

4. **Formalities**, discussed *post*, II, § 7, *a*, *b*, *c*.

5. **Consummation**, discussed *post*, II, § 8.

6. *Sharon v. Sharon*, 75 Cal. 1.

7. **LORD BROUGHAM** calls these irregular marriages. *Piers v. Piers*, 2 H. L. Cases, 331, 371. As to punishments and penalties see *post*.

been complied with ; but there are many laws relating to marriages which may be disregarded without preventing the parties from becoming by the marriage completely husband and wife.¹ Thus, a licence is usually required by law, but failure to secure a licence will not prevent the parties from becoming husband and wife if they are otherwise properly married.² Any marriage contrary to law in any respect is in this sense illegal, and any marriage by which the parties become completely husband and wife is valid. There have been marriages by which the parties are made husband and wife only in certain respects, but they are not important.³

A marriage *per se*, and without any judgment or decree, invalid for all intents and purposes, no matter in what proceeding or in what court the question arises, is called a void marriage.⁴ Thus, if a man, being already married, marries another woman, his marriage is invalid to all intents and purposes without any judgment or decree,⁵ whether in a proceeding between the parties to settle the question,⁶ or in a proceeding after his death, in which his is-

1. Stewart Mar. & Div., §§ 48-52. Sometimes the marriage is recognized, but the parties are punished for marrying or for marrying in the way pursued; as in Maryland, where a marriage without licence or publication of banns is valid but the parties are fined \$100 each. Sometimes the marriage will not be recognized, but there is no penalty; as in Massachusetts, where if a woman marries a second time when her husband has been absent unheard of for seven years, if he be not dead at the time of the second marriage, this is void, but she is not punishable for bigamy. Glass v. Glass, 114 Mass. 563; and to illustrate more fully the importance of these distinctions, the marriage of a minor without the consent of his parents was, in England, under LORD HARDWICKE'S act, void. Jones v. Robinson, 2 Phillim. 285; Piers v. Piers, 2 H. L. Cas. 331. In Scotland, voidable for one year. Rex v. Jacobs, 1 Moody C. C. 140; in Maryland, simply prohibited, code 1888; see *post*, § 5.

Jones v. Jones, 45 Md. 144, 159: "The statute prohibited ministers of the gospel from publishing the banns or celebrating matrimony between servants or a servant and a free person under penalty, without the consent of the master. But the statute did not declare the marriage void, nor was that the operation of it. The minister subjected himself to a fine, but the marriage was valid."

2. Blackburn v. Crawford, 3 Wall. (U. S.) 185; *post*, II, § 7.

3. **Partial Validity.**—A marriage may be valid for certain purposes only, as formerly precontract, which prevented a second marriage but would not give dower. Dalrymple v. Dalrymple, 2 Hogg Const. 54; Reg. v. Millis, 10 Clark & S. 782.

So a marriage in good faith may, though void, be valid so far as to render the children legitimate. Eubanks v. Banks, 34 Ga. 407. Generally by statute. Graham v. Bennet, 2 Cal. 503; Lincecum v. Lincecum, 3 Mo. 441.

So a marriage may, by statute, though void, give the deceived party marriage property rights. Clendenning v. Clendenning, 15 Mart. (La.) 438; Strode v. Strode, 3 Bush (Ky.) 227; Carroll v. Carroll, 20 Tex. 731.

So a marriage may be valid in one State but not in another. Hyde v. Hyde, L. R., 1 P. & D. 130; title CONFLICT OF LAWS, vol. 3, p. 598.

4. **Void Marriages.**—Patterson v. Gaines, 6 How. (U. S.) 550; Smart v. Whaley, 6 Sm. & M. (Miss.) 308; Fornhill v. Murray, 1 Bland Ch. (Md.) 479; Higgins v. Breen, 9 Mo. 497; Spicer v. Spicer, 16 Abb. (N. Y.) Pr. N. S. 112; Gathings v. Williams, 5 Ired. (N. Car.) 487; Hantz v. Sealey, 6 Binn. (Pa.) 405; Purgree v. Goodrich, 41 Vt. 47.

5. Reg. v. Chadwick, 11 Q. B. 173; Martin v. Martin, 22 Ala. 86; Reeves v. Reeves, 54 Ill. 332; Tefft v. Tefft, 35 Ind. 44; Emerson v. Shaw, 56 N. H. 418; Blossom v. Barrett, 37 N. Y. 434; *post*, II, § 5, g.

6. Tefft v. Tefft, 35 Ind. 44.

sue claim as legitimate.¹ And if his first marriage was void because the woman was already married, this may be made to appear in a prosecution against him for bigamy,² or in a petition against his estate for dower.³

A marriage which is valid to all intents and purposes, unless and until duly avoided, or which is valid to all intents and purposes, unless and until duly confirmed, is called a voidable marriage.⁴

A marriage may be valid to all intents and purposes unless and until duly avoided, but if duly avoided absolutely void from the beginning. To this class belong marriages which, for incapacity of party existing at the time of the marriage, may be avoided under the ecclesiastical law,⁵ or under special statutes,⁶ by a special proceeding instituted within a specified time,⁷ *i. e.*, by a nullity suit.⁸

A marriage may be void for all intents and purposes unless and until duly confirmed, but if duly confirmed, valid *ab initio*. To this class belong marriages which for incompleteness or un-reality of consent are void as wanting the essential contract, and which are inchoate and incomplete rather than voidable marriages.⁹

It is therefore very important to have some means of determining to which class of marriages a given imperfect or illegal marriage belongs, and there are certain rules of construction which may be useful for this purpose, to wit: (1) Unless by express words, a statute goes to the validity of a marriage (*i. e.*, unless there are words of nullity), it will be held to affect the le-

1. *Plant v. Taylor*, 7 Hurl. & N. 211; *Middleborough v. Rochester*, 12 Mass. 363.

2. See *Williams v. State*, 44 Ala. 24.

3. *Reeves v. Reeves*, 54 Ill. 332; *Shoak v. Shoak*, 4 Brewst. 305.

4. **Voidable Marriages.**—Sir JOHN NICHOLL, in *Elliott v. Gurr*, 2 Phillim. 16, 1 Eng. Ec. 166, 168, says: "The marriage was within the prohibited degrees; but the marriage was not declared void in the lifetime of the parties. Now the difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity and certain corporal infirmities only make the marriage voidable and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, such as a prior marriage, want

of age, idiocy and the like, make the marriage contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all; they do not put asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union, and, therefore, no sentence of avoidance is necessary."

5. *Harrison v. Harrison*, 22 Md. 468, 484.

6. See *Cropsey v. McHeaney*, 30 Barb. (N. Y.) 47.

7. *Rex v. Jacobs*, 1 Moody (C. C.) 140; Cal. Civ. Code, § 83.

8. **Nullity suits**, discussed *post*, II, § 5, c, d, and part 4.

9. *Koonce v. Wallace*, 7 Jones (N. Car.) 194; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659.

A marriage invalid for want of age may be avoided with or without judicial proceedings, or it may be confirmed, *post*, § 5.

gality of the marriage only.¹ Thus, a statute providing simply that a white and a negro shall not intermarry was held not to render such marriage invalid.² And so, statutes prescribing particular formalities, but not providing that if such formalities are not followed the marriage shall be void, are held to be directory only.³ (2) A statute referring to the formation of marriage will be made to harmonize as far as possible with the pre-existing

1. *Cotterall v. Sweetman*, 1 Rob. Ec. 304, 317, 320; *Meister v. Moore*, 96 U. S. 76, 79; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 185, 194; *Campbell v. Gullatt*, 43 Ala. 57, 67, 68; *Book v. Barron*, 20 Ga. 702; *Askew v. Dupree*, 30 Ga. 173; *Port v. Port*, 75 Ill. 484; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Harrison v. Harrison*, 22 Ired. 468; *Jones v. Jones*, 45 Md. 144, 159; *Hutchins v. Kimmell*, 31 Mich. 126; *Dickson v. Brown*, 49 Miss. 357; *Hargraves v. Thompson*, 31 Miss. 211; *Dyer v. Brannock*, 66 Mo. 391; *Walter's Appeal*, 70 Pa. St. 392; *Rodebough v. Sanks*, 2 Watts (Pa.) 9; *Pearson v. Howey*, 11 N. J. L. 12; *State v. Robbins*, 6 Ired. (N. Car.) 23; *Peck v. Peck*, 12 R. I. 485.

2. *Jones v. Jones*, 45 Md. 144, 159.

3. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a licence, or publication of banns, or be attested to by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. This is the conclusion reached by Mr. Bishop, after an examination of the authorities. *Bishop, Mar. and Div.*, section 283 and note. We do not propose to examine in detail the numerous decisions that have been made by the state courts. In many of the States, enactments exist very similar to the Michigan statutes; but their object has manifestly been, not to declare what shall be requisite to the

validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases, the leading purpose is to secure a registration of marriages, and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the States, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed without a licence first had. So, in Massachusetts, it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. *Milford v. Worcester*, 7 Mass. 48. It may well be doubted, however, whether such is now the law in that State. In *Parton v. Hervey*, 1 Gray (Mass.) 119, where the question was, whether a marriage of a girl only thirteen years old, married without parental consent, was a valid marriage (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. In speaking of the effect of statutes regulating marriage, including the Massachusetts statute (which, as we have said, contained all the provisions of the Michigan one), the court said: "The effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and

law.¹ Thus, a statute declaring a marriage void but not expressing any intention of changing the pre-existing law will not be held to render a marriage formerly voidable absolutely void.² And so, a statute which provides a means of avoiding a void marriage without adding that such marriage shall be valid until duly avoided, does not thereby render such marriage voidable only, if void by the pre-existing law.³

3. Conflict of Laws.—In determining the validity of any marriage, it is necessary to decide first by what state's or country's laws its validity is to be tested. The capacity of the parties is controlled, according to different views, by the law of the place of the parties' domicil, or of the place where the marriage takes place; and the necessity and sufficiency of the ceremonies and consummation, by the law of the place where they are married. The law as to consent is the same everywhere.⁴

magistrates and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But, in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute." There are two or three other States in which decisions have been made like that in 7th Massachusetts.

We will not undertake to cite those which hold a different doctrine, one in accord with the opinion we have cited from 1 Gray. Reference is made to them in Bishop, Mar. & Div., § 283, *et seq.*; in Reeve, Dom. Rel. 199, 200; in 2 Kent Com. 90, 91; and in 2 Greenl. Ev. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf:

"Though in most, if not all the United States, there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations, would still be a valid marriage."

As before remarked, the statutes are held merely directory; because marriage is a thing of common right; be-

cause it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law." MR. JUSTICE STRONG, in *Meister v. Moore*, 96 U. S. 76, 79; 24 L. Ed. 827.

1. Cases cited *supra*.

2. "The disabilities enumerated are all canonical disabilities, and not those known to the law as civil disabilities. Canonical disabilities were such as rendered the marriage voidable and not void. They require the judgment of an ecclesiastical court, during the lives of the parties, to make them effective as causes of a divorce. On the other hand, civil disabilities, such as arose *pro defectu consensus*, for want of a capacity to contract, or mental infirmity, *ipso facto* avoided marriage without the action of the courts. When the legislature declared by statute that persons laboring under canonical disabilities should not marry under certain penalties, but such marriages should be void, and gave jurisdiction to the general court to hear and determine upon such marriages, it is to be supposed they designed to put persons laboring under such disabilities in the same position they were at common law, viz: they should be void, when established by the judgment of a court, in the life of the parties to the marriage, not to confound canonical and civil disabilities, and destroy the distinction between them." *Harrison v. Harrison*, 22 Md. 468.

3. *Smith v. Smith*, 5 Ohio St. 32, 33. But see *Spicer v. Spicer*, 16 Abb. (N. Y.) Pr., N. S. 112.

4. See tit. CONFLICT OF LAWS, vol.

4. Capacity of Parties in General.—A party may be generally incapable of marrying or incapable of forming a particular marriage because of (1) want of age; (2) want of mental capacity to understand the nature of the act; (3) want of physical and sexual capacity to consummate the marriage (impotence); (4) relationship by blood (consanguinity), or by marriage (affinity) with the other party; (5) civil condition of servitude (slavery); (6) being of a different race from the other party; and (7) having been married before and that marriage not being at an end. The incapacities of precontract,¹ of relationship by carnal knowledge,² and of religious belief,³ have no existence now.

5. Capacity of Parties—*a. Want of Age.*—Want of age may render a marriage void, voidable, or simply illegal.

At common law, the marriage of a party under seven years of age was void;⁴ of a male between seven and fourteen, or a female between seven and twelve, voidable;⁵ of a male over fourteen and a female over twelve, valid.⁶

3, p. 598; Stewart Marriage and Divorce, §§ 105, 121.

1. *Cheney v. Arnold*, 15 N. Y. 345, 352. As to ecclesiastical law, see *Baxter v. Brickley*, 1 Lee 42; *Reg. v. Millis*, 10 Clark & F. 534, 763, 784.

2. *Wing v. Taylor*, 2 Swab. & Tr. 278.

3. *Phila. v. Williamson*, 10 Phila. (Pa.) 176, 177. See *Com. v. Kenney*, 120 Mass. 387.

4. 1 Black. Com. 436. "The next legal disability is want of age.

This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen or a girl under twelve years of age marries, this marriage is only inchoate and imperfect, and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for if they are *habiles ad matrimonium*, it is a good marriage whatever their age may be. And in our law it is so far a marriage, that if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may, for in contracts the obligation must be mutual; both must be bound or neither;

and so it is, vice versa, when the wife is of years of discretion and the husband under."

Bishop on M. & D., vol. 1, § 147. "Another period to be considered is that of seven years, alike in male and female. If either party to a marriage is below seven it is a mere nullity." See also 2 Burns Ecc. Law 434a.

5. *Beggs v. State*, 55 Ala. 108, at 111. "By the common law, no persons were capable of binding themselves in marriage until they had arrived at the age of consent, which in males was fixed at fourteen and in females at twelve. Marriage before that age was voidable at the election of either party, on arriving at the age of consent, if either of the parties was under that age when the contract was made." See also *Koonce v. Wallace*, 7 Jones (N. Car.) 194, and note 1 above.

6. See notes 4 and 5 above.

Parton v. Hervey, 1 Gray (Mass.) 119. "The age of consent in this commonwealth, as by the common law, is twelve in females and fourteen in males, and a marriage between two infants above those ages is valid, without the consent of their parents or guardians, notwithstanding the Rev. Stat., ch. 75, §§ 15, 19, which prohibit magistrates and ministers, under a penalty, from solemnizing the marriage of a female under the age of eighteen, or a male under the age of twenty-one, without the consent of the parent or guardian." See also *Bennett v. Smith*, 21 Barb. (N. Y.) 439, 441; *Governor v. Rector*, 10 Humph. (Tenn.) 57, 61.

Statutes prescribing at what age a party may marry are to be construed according to the rule already laid down,¹ and are to be held to affect the validity of a marriage which would be valid at common law only when the statute so expressly states.² And, as a rule, marriages of parties under the statutory age are held voidable at most, unless within the age at which they would have been void at common law.³ Statutes prescribing the consent of parents are deemed to be statutes relating to the ceremonies of marriage rather than to the age of the parties.⁴

The marriage of parties over seven years of age is therefore in general a voidable marriage;⁵ void unless confirmed,⁶ or valid unless avoided.⁷ It may be confirmed by acknowledgment or cohabitation, when both the parties are of full age.⁸ It may be

1. *Parton v. Hervey*, 67 Mass. 119, at 122. "But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed condition and formalities have not been fulfilled. But in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, although had in violation of the specific regulations imposed by statute. 2 Kent Com. 90, 91; 2 Greenl. Ev., § 460; *Milford v. Worcester*, 7 Mass. 48; *Londonderry v. Chester*, 2 N. H. 268; *Hantz v. Sealy*, 6 Binn. (Pa.) 405. And such is the effect given to similar statutes in England. *The King v. Birmingham*, 8 B. & C. 29; *Catterall v. Sweetman*, 1 Robertson 304.

In many States, statutes prescribe at what age a party may marry. Compare Ala. R. C. 1876, § 2333, with Ark. Dig. 1874, § 4172. For example, the age of eighteen for males and fourteen for females. *Goodwin v. Thompson*, 2 Greene (Iowa) 329. *Shaffer v. State*, 20 Ohio 1, 4. Or sixteen for males and fourteen for females. *Koonce v. Wallace*, 7 Jones (N. Car.) 194.

2. See note 1 above.

3. See notes 4, 5, 6, p. 487; note 1, *supra*; *Walls v. State*, 32 Ark. 565, 570; *McDeed v. McDeed*, 67 Ill. 545; *People v. Slack*, 51 Mich. 193, 200.

4. See note 1, p. 487, and n. 1, *supra*.

5. See notes 4 and 5, p. 487.

6. *Shaffer v. State*, 20 Ohio 1. "Marriages in this State, contracted by male persons under the age of eighteen, and female persons under fourteen, are invalid, unless confirmed by cohabitation after arriving at those ages respectively. Such a marriage not thus confirmed does not subject a party to punishment for bigamy for contracting a subsequent marriage while the first husband or wife is living." But see note 8 below, where this case is criticised.

7. *Walls v. State*, 32 Ark. 565. "Under an indictment for bigamy, evidence that the first marriage was within the age of legal consent is no defence, unless it also be shown that it was annulled by a court of competent jurisdiction."

At page 570: "By the common law, if he did not disaffirm the marriage on reaching the age of legal consent, but cohabited with the wife after arriving at such age, it would be an affirmation of the marriage contract. *Bishop on Marriage and Divorce*, §§ 195-6-7 and § 199; *Tyler on Infancy and Coverture*, p. 130, etc.; 2 Kent Com. Marg., p. 78." Cal. Civ. Code, §§ 82, 83.

8. *Beggs v. State*, 55 Ala. 108, 113. "The statute serves the purpose of its enactment when construed as operating merely an enlargement of the age of consent from that fixed by the common law—of twelve in females and fourteen in males—to fourteen in females and seventeen in males. The marriage of persons not of the statutory age is, as was the marriage between persons not of the age of consent at common law, imperfect, becoming perfect only by affirmation when the requisite age is obtained. Until disaffirmance, it is a marriage in fact, and the second marriage of either

avoided by a nullity suit,¹ or without suit by conduct.² When the minor comes of age (marriageable age)³ either⁴ party may avoid the marriage by refusing to acknowledge the marriage or to cohabit;⁵ and the same effect would probably follow the same conduct during the minor's minority.⁶

An infant's guardian can have the adult enjoined from cohabiting or interfering with the infant until the latter's majority.⁷

b. Want of Mental Capacity.—Want of mental capacity has been held to render a marriage (1) *void*—a mere nullity, incapable of ratification;⁸ (2) *valid unless avoided*—a binding marriage,

party is bigamy. The case of *Shaffer v. State*, 20 Ohio 1, is opposed to this view, and opposed, as we think, to the great weight of authority." See also *Walls v. State*, 32 Ark. 570; Cal. Civ. Code, § 82; *People v. Slack*, 15 Mich. 193; *Koonce v. Wallace*, 7 Jones (N. Car.) 194; *Governor v. Rector*, 10 Humph. (Tenn.) 57, and *Stewart on Marriage and Divorce*, §§ 58, 150, 151.

1. *Stewart on Marriage and Divorce*, § 139. "A suit may be instituted for the purpose of declaring a pretended marriage to be void *ab initio*, or for the purpose of rendering void a voidable marriage; in either case the suit is properly called a nullity suit." See *post*, part 4.

2. *McDeed v. McDeed*, 67 Ill. 545; at 550: "There was evidence tending to show that John McDeed was under the age of eighteen at the time of the marriage, and that he never cohabited with M L after his arrival at that age, and that under such circumstances the marriage was made void under the law of Ohio. In view of there being such testimony in the case, the instruction was properly refused."

In *The People v. Slack*, 15 Mich. 193, at 199: "We are all agreed that if the separation takes place with consent of the party under age, and cohabitation is not resumed after such party attains the age of consent, the marriage is thereby rendered null, while we are not agreed that the party who is of competent age can by his own act annul it."

3. *Warwick v. Cooper*, 5 Sneed (Tenn.) 659. See note 2 above.

4. *Shaffer v. State*, 20 Ohio 1; note 1, p. 487. But see note 2 above.

5. See note 2 above; *post*, part 4, § 4, notes.

6. See discussion in *People v. Slack*, 15 Mich. 193, 200, 203; 1 Bishop M. & D., § 149; *McDeed v. McDeed*, 67 Ill. 546.

7. *Aymar v. Roff*, 3 Johns. Ch. (N. Y.) 49, "where a man was married to an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the marriage, and her dissent to it, the court, on a bill filed by her next friend, ordered her to be placed under its protection, as a ward of the court, and forbade all intercourse or correspondence with her by the defendant, under pain of contempt."

"Majority" under the above means full age for marriage. *Warwick v. Cooper*, 5 Sneed (Tenn.) 659.

8. *Middleborough v. Rochester*, 12 Mass. 363, 365.

"The verdict having established the fact that E. Winslow, to whom the pauper was formerly married, was, at the time of the solemnization, void of understanding, so as to be incapable of making a valid contract, judgment must be entered for the defendants. . . . No authority has been cited to show that such a marriage is valid to any intent or purpose whatever. On the contrary, it is laid down by Blackstone that, like all other contracts, if made with a fool, or person *non compos*, at the time of it, it is absolutely void. And it is but reasonable that these unhappy persons, who are prohibited by law from making any binding contract for the merest pecuniary trifle, should be protected from the effects of a covenant of so high a nature, which never could be entered into by the other party without some base or sinister design. If it would be hard that the issue of such marriages should be deemed bastards, it would be as much so that human beings without reason, or their families, should be the victims of the artifice of desperate persons who might be willing to speculate on their misfortunes." See also *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. 355; *Browning v. Reane*, 2 Phillim. 69; *Rawdon v.*

which cannot be questioned collaterally¹ or after the death of the party,² unless duly avoided;³ and (3) *void unless ratified*—an inchoate marriage to which the needed consent may be given if the party acquires capacity and desires to confirm his act.⁴ The last is the best opinion.

The mental capacity necessary to enable a party to marry (or confirm his marriage) is such as renders him capable of understanding the nature of the act and its consequences,⁵ of entering

Rawdon, 28 Ala. 565; Powell v. Powell, 18 Kan. 371; Jenkins v. Jenkins, 2 Dana (Ky.) 102; Ward v. Dulaney, 23 Miss. 410; Keyes v. Keyes, 22 N. H. 553; Christy v. Clarke, 45 Barb. (N. Y.) 529; Crump v. Morgan, 3 Ired. Eq. (N. Car.) 91; Foster v. Means, Spear Eq. (S. Car.) 569; Clement v. Matison, 3 Rich. (S. Car.) 93.

1. Wiser v. Lockwood, 42 Vt. 720. "At the time the marriage ceremony was performed between Sumner Lockwood and Sarah A. Blodgett he took part in it so far as he was capable of doing so, and such consent as he could give he did give. The ceremony was gone through with according to the laws of the State, and she became his wife and he became her husband as fully as he could become the husband of any woman. There was a marriage in fact, followed by cohabitation between them. This marriage was void in the sense in which the word 'void' is sometimes used. It was not binding upon him, and, perhaps, not upon her; but as to the latter we express no opinion. He, or any relative interested to have it annulled, could have done so, and it would have become void from the beginning, and have been in all things as if the ceremony had never been performed. Nothing was done to annul it, and it remained in as full force at the time of his decease as it ever had been. It remained a marriage in fact, and although void in the sense that it could have been avoided, still it was a marriage, and he and she were in fact husband and wife. This seems to be the plain import of the provisions of the statutes of this State upon this subject.

. . . This construction of the provisions of the statutes is in harmony with the common law upon this subject. Bac. Abr., Idiots and Lunatics D. Smart v. Taylor, 9 Mod. 98; *Ex parte* Turing, 1 Ves. & B. 140; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343."

2. See note 1 above.

3. See note 1 above and §§ 61, 139-149; Stewart on M. & D.

Bell v. Bennett, 73 Ga. 784. "The question of whether a man was of unsound mind, and so incapable of contracting a marriage, may be raised twelve years afterwards in a proceeding by the woman, after his death, to obtain the year's support given by statute."

4. Cole v. Cole, 5 Sneed (Tenn.) 57, 63. "A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane. Bishop, § 189; Campbell v. Mesier, 6 Met. 415; 4 Johns. Ch. (N. Y.) 333. And this without any new solemnization. If there is sufficient reason to apply this principle to deeds and other contracts of persons incapable of consent for infancy, there is surely a better and stronger reason to extend it to the contract of marriage."

5. True v. Ranney, 21 N. H. 52. "The consent of the parties is essential to the validity of all contracts; and, as marriage is a contract, it is essential to its validity that the parties should understand the nature of the agreement they are about to enter into. . . . So, in the case of Browning v. Reane, 2 Phill. R. 70, SIR J. NICHOLL, after quoting Blackstone, said: 'Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. If the incapacity be such that the party be incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, of taking care of his or her own person, or property, such an individual cannot dispose of her person and property by the matrimonial contract any more than by any other contract.' . . . The evidence in the case satisfies us, as we think it cannot fail to satisfy any reasonable man, that the petitioner was so imbecile; that she was entirely unable to understand the nature and obligation of the contract into which it was proposed she should enter. There is

into ordinary contracts,¹ or of managing himself, his property, his affairs.² The want of capacity must exist at the time of the marriage;³ paroxysms of insanity before the marriage,⁴ or the development thereof afterwards⁵ will not suffice. The marriage of an insane person during a lucid interval is, in the absence of statute,⁶ valid;⁷ but the burden of proof lies on the party alleging the lucid interval.⁸

The marriage of a party who has not the requisite mental capacity may be confirmed by such party if he becomes competent and then acknowledges the marriage or continues the cohabitation.⁹ If he dies without a lucid interval,¹⁰ or if, after gaining lucidity, he refuses or fails to recognize the marriage as existing,¹¹ the marriage is absolutely void, and no marriage rights attach.¹²

every reason to believe that no person so lamentably imbecile as this young woman appears to be, could have the remotest idea of the meaning of a contract for the performance of any of the ordinary duties of life, and still less of a contract of marriage." See also *Ward v. Dulaney*, 23 Miss. 410.

1. See note 5, p. 490, and *Middleborough v. Rochester*, 12 Mass. 363; *Atkinson v. Medford*, 46 Me. 510.

2. See note 5, p. 490.

3. *Lloyd v. Lloyd*, 66 Ill. 87, 89. "It would be a harsh rule indeed that would permit a man, who has married a woman who later in life becomes insane, to put her away on account of her inexpressibly sad misfortune. It is to the credit of our common humanity that there cannot be found, in all the range of judicial proceedings, a single case that holds that insanity is or could be a cause for divorce." See also *Wertz v. Wertz*, 43 Iowa 534; *Ward v. Dulaney*, 23 Miss. 410; *Baker v. Baker*, 82 Ind. 146.

In *State v. Setzer*, 97 N. Car. 252, "the question of whether a party to a marriage was an idiot, and so incapable of marrying, cannot be raised in a collateral proceeding, for example, in an action to which the children of such marriage, claiming as heirs, or next of kin, are parties."

4. *Hamaker v. Hamaker*, 18 Ill. 137; *Achey v. Stephens*, 8 Ind. 411; *Smith v. Smith*, 47 Miss. 211, and note 3, above.

5. See note 4, above.

6. *Scott v. Paquet*, 4 Lower Can. Jur. 149. "A person attacked with *delirium tremens* may have a lucid interval and may contract a valid marriage during such lucid interval."

7. See above, and *Turner v. Myers*, 1 Hagg. Const. 414.

8. See INSANITY AND LUNATICS, in this work, and *Rawdon v. Rawdon*, 28 Ala. 565.

Mere intoxication is not sufficient. *Dixon v. Dixon*, 22 N. J. Eq. 91. But if it has caused complete unconsciousness or madness, or has been produced by fraud, the marriage is void. Deaf and dumb persons are not idiots in law, and are mentally competent to marry. *Harrod v. Harrod*, 1 Kay & J. 4.

An inquisition is *prima facie* evidence of sanity or lunacy, but this evidence may be rebutted. *Portsmouth v. Portsmouth*, 1 Hagg. Const. 355; *Keys v. Norris*, 6 Rich. (S. Car.) Eq. 388.

9. *Cole v. Cole*, 5 Sneed (Tenn.) 57, 63. "But if the proof established the fact that she was of unsound mind at the time of the marriage, there is abundant evidence that she was afterwards restored, at least temporarily, and did not repudiate, but her acts and conduct recognized the validity of her marriage. A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane. *Bishop*, § 189; 6 Metc. 415; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 333. And this without any new solemnization." See *Sabalot v. Populus*, 31 La. An. 854; *McKenny v. Clark*, 2 Swan (Tenn.) 321.

—10. *Jenkins v. Jenkins*, 2 Dana (Ky.) 102, 103. "A person of unsound mind cannot be married. The performance of a marriage ceremony and continued cohabitation till death, with one in that condition, will not constitute a legal marriage; nor give claim to dower or curtesy in his or her estate." See also *Christy v. Clarke*, 45 Barb. (N. Y.) 529, 543; *Foster v. Means*, Spear (S. Car.) Eq. 569.

11. See note 9, above.

12. See note 9, above.

A decree of nullity¹ may ordinarily be obtained but is not necessary.²

c. Want of Sexual Capacity.—Want of sexual capacity, or *impotence*, is no impediment to marriage in the absence of statute or ecclesiastical jurisdiction.³ Under the ecclesiastical law, impotence rendered a marriage voidable,⁴ and in most States there is some statutory provision rendering impotence an impediment to marriage,⁵ or a "cause for divorce."⁶ Under the rule already laid down,⁷ a statute declaring a marriage void for impotence would be held to render it voidable only, as under the ecclesiastical law.⁸ And, likewise, statutes declaring impotence a cause for divorce will be construed to render it a cause for nullity.⁹

Impotence which affects the validity of a marriage is a defect

1. *Rawdon v. Rawdon*, 28 Ala. 565, 567. "The authorities are also equally clear that if a marriage contract be void, by reason of the insanity of one of the parties, the legal sequence is that no decree of divorce is necessary to restore the parties to their original rights." *Ex parte Turney*, 1 Ves. & Beames 140.

Yet we cordially approve the sentiment of the distinguished chancellor of New York, that "the fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party." *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343; *Crump v. Morgan*, 3 Ired. (N. Car.) Eq. 91."

2. See note 1, above.

A decree may be obtained by the party himself if he becomes lucid. *Turner v. Myers*, 1 Hagg. Const. 414; *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343. By his committee or guardian if he does not. *Wagmire v. Jetmore*, 22 Ohio St. 271; *Thayer v. Thayer*, 9 R. I. 377. The court may pass such a decree in the exercise of its ordinary equity jurisdiction. *Wagmire v. Jetmore*, 22 Ohio St. 271.

3. Anonymous, 24 N. J. Eq. 19. "A marriage will not be annulled for impotence. The court of chancery is restricted in its jurisdiction, in suits for divorce, to the legislation on the subject, and in suits for nullity of marriage to cases within the inherent and undoubted jurisdiction of equity. This court will, outside of its statutory jurisdiction, annul a contract of marriage only where the contract is void; not where it is voidable merely." At page 23: "Incompetency at

the time of marriage to perform the duties which the marriage contract enjoins, will, if it continues and be incurable, render the marriage invalid. *Greenstreet v. Cumyns*, 2 Phill. 10. But such marriage is voidable only."

4. *P. v. S.*, 37 L. J. Mat. Cas. 80. "The impotence of one of the parties to a marriage does not render the marriage void, but only voidable. The validity of such a marriage can only be questioned in the lifetime of both of the parties, and by the party who suffers an injury from it."

5. See note 9, below.

6. Rev. Laws of Ala., 1876, § 2685; Ark., 1874, § 2195; Colo., 1877, § 917; Del., 1874, p. 475; Fla., 1881, p. 472; Ga., 1878, § 1711; Ill., 1880, p. 422; Ind., 1881, 1032; Kan., 1881, § 4178; Ky., 1881, p. 522; Md., 1878, p. 480, § 12; Mass., 1882, p. 813; Minn., 1878, p. 626; Miss., 1880, § 1155; Mo., 1879, § 2174; Neb., 1881, p. 253; Nev., 1873, § 215; N. H., 1878, p. 432; N. J., 1877, p. 315; N. Car., 1873, p. 364; Ohio, 1880, § 5689; Pa., 1872, p. 507; R. I., 1882, p. 426; Tenn., 1873, § 2448; Va., 1878, p. 851; W. Va., 1879, p. 495; Wis., 1879, § 2356.

7. See §§ 62, 418, *Stewart on Marriage and Divorce*.

8. See note 4, above.

9. *Stewart on Marriage and Divorce*, § 235. "Most of the State statutes declare impotence a cause for divorce; such statutes are merely declaratory of the common law, and a divorce suit for impotence is really like a suit for nullity under the ecclesiastical law. *Chase v. Chase*, 55 Me. 21, 23; *J. G. v. H. G.*, 33 Md. 401; *Bascomb v. Bascomb*, 25 N. H. 267; *LeBarron v. LeBarron*, 35 Vt. 365."

rendering the party permanently unfit for sexual intercourse.¹ The rule, as administered by the ecclesiastical courts, may be laid down as follows: If from some incurable² physical³ or psychical⁴

1. Anonymous, Deane & Swabey Ecc. Courts (England, 1855 to 1857), 296. "This is a suit brought by the plaintiff for the purpose of having his marriage with the defendant declared null and void, by reason of her incurable malformation and consequent inability for sexual intercourse. . . .

What is the principle, the foundation of the right to claim a decree pronouncing a marriage void where one of the parties is incapable of consummation? . . .

First, because the great chief purpose of marriage cannot be fulfilled; second, because by such marriage the temptation to evil courses is not removed; third, because in some cases, especially where the defect is on the husband's side, continued cohabitation would be destructive to the health and comfort of one of the parties."

2. J. G. v. H. G., 33 Md. 401, 405.

"Has the alleged impotence of the appellee been proved? A careful examination of the evidence has convinced us that this question must be answered in the affirmative. Without repeating here, at length or in detail, the evidence on this question, it may be stated that the testimony of the examining surgeons establishes the following facts:

"That the physical condition of the appellee at the time of the marriage was that of a very imperfect development of the sexual organs, both externally and internally. These organs were in a rudimentary condition, evincing that their development had ceased and been arrested before the age of puberty. She had never experienced the monthly sickness to which females of mature age are subject; and was without the natural passion or desire incident to woman. The rudimentary condition of her sexual organs and their imperfect development not only rendered conception impossible, but there was on her part an incapacity for *vera copula*. That is to say, she was not capable of the act of generation in its natural and ordinary meaning, but only of incipient and imperfect coition.

"In giving the results of their examination the surgeons differ somewhat as to the degree or extent of the organic defects; but we have stated the conclusions which appear to us to be es-

tablished by their testimony. They all concur in saying that the defect is incurable.

"Whatever differences of opinion may have arisen as to the legal definition of impotence, it is well settled that if by reason of malformation or organic defect existing at the time of the marriage there cannot be natural and perfect coition, *vera copula*, between the parties; and it appears that the defect is permanent and incurable, the case comes within the legal definition of impotence, and is cause for nullity of marriage. Deane v. Aveling, 1 Rob. Ecc. R. 279; Devenbush v. Devenbush, 5 Paige (N. Y.) 554; 1 Bishop on M. & D., §§ 325 to 340."

See also Stagg v. Edgecomb, 3 Swab. & T. 240; Anon., 35 Ala. 226, 229; Ferris v. Ferris, 8 Conn. 166; Kempf v. Kempf, 34 Mo. 211, 213; Bascomb v. Bascomb, 25 N. H. 267; Morrell v. Morrell, 17 Hun (N. Y.) 324; Norton v. Norton, 2 Aiken 188.

3. W— v. H—, 2 Swab. & T. 240. "On a petition for a decree of nullity by reason of malformation of the woman, neither the court nor the parties are concluded by the terms of the report of medical inspectors, but the inspectors themselves and other medical men may be examined. There is no rule as to any particular age constituting a bar to such petitions. Where the result of the medical evidence is that the malformation might possibly, but at great risk to life, and with doubtful success as to the end desired, be removed, the petitioner need not call upon the respondent to submit to an operation, and such a state of things is equivalent to a permanent and irremovable malformation."

See also Ewens v. Ewens, 33 L. J. Mat. Cas. 37; Keith v. Keith, Wright (Ohio) 518.

4. G—S v. —T E, 1 Spink Ecc. Reports (England, 1854) 389. A decree of nullity was given on certificate that "We find no anatomical malformation, but from oral information obtained, during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to

defect of one party to a marriage, sexual intercourse¹ with the other party² is impossible in a complete³ and natural manner,⁴ or impracticable without the use of violence,⁵ or without danger to health,⁶ and if the defect existed at the time of the marriage,⁷ unknown to the party complaining,⁸ upon the application of such party to the proper court,⁹ and upon strict proof¹⁰ of facts making out such a case, the marriage will be declared null and void *ab initio*,¹¹ unless such complainant is insincere in bringing the suit,¹² or has been guilty of unreasonable and unexplained delay,¹³

which a remedy can be applied, we fear this defect will be permanent." See also *H v. H*, 3 Law R. D. 126; *G v. G*, 2 L. R. D. 287.

1. *Deane v. Aveling*, 1 Robb. Ecc. Reports, 279 (England, 1845). Upon following testimony of doctors decree of nullity was pronounced: "I found her external sexual organs perfectly formed and developed, and that the formation necessary for creating sexual desires was also perfect, but upon introducing the finger into the vagina an impediment at once presented itself, and I discovered that the vagina, instead of being, as it ought naturally to have been, of the depth of four inches or thereabouts, was in the said Maria D. of the depth of only one inch and a quarter . . . and the said vagina was so constructed as to form a perfect *cul de sac*, without any apparent means of communication with any internal organ . . . and of such contracted dimensions as would prevent the insertion of the male organ as in ordinary cases."

2. Anonymous, 22 Eng. L. & Eq. 637; *Ousey v. Ousey*, L. R., 3 P. & D. 223; *H v. C*, 1 Swab. & T. 605; *Essex v. Essex*, 2 How. St. Tr. 785. See note 1, *supra*.

3. *Lewis v. Hayward*, 35 L. J. Mat. Cas. 105, and note 1, *supra*.

4. See notes 2, 3, 4, p. 403; n. 1, *supra*.

5. *G v. G*, L. R., 2 Probate & Divorce (England, 1871) 287, 290. "It is unquestionable that these two people, neither of them advanced in life, have slept together for two years and ten months, and that the marriage has never been consummated. . . . The question is whether that cause is of such a character that it can practically be regarded as permanent. . . . Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea. . . . Dr. Farre says: 'As far as I can form an opinion, I believe, as a scientific man, that if these two people should

live together again there will be no change for the better.' . . . he is entitled to a decree of nullity."

6. *H v. H*, 3 L. R. D. 126; *Pollard v. Wybourne*, 1 Hagg. Ecc. 725; *S v. E*, 3 Swab. & T. 240; *F v. D*, 4 Swab. & T. 86; and note 7 above.

7. *J G v. H G*, 33 Md. 401. "Where, by organic defect of the female, existing at the time of the marriage, there cannot be a natural and perfect coition—*vera copula*—between the parties, and the defect is permanent and incurable, the case comes within the legal definition of impotence, and will authorize a decree of divorce *a vinculo*."

See also *Brown v. Brown*, 1 Hagg. Ecc. 523; *Powell v. Powell*, 18 Kan. 371; *Bascomb v. Bascomb*, 25 N. H. 267.

8. *Norton v. Seton*, 3 Phillim. 147; and note 7 above.

9. *Stewart on Marriage & Divorce*, § 67. "Such suits were instituted in the ecclesiastical courts in England, and can be entertained in the United States only by such courts as have succeeded to ecclesiastical jurisdiction or as are given jurisdiction by statute." *Post*, part 4.

10. *M v. B*, 3 Swab. & T. 550; *A v. J*, 37 L. J. Mat. Cas. 7; *T v. D*, 35 L. J. Mat. Cas. 51; *Newell v. Newell*, 9 Paige (N. Y.) 25; *Lorenz v. Lorenz*, 93 Ill. 376.

11. *Post*, part 4, § 8.

12. *Lorenz v. Lorenz*, 93 Ill. 377. "When a wife seeking a divorce on the ground of the impotency of her husband admits that she lived with him for ten years, during all which time he was impotent, her living with him and making no complaint is a circumstance that may be considered as tending to show her story is a fabrication."

See also *Cuno v. Cuno*, 2 L. R. D. 614; *S v. A*, L. R., 3 P. D. 72.

13. See note 12 above and *Lewis v.*

or is barred by limitations;¹ but the decree must be granted, if at all, during the lifetime of both parties.²

Impotence is sometimes difficult of proof, but evidence on this subject is not objectionable on account of indelicacy.³ Expert medical men usually testify as to the condition of the organs of the parties;⁴ and the court, independently of statute,⁵ can compel the defendant to submit to an examination,⁶ and issue an attachment to prevent his or her removal from its jurisdiction.⁷

The question is one of copulation, and not one of reproduction;⁸ but if conception has resulted from the intercourse of the parties, no matter how obtained, the question of impotence cannot be raised.⁹

This question will receive further treatment under IV. NULLITY SUITS.

Hayward, 35 L. J. Mat. Cas. 51; Castleden v. Castleden, 9 H. L. Cas. 186; Reynolds v. Reynolds, 45 L. J. D. Div. 89.

1. Kaiser v. Kaiser, 23 N. Y. Sup. 602; for example of such a statute see Cal. Civ. Code, § 83.

2. See case of P— v. S—, 37 L. J. Mat. Cas. 80, quoted in note 4, p. 492.

3. LORD STOWELL, in Briggs v. Morgan, 3 Phillim. 325, said: "It has been said that the means resorted to for proof are offensive to natural modesty, but nature has provided no other means and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own." See also Lebarron v. Lebarron, 35 Vt. 365.

4. See notes 3, 4, p. 493, and note 1, p. 494 above, and T— v. M—, 35 L. J. Mat. Cas. 10; L. R., 1 P. D. 31.

5. Lebarron v. Lebarron, 35 Vt. 365. "Impotence being made by our statute a cause for nullifying a marriage, and the legislature having vested the supreme court with jurisdiction of the subject, the court have power to compel the defendant to submit to a medical examination, though the statute makes no provision for it."

See also Briggs v. Morgan, 3 Phillim. 325; T— v. M—, 35 L. J. Mat. Cas. 10; Anon. 35 Ala. 226; Shafto v. Shafto, 28 N. J. Eq. 34.

6. Briggs v. Morgan, 3 Phillim. 325; T— v. M—, 35 L. J. Mat. Cas. 10; Anon. 35 Ala. 226; Shafto v. Shafto, 28 N. J. Eq. 34; Devenbagh v. Devenbagh, 5 Paige (N. Y.) 554 and note 5 above.

7. B— v. L—, 38 L. J. Mat. Cas. 35 (England, 1869).

"In a suit for nullity of marriage by reason of malformation the respondent refused to comply with the order for inspection. The court declined to issue an attachment against her until after the hearing, but intimated that the attachment would issue forthwith if she attempted to remove out of the jurisdiction."

The only ground for refusal seems to be the defendant's old age at the time of marriage. Shafto v. Shafto, 28 N. J. Eq. 34.

8. In Deane v. Aveling, 1 Rob. Ecc. 279, at 296: "Mere incapability, however, of conception is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient, that it would be a waste of time to discuss an admitted point. The only question is, whether the lady is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed."

Neither a ruptured hymen in the woman (T— v. D—, L. R., 1 P. & D. 127; F— v. D—, 4 Swab. & T. 86) nor apparently fully developed organs in the man (M— v. H—, 3 Swab. & T. 517) is proof of true copulation; nor is an unruptured hymen inconsistent with the fact of consummation. (L— v. H—, 4 Swab. & T. 115.)

Caton v. Caton, 12 Cent. Rep. 45 District of Columbia. "A woman is 'matrimonially incapacitated' within the meaning of D. C. Rev. Stat. 738, when she is at time of marriage pregnant by a person other than her husband."

9. Lewis v. Hayward, 35 L. J. Mat. Cas. 105, at 107. "If a miscarriage actually took place, whatever appearances the person of the appellant may have exhibited, and however imperfect

d. Affinity and Consanguinity.—The marriage of a man and woman related by blood or by marriage within certain named degrees may be under the criminal law incest,¹ under the ecclesiastical law voidable,² or by express statute void.³ As affecting the capacity of parties to marry, it is dependent on statute;⁴ but as under the ecclesiastical law it rendered marriages simply voidable by a nullity suit,⁵ statutes declaring marriages "void" for consan-

the intercourse may have been, there is of course an end of the appellant's case.

See §§ 62 to 67 in Stewart on Marriage and Divorce for a further discussion of the subject.

1. Stewart on Marriage and Divorce, § 158. "The marriage of parties related within the prohibited degrees may render them liable to punishment, the offence being called incest." In *The State v. Schauhurst*, 34 Iowa 548, "Revision—Sections 4367, 4368, forbid the intermarriage of a brother with a sister, and section 4369 declares that all persons within the degrees of consanguinity, in which marriages are prohibited, who shall intermarry with or carnally know each other shall be deemed guilty of incest, and punished by imprisonment in the penitentiary for a term not exceeding ten years. Crimes in this State are such as are prescribed by statute. It is entirely competent for the legislature, upon declaring an act to be a crime, to designate it by any term that may be chosen for that purpose. In this case, the statute forbids the intermarriage of persons within certain degrees. The crime thus recognized by the statute is not inappropriately termed incest. The act denominated in common language incest is also within the provisions of the statute." *Desty Crim. L.*, § 58; *U. S. v. Hiler*, 1 Morris 330.

2. *Harrison v. Harrison*, 22 Md. 468. "The act of 1777, ch. 12, § 1, enacts that if any person within this State shall hereafter marry with any person related within any of the degrees of kindred or affinity expressed in the following table such marriage shall be void."

BOWIE, C. J., on page 483. "The canon and civil law regulating marriages was a part of the common law administered by ecclesiastical and civil tribunals in England, and transplanted to the colonies by our ancestors, without introducing corresponding courts to enforce them. The act in question, passed in the first year of the State

government, was declaratory of the canon as a part of the common law, prohibiting marriages between persons related in such degrees of consanguinity and affinity as previously prevented their lawfully joining in matrimony. The disabilities enumerated are all canonical disabilities, and not those known to the law as civil disabilities. Canonical disabilities were such as rendered the marriage voidable and not void. They require the judgment of an ecclesiastical court, during the lives of the parties, to make them effective as causes of a divorce. On the other hand civil disabilities, such as arose '*pro defectu consensu*,' for want of a capacity to contract, or physical infirmity, *ipso facto* avoided the marriage without the action of the courts. When the legislature declared by statute that persons laboring under canonical disabilities should not marry under certain penalties, but such marriages should be void and gave jurisdiction to the general court to hear and determine upon such marriages, it is to be supposed they designed to put persons laboring under such disabilities in the same position they were at common law, viz: they should be void when established by the judgment of a court.

When a marriage is declared to be void, it does not necessarily mean void '*ab initio*.' Reason and justice would imply it was void from the time its nullity should be pronounced by a court of competent jurisdiction." See also *Hodkins v. McNeil*, 9 U. Canada Chan. 305; *Bonham v. Badgley*, 7 Ill. 622; *Parker's Estate*, 44 Pa. St. 309; *Com. v. Perryman*, 2 Leigh (Va.) 717.

3. For example see Cal. Civ. Code, § 59; Ky. G. S. 1881, p. 514, § 1; Mass. P. S. 1882, p. 809, § 7; N. Y. R. S. 1882, p. 2332, § 3.

4. Cal. Civ. Code, § 59; Ind. R. S. 1881, § 5324; La. Civ. Code 1875, §§ 94, 95; Md. R. C. 1878, art. 51, §§ 1, 2, 8; R. S. N. J. 1877, p. 631, § 1, and see case in 34 Iowa quoted in note 1 above.

5. *Post*, part 4.

guinity or affinity will, under the rule already discussed,¹ be construed to mean "voidable" unless such construction is expressly negated by the terms of the statute.²

This disability is based remotely on the laws (so called) of Moses,³ directly on statute 32 Hen. VIII, ch. 38, and similar statutes enacted in this country, some details as to which are given in the notes.⁴

Marriages defective for this cause are, as a general rule, valid unless duly avoided by a nullity suit.⁵

e. Slavery.—A slave cannot marry (1) because he cannot make a valid contract;⁶ (2) because the duties of a slave are inconsistent with those of a husband or a wife;⁷ (3) because a slave is

1. See note 2, p. 496, last part. It must be borne in mind that marriage is favored by law, and therefore, unless by express words a statute goes to the validity of a marriage, *i. e.*, unless there are words of nullity, it will be held to affect its legality only. Stewart on Marriage and Divorce, § 53, *ante*, part 2. § 2.

2. See note 2, p. 496, especially the latter part.

3. The Bible, Lev., ch. 18.

4. The statute of 32 Hen. VIII, ch. 38, confines the incapacity to all related in the ascending or descending line, and to collaterals including the third degree, civil reckoning (all nearer than first cousins), and by construction applies whether the relationship be by blood or marriage (Butler v. Gastrill, Gilb. Ch. 156), whether by whole blood or half blood (Reg. v. Brighton, 1 Best & Smith 447), whether legitimate or not (Reg. v. Chadwick, 11 Q. B. 173). Thus a man cannot marry his deceased wife's sister (Brook v. Brook, 9 H. L. Cas. 193), nor a woman her deceased husband's brother (Aughtie v. Aughtie, 1 Phillim. 201). Nowhere in this country is marriage with a deceased wife's sister invalid except in Virginia. Com. v. Perryman, 2 Leigh (Va.) 717; Kelly v. Scott, 5 Gratt. (Va.) 479. Nor can a man marry his deceased wife's sister's daughter (Worthy v. Watkinson, 2 Lev. 254), or wife's mother's sister (Butler v. Gastrill, Gilb. Ch. 156), though he may marry the widow of his great uncle (Harrison v. Burwell, Vaughan 206), or his brother's wife's sister (1 Bish. M. & D., § 314).

5. See note 2, p. 496, and Walter's Appeal, 70 Pa. St. 302.

6. In Timmins v. Lacy, 30 Tex. 115, 136: "By the civil law slaves could not take by purchase or descent. They

had no heirs, and therefore could make no will. They were not entitled to the rights and considerations of matrimony, and therefore had no relief in case of adultery. Nor were they proper objects of cognation or affinity, but of quasi cognation only. . . . The same disability. I apprehend, will apply to the case of slaves with us. . . . Cunningham v. Cunningham, 1 Har. & McH. (Md.) 561; Bynum v. Bostick, 4 De S. 266; Marbletown v. Kingston, 20 Johns. (N. Y.) 1; 20 How. St. Tr. 27, show very conclusively that the permitted cohabitation existing formerly among our slave population did not partake of lawful marriage. If we could say the legal rights of husband and wife, parent and child, spring from these connections, it must also be held that corresponding disabilities flow from them, many of which are of a severely penal character, affecting almost this entire portion of our population."

Hall v. United States, 92 U. S. 27, 30. "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage. Stephens on West Ind. Slav. 58; Hall v. Millin, 5 Har. & J. (Md.) 190; Gregg v. Thompson, 2 Mill. (S. Car.) 331; Jenkins v. Brown, 6 Humph. (Tenn.) 299; Jackson v. Lurvey, 5 Cow. (N. Y.) 397; Emerson v. Howland, 1 Mason (U. S.) 45; Bland v. Dowling, 9 Gill & J. (Md.) 27."

7. Malinda v. Gardner, 24 Ala. 719, 724. "The father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are

property.¹ So the marriage of a slave is a mere nullity,² though it is allowed a certain moral effect.³ Such a marriage may be valid by statute,⁴ or in a State which will not recognize slavery.⁵ And such a marriage may be confirmed after emancipation.⁶ In most States there are statutes relating to this subject,⁷ which was an important one twenty years ago, but is now no longer important except as history.

f. Race.—In many States the marriage of persons of different race, as whites and negroes, or whites and Indians,⁸ is forbidden and made a crime (miscegenation),⁹ and the statute may also render such marriages void.¹⁰ Under the rule already discussed,¹¹ such marriages will be deemed illegal only, unless expressly declared to be void.¹² Such statutes are constitutional and do not conflict with the fourteenth amendment, or Civil Rights bill.¹³ Owing to the great intermingling of the race, it is often difficult to determine whether a person is a white or a negro; this generally depends on the term of the statute.¹⁴

deemed essential to this contract are necessarily incompatible with the nature of slavery."

1. *Howard v. Howard*, 6 Jones (N. Car.) 235, 236. "A slave, being property, has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liabilities incident thereto."

2. See notes 6, 7, p. 497; note 1, *supra*; *Andrews v. Page*, 3 Heisk. (Tenn.) 653.

3. *Stikes v. Swanson*, 44 Ala. 633; *Cantelon v. Hood*, 56 Ala. 519; *Williams v. State*, 33 Ga. Supp. 85; *Jones v. Jones*, 45 Md. 144; *Estill v. Rogers*, 1 Bush (Ky.) 62; *Johnson v. Johnson*, 45 Mo. 595; *State v. Adams*, 65 N. Car. 537.

4. *Markelton v. Kingston*, 20 Johns. (N. Y.) 1; *Oliver v. Sole*, Min. 29, 30 note.

5. See *Minor v. Jones*, 2 Redf. (N. Y.) 289. This is on the principle that "a court may refuse to recognize foreign marriages or impediments to marriage based on principles inconsistent with the fundamental law of the forum." *Stewart on M. & D.*, § 121.

6. *Stikes v. Swanson*, 44 Ala. 633; *McReynolds v. State*, 5 Cold. (Tenn.) 18.

7. See for example Ark. Dig. 1874, § 4191; Fla. Dig. 1881, p. 409; Ga. Code, 1873, § 1667; Mo. R. S., 1879, § 3275; Tenn. R. S., 1871, § 2447.

8. *Capacity of Parties—Race.*—Ala. Code, 1876, § 4189; Cal. Civ. Code, 1881, § 60; Colo., 1877, § 1736; Md. R. C., 1878, art. 72, § 106; Me. R. S., 1871, p. 483, § 2, p. 487, § 1.

9. *Stewart on M. & D.*, § 157. "The intermarriage of a man and woman of different races, generally of white and black, may be punishable by statute, the offence being called miscegenation. *Desty Crim. L.*, § 59; *Hoover v. State*, 59 Ala. 57; *Fraser v. State*, 3 Tex. App. 263."

10. *Succession of Minvielle*, 15 La. Ann. 342; *Hoover v. State*, 59 Ala. 57; *Scott v. State*, 39 Ga. 321; *Bailey v. Fiske*, 34 Me. 77; *Medway v. Needham*, 16 Mass. 157; *Kinney v. Com.*, 30 Gratt. (Va.) 858; *State v. Kennedy*, 76 N. Car. 251; *State v. Hooper*, 5 Ired. (N. Car.) 201; *State v. Brady*, 9 Humph. (Tenn.) 74.

11. See II, § 8, note 1, p. 498, and § 53 of *Stewart on M. & D.*

12. See note 11, above. This rule does not seem to have been expressly recognized in these cases, and is disregarded in *Carter v. Montgomery*, 2 Tenn. Ch. 216.

13. *Fraser v. State*, 3 Tex. App. 263; *Green v. State*, 58 Ala. 190; and see *Dred Scott v. Sandford*, 19 How. (U. S.) 393; *Ex rel. Hobbs*, 1 Woods (U. S.) 537; *State v. Gibson*, 36 Ind. 389; *Francois v. State*, 9 Tex. App. 144; *Kinney v. Com.*, 30 Gratt. (Va.) 858.

14. A mulatto is not usually a negro (*Felix v. State*, 18 Ala. 720), but is the child of a negro and a white person. (*Medway v. Natick*, 7 Mass. 88), not the child of a mulatto and a white (same case). And where a negro must have one-fourth negro blood, one drop less will make him white (*McPherson v. Com.*, 28 Gratt. (Va.) 939);

g. Former Marriage.—The object of this section is to discuss the right and capacity of a person who has been married to marry during the lifetime of his or her spouse—a right and capacity which can exist only when there has been a divorce. The word “divorce” is very commonly used to include decrees of nullity; properly, a divorce is a complete or partial dissolution, and can be had only when there has been a valid marriage; an invalid marriage cannot be dissolved, but can be decreed null and void. (See this title, part 4).

The Marriage of a Person Already Married, Considered Civilly and Criminally.—A man cannot have at the same time two wives, or a woman two husbands; and one who has married once cannot marry again unless such first marriage was void,¹ or voidable and has been duly avoided;² or if valid, has been dissolved by death³ or divorce. Such a second marriage is both invalid and illegal. (See title DIVORCE, vol. 5, 745.)

Considered Civilly.—If a second marriage is had, it is not voidable merely,⁴ even where a statute provides that it may be de-

but a party with one-eighth (*Bailey v. Fiske*, 34 Me. 77), and even with one-sixteenth, negro blood has been held a negro (*State v. Chavers*, 5 Jones (N. Car.) 11), so a descendant of a negro in the fourth generation (*State v. Watters*, 3 Ired. (N. Car.) 455).

1. *Reeves v. Reeves*, 54 Ill. 332. “The marriage of a woman with a man whose wife by a former marriage is still living, undivorced, is void, and her subsequent marriage with another is valid although her husband by such void marriage is living.” See *Shook’s Est.*, 4 Brewst. 305; *Bruce v. Burke*, 2 Add. Ecc. R. 471.

2. For example, a woman, on discovering she had married an impotent, could not, without having such marriage decreed void, marry anyone else. See *Smith v. Morehead*, 6 Jones (N. Car.) 360. *Stewart Mar. & Div.*, §§ 79, 159.

3. *Stewart on Mar. & Div.*, § 167. “When one of the parties to a marriage is dead, the other cannot be her husband or his wife; the marriage is absolutely dissolved, and the survivor is a widow or widower.”

Presumption of Death.—In most of the States statutes provide that where a party has been absent unheard of, or beyond seas, for five or seven years, the other party shall not be punishable for marrying again (*Barber v. State*, 50 Md. 161, 167; *Eubanks v. Banks*, 34 Ga. 407; *State v. Patterson*, 2 Ired. (N. Car.) Eq. 346, 350); but such statutes do not apply to cases where the party

marries a second time knowing the absent party is alive (*Reg. v. Briggs*, 7 Cox (C. C.) 175, 177; *Com. v. Johnson*, 10 Allen (Mass.) 196, 198; 1 Bish. M. & D., § 596; *Stewart M. & D.*, § 161); nor do they render the second marriage valid if the first really existed still (*Glass v. Glass*, 114 Mass. 563); though in some States the statutes expressly state that the second marriage must be declared void and thus made voidable simply (*White v. Lowe*, 1 Redf. (N. Y.) 376, 379. See *Spicer v. Spicer*, 16 Abb. (N. Y.) Pr., N. S. 112, 123, 124; *People v. Vodes*, 9 Alb. L. J. 5, 25; *post*, pt. 4, § 5). In general life is presumed to continue for seven years after the party has disappeared, but if a party supposing his wife dead, marries within seven years, and the wife is never heard of afterwards, it will generally be presumed not only that she is dead, but that she died before he married again (*Kelly v. Drew*, 12 Allen (Mass.) 107, 110; *Canady v. George*, 6 Rich. (S. Car.) Eq. 103, 107; *post*, pt. 3, § 3).

4. *Martin v. Martin*, 22 Ala. 86, 101. “And first, as to the marriage; though a man marries never so often, he can have but one lawful wife living. So long as she is living, and the marriage bond remains in full force, all his subsequent marriages, whether meretricious, or founded in mistake and at the time supposed to be lawful, are utterly null and void. No decree of divorce is necessary to annul such subsequent marriage, for it never had any legal existence.

creed null,¹ but no decree is necessary,² and it is void *ab initio*.³ The effect of statutes which provide that under certain circumstances a *bona fide* second marriage shall be void only from the time that it is so decreed is unsettled; but courts will avoid, if possible, a construction which would give a person two spouses at the same time.⁴ Nor, in general, does the innocence of one of the parties make the second marriage any the less void,⁵ though by the Spanish⁶ and civil⁷ law a woman who is deceived into a marriage with a married man has the rights of a wife, and her children are legitimate;⁸ and even in other courts she has been allowed alimony.⁹ In one case, A, who had married B,

Such was clearly the common law." *Heffner v. Heffner*, 23 Pa. St. 104; *Higgins v. Breene*, 9 Mo. 497; *Ponder v. Graham*, 4 Fla. 23, 30.

1. *Drummond v. Irish*, 52 Iowa 41. "A marriage between parties, one of whom has a husband or wife living, is absolutely void, and no rights of the other party are affected thereby. This is not altered by the fact that the statute provides for actions to annul such marriages." But see *Jones v. Zoller*, 32 Hun (N. Y.) 280.

2. See note 4, p. 499, and *Blossom v. Barrett*, 37 N. Y. 434.

3. See note 4, p. 499, and *Miles v. Chilton*, 1 Rob. Ec. 684; *Bird v. Bird*, 1 Lee 621; *Bayard v. Morphew*, 2 Phillim. 321; *Rhea v. Rhenner*, 1 Pet. (U. S.) 105; *Tefft v. Tefft*, 35 Ind. 44; *Janes v. Janes*, 5 Blackf. (Ind.) 141; *Strode v. Strode*, 3 Bush (Ky.) 227; *Summerlin v. Livingston*, 15 La. An. 519; *Harrison v. Lincoln*, 48 Me. 205; *Glass v. Glass*, 114 Mass. 563; *Emerson v. Shaw*, 56 N. H. 418; *Zule v. Zule*, 1 N. J. Eq. 96; *Blossom v. Barrett*, 37 N. Y. 434; *Appleton v. Warner*, 51 Barb. (N. Y.) 270; *Spicer v. Spicer*, 16 Abb. (N. Y.) Pr., N. S. 112; *Heffner v. Heffner*, 23 Pa., St. 104; *Sellars v. Davis*, 4 Yerg. (Tenn.) 503; *Smith v. Smith*, 1 Tex. 621; *State v. Goodrich*, 14 W. Va. 834. But see *Eubanks v. Banks*, 34 Ga. 407; *Teter v. Teter*, 88 Ind. 404.

4. See 3 Rev. Stat. N. Y. 1882, p. 2332, § 6; *Spicer v. Spicer*, 16 Abb. (N. Y.) Pr., N. S. 112; *Hiram v. Pierce*, 45 Me. 367.

In *Glass v. Glass*, 114 Mass. 563, 565, "By the Gen. Stat., ch. 106, § 30, when a marriage is dissolved on account of a prior marriage of either party, and it appears that the second marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead, that fact shall be stated in the decree of di-

vorce or nullity; and the issue of the second marriage, born or begotten before the commencement of the suit, shall be deemed to be the legitimate issue of the parent capable of contracting the marriage." And *People v. Oades*, 9 Alb. L. J. 5, 25; *Wilson v. Wilson*, L. R., 1 Eq. 247.

5. In *Glass v. Glass*, 114 Mass. 563, at 566, "It must be assumed upon the report of this case that the second marriage was contracted by both parties in good faith, and with the full belief that the respondent's former husband was dead. . . . A decree of nullity must therefore be entered." See *U. S. v. Hays*, 30 Fed. Rep. 710.

6. *Lee v. Smith*, 18 Tex. 141. "In Spanish Law, the consort who enters into matrimony in ignorance that her husband has a partner or wife living (or of other impediment to the marriage) is in law not only innocent of crime, but has all the rights, incidents and privileges pertaining to lawful marriage; and these are continued as long as there is ignorance of the former or other impediment to the second marriage."

7. *Succession of Navarro*, 24 La. An. 298.

8. In *Lee v. Smith*, 18 Tex. 141, at 145: "But the second marriage of Smith with Maria Jesusa Delgado was not null and void in law, with reference either to the wife or the children of that marriage." See also *Harrington v. Sarfield*, 30 La. An. 1297; *Hiram v. Pierce*, 45 Me. 367; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642; *Gaines v. Henner*, 24 How. (U. S.) 553.

9. *Strode v. Strode*, 3 Bush (Ky.) 227, 228. "Appellant avers, in his answer, that when he married appellee, he had a wife living in the State of Texas, from whom he had not been divorced. This fact he does not allege he ever disclosed to her, or that she knew it, or had the means of being informed

married C at eleven o'clock the same day that he was divorced from B, the divorce from B not having been granted until 2 o'clock, but A and C having acted in good faith, the marriage was held valid.¹

Considered Criminally.—When a party who is already married goes through the form of,² or contracts,³ a second marriage, he or she, or both parties,⁴ may be guilty of the crime of bigamy or polygamy.⁵ This is a purely statutory crime and does not exist at common law.⁶ Whether the English statute of 1604 is in force in the United States is doubtful; in Maryland it is,⁷ but not in Pennsylvania.⁸ The two marriages must be strictly

on the subject. He had concealed his marriage in Texas from her; she, therefore, believed appellant to be her lawful husband when she married him. She was first deceived and then abandoned by him. . . . But independent of the case of *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113, it has been held in England, that where the marriage was void, and the woman was of good character and blameless in the affair, she would be allowed a sum in *solido nomine expensarum* (Bish. on Mar. & Div., note to § 563); and it has been held in some of the States that alimony will be granted on a divorce from the bond of matrimony as well as from bed and board; and this court has heretofore sanctioned allowances for alimony upon the dissolution of the marriage relations where the woman has been blameless; and the weight of authority is to that effect." See *Miles v. Chilton*, 1 Rob. Ec. 684. But see *Bird v. Bird*, 1 Lee 627; *Appleton v. Warner*, 51 Barb. (N. Y.) 270.

1. *Merriam v. Wolcott*, 61 How. Pr., N. S. (N. Y.) 377.

2. *Reg. v. Brown*, 1 Car. & K. 144; 47 Eng. C. L. 143; *People v. Brown*, 34 Mich. 339.

Hayes v. People, 25 N. Y. 390. "To support an indictment for bigamy, it is a sufficient marriage in fact that the parties agree to be husband and wife, and cohabit and recognize each other as such. It is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character. It is no answer for the accused, that having a wife living, and so incapable of a valid marriage, he did not intend or consent to a marriage in fact, but obtained the consent of the woman by fraudulently imposing upon

her the form of marriage by a pretended clergyman. A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy."

3. *Robinson v. Com.*, 6 Bush (Ky.) 309, and note 2 above.

4. As a joint offence, consult *Baumer v. State*, 49 Ind. 544, 548; *Delany v. People*, 10 Mich. 241, 243.

5. *Reynolds v. U. S.*, 98 U. S. 145, 146. "This is an indictment found in the district court for the third judicial district of the territory of Utah, charging George Reynolds with bigamy, in violation of section 5352 of the Revised Statutes, which, omitting its exceptions, is as follows: 'Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.' " 4 Black. Com. 164; 1 Russ. Cr. (9th ed.) 268; 2 Whart. Crim. L. (8th ed.), § 1682; *Desty Crim. L.*, § 89.

6. *Barber v. State*, 50 Md. 161, 166. "Bigamy was not a felony at the common law; indeed, according to that law it was not a crime of which the ordinary common law tribunals took cognizance at all. It was originally considered as of ecclesiastical cognizance exclusively." And *Reynolds v. U. S.*, 98 U. S. 145.

7. *Barber v. State*, 50 Md. 161, 170. "We are of opinion, therefore, that the Stat. 1 Jac. 1, ch. 11, is still in force in this State, modified by the act of 1809, as to the punishment for the offence but not as to the grade of the crime."

8. *Report of Judges*, 6 Binn. (Pa.) 549, 622, 623.

proved.¹ The first must be valid² or voidable and not avoided;³ if it is void, there can be no bigamy.⁴ The second need not be otherwise valid, a mere contract⁵ or form of marriage being sufficient;⁶ so that a second marriage has been held to constitute bigamy, though void for consanguinity.⁷ The place where the first marriage took place is immaterial;⁸ but the second marriage must, in the absence of special statutory provision,⁹ have taken place in the State where the prosecution is instituted.¹⁰ Ignorance of the fact of the other's marriage may excuse the unmarried party;¹¹ but ignorance of law excuses no one;¹² so that a

1. *Langtry v. State*, 30 Ala. 536. In *Morris v. Miller*, 4 Burr. 2057, LORD MANSFIELD, in delivering the opinion of the court in a case of crim. con., said: "It shall not depend upon the mere reputation of a marriage which arises from the conduct or declarations of the plaintiff himself." He adds: "In prosecutions for bigamy, a marriage in fact must be proved." To the same effect are *Fenton v. Reed*, 4 Johns. (N. Y.) 52; *Com. v. Littlejohn*, 15 Mass. 163; *Bishop on Mar. & Div.*, § 324.

On the other hand, the following authorities are directly in point to show that marriage, even in prosecutions for bigamy, may be proved by cohabitation and the confessions of the party; but that the testimony, to justify a conviction, must be clear, strong and convincing. See able opinion by C. J. GIBSON in *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159; *Com. v. Murtagh*, 1 Ashm. (Pa.) 272; *Ham's Case*, 11 Me. 391; *Cayford's Case*, 7 Greenl. (Me.) 57; *State v. Hilton*, 3 Rich. (S. Car.) 434; *Roscoe's Cr. Ev.* (3rd Amer. ed.), 311."

2. *Beggs v. State*, 55 Ala. 108, 111. "The indispensable evidence to support a prosecution for bigamy is that the defendant had 'a former wife or husband living;' a subsisting, valid prior marriage, subjecting to its duties and conferring its rights. If the first marriage is void the offence has not been committed. 3 Whart. Am. Cr. Law, § 2628; 3 Greenl. Ev., § 208. But if it is merely voidable, contracted under disabilities or impediments, which render it capable of confirmation or avoidance as the party may elect, it is a marriage in fact until avoided, and a second marriage while it remains a marriage in fact is criminal. 3 Whart. Am. Cr. Law, § 2628; 1 East 466;" *Breakey v. Breakey*, 2 U. C. Q. B. 349, 353.

3. See above note and *Rex v. Jacobs*,

1 *Moody (C. C.)* 140; *Walls v. State*, 32 Ark. 565, 570; *State v. Barefoot*, 2 Rich. (S. Car.) 209, 221.

4. See note 2 above and *Reg. v. Chadiorick*, 11 Q. B. 205, 235; 63 Eng. C. L. 204, 235.

5. See notes 2 and 3, p. 501.

6. See notes 2 and 3, p. 501, and *Reg. v. Brown*, 1 Car. & K. 144; *Reg. v. Person*, 5 Car. & P. 412; *People v. Brown*, 34 Mich. 339; 1 Am. Cr. R. 72; *Carmichael v. State*, 12 Ohio St. 553.

7. *Reg. v. Brown*, 1 Car. & K. 144. "A, a married woman, in the lifetime of her husband, married B, who was a widower, B having been the husband of A's deceased sister. Held, that this was bigamy in A, and that the circumstance that the marriage of A and B would have been wholly void under the Stat. 5 & 6 Will. IV, ch. 54, § 2, even if A had been an unmarried person, made no difference."

8. *Beggs v. State*, 55 Ala. 108, at 111, quoted in note 2 above: "This offence is committed without regard to the place of the former marriage, whether within or without the State."

9. *Beggs v. State*, 55 Ala. 108, at 110: "It results that the offence is committed only at the place of the second marriage; and there alone—in the very county—is the offence indictable and punishable. 2 Bish. Cr. Law, § 892; *People v. Mosher*, 2 Park Cr. Cas. 195; *U. S. v. Jernegan*, 4 Cranch (C. C.) 1. Subsequent cohabitation in another jurisdiction than that of the marriage may be an offence but it is not bigamy." *Reg. v. Topping*, Dears 647; *Walls v. State*, 32 Ark. 565; *Com. v. Bradley*, 2 Cush. (Mass.) 553; *State v. Palmer*, 18 Vt. 570.

10. See note 9 above and *Com. v. Lane*, 113 Mass. 458, 461.

11. *Reg. v. Brown*, 1 Car. & K. 144; *State v. Goodenow*, 65 Me. 30, 33.

12. *State v. Goodenow*, 65 Me. 30, 33.

second marriage contracted in good faith, and supposed to be lawful, may be sufficient to constitute bigamy.¹

When There Has Been a Decree of Nullity.—A decree of nullity may be passed in a case where the marriage is void or only voidable. In the case of a void marriage, the parties not being thereby incapacitated for marriage, they may marry again even before and without a decree of nullity.² In the case of a voidable marriage, it being void *ab initio* if duly avoided, the parties may marry again after a decree of nullity.³ But a marriage where there has been a voidable marriage which has not been avoided is both invalid⁴ and bigamous.⁵

When There Has Been a Decree Nisi or Which Has Been Appealed from.—A decree *nisi* does not dissolve a marriage and the parties cannot marry again until it has been made absolute.⁶ If there has been any appeal from a decree of divorce and the appeal is sustained, an intervening marriage of either party would be void.⁷ Whether a *decree nisi*, or a decree of a lower court subject to appeal, would be a defence in a prosecution for bigamy has not been decided; probably it would not.

When There Has Been an Absolute Divorce.—An absolute divorce, or a divorce *a vinculo matrimonii*, dissolves the relation of husband and wife, and either party may marry again,⁸ except in

"Ignorance of the law excuses no one, etc." See *Hoover v. State*, 59 Ala. 57; *Smith v. State*, 13 Ark. 696; see note 1 below.

1. *State v. Goodenow*, 65 Me. 30. "A man and woman jointly indicted for adultery, the female defendant having a lawful husband alive, cannot set up in defence of the indictment that such husband had been married again, and that on that account they supposed they could lawfully intermarry; and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith."

2. *When There Has Been a Decree of Nullity.*—*Reeves v. Reeves*, 54 Ill. 332. "The marriage of a woman with a man whose wife by a former marriage is still living, undivorced, is void, and her subsequent marriage with another is valid, although her husband by such void marriage is living." See *Shook v. Shook*, 4 Brewst. (Pa.) 305.

3. See n. 2, p. 502 above, and *Thompson v. Thompson*, 10 Phila. (Pa.) 131.

4. See n. 2, p. 502 above, and *Smith v. Morehead*, 6 Jones (N. Car.) 360; *Stewart Mar. & Div.*, §§ 79-159.

5. See n. 2, p. 502 above, and *Rex v. Jacobs*, 1 Moo. (C. C.) 140; *Walls v. State*, 32 Ark. 565; *State v. Barefoot*, 2 Rich. (S. Car.) 209, 221.

6. *Where There Has Been a Decree Nisi or Which Has Been Appealed from.*—*Moors v. Moors*, 121 Mass. 232. "A decree of divorce *nisi* under the Stat. of 1867, ch. 222, was granted, which by its terms was to be made absolute on notice, after six months' publication, 'unless sufficient cause to the contrary appear.' Within the six months the libellant, believing that he had obtained a divorce and was at liberty to marry again, married another woman and had sexual intercourse with her. *Held*, that the second marriage was illegal and void, and that the libellant was not entitled to have the decree of divorce made absolute." *Noonan v. Villars*, L. R., 2 Exch. Div. 359, 361; *Cook v. Cook*, 144 Mass. 163. "A marriage solemnized on the day before the entry of a decree absolute on a decree *nisi*, in favor of one of the parties, is void."

7. See note 6 above, and *Allen v. MacClellan*, 12 Pa. St. 328, 332.

8. *Clarke v. Lott*, 11 Ill. 105, 114. "The divorce is absolute, the marriage is dissolved and all rights and obligations dependent on the existence of the marriage relation are extinguished. The parties are no longer husband and wife but are permitted to marry at pleasure." *Whitsell v. Mills*, 6 Ind. 229, 230; *Harding v. Alden*, 9 Me. 149;

the case of a special prohibition which is discussed below. It is doubtful whether formerly in England a person could marry again after an absolute parliamentary divorce.¹ (See title DIVORCE, vol. 5, 745).

When There Has Been a Limited Divorce.—A limited divorce, or a divorce *a mensa et thoro*, does not dissolve the relation of husband and wife, and neither party can marry again.² But such second marriage, though invalid, does not constitute bigamy.³ At one time, it seems, a party could marry again after a divorce *a mensa et thoro*.⁴

When, Accompanying the Divorce, There Has Been a Prohibition Against Another Marriage.—A prohibition against the marriage after divorce of (generally only) the guilty party for a certain time, or except on certain conditions, is sometimes contained in a statute, as in New York,⁵ and is sometimes entered by a court as a part of the decree of divorce under the authority of a statute, as in Maryland.⁶ In either case the effect would be the same. But no such prohibition by a court is valid unless it is authorized by a statute,⁷ and unless the party against whom it is directed has been duly summoned or has appeared.⁸ A statute containing such a prohibition may be applied to existing marriages and causes of divorce,⁹ but perhaps a statute passed after a divorce, relieving a party of his incapacity, would be void.¹⁰ In some States the court may annul the decree of prohibition and allow the party to marry after the lapse of a certain time, provided that the party's intermediate conduct has been good.¹¹ On principle, if the prohibition contain no words of nullity, a marriage in disregard of it should be simply valid and illegal, and so it has once been held;¹² but, in general, where the prohibition

Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 115.

1. 2 Bish. Mar. & Div., § 698; Chester v. Mure, 3 Swab. & P. 223, 232.

2. In Barber v. State, 50 Md. 161, the court enumerates five exceptions to the Stat. 1 Jac. 1, ch. 11, being the statute which declared bigamy to be a felony. "3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court." Young v. Naylor, 1 Hill (S. Car.) Ch. 383; Barber v. Barber, 21 How. (U. S.) 582; Savage v. Ignogoso, 7 La. 281.

3. See note 2 above.

4. See Wait v. Wait, 4 Const. (N. Y.) 95, 105; 2 Bish. M. & D. 728.

5. N. Y. Code Civ. Proc. 1882, § 761; Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505.

6. Md. Rev. Code 1878, art. 51, § 12; Elliott v. Elliott, 38 Md. 357. In Maryland it is now very unusual for

such a prohibition to be put into the decree.

7. Barber v. Barber, 16 Cal. 378. "There is no authority in the court to impose any restraint upon a second marriage, when a dissolution from the bonds of matrimony is adjudged. . . . The cases where restraint upon a second marriage is permitted have arisen upon express statutes authorizing its imposition upon the guilty party. (Bishop on Divorce, §§ 655-659); People v. Hovey, 5 Barb. (N. Y.) 118."

8. Garner v. Garner, 56 Md. 127. In every suit such is the inalienable right of citizens of this country.

9. Elliott v. Elliott, 38 Md. 357.

10. Sparhawk v. Sparhawk, 116 Mass. 315, 320.

11. Cochrane v. Petitioner, 10 Allen (Mass.) 276; Bullock v. Bullock, 122 Mass. 3, 4; Peck v. Peck, 8 Abb. (N. Y.) N. C. 400.

12. Park v. Barron, 20 Ga. 702. "The

has any effect, a marriage in disregard of it is a mere nullity,¹ though it be contracted with the innocent party and former spouse.² But such marriage does not constitute bigamy³ or adultery.⁴ In one case, where a second marriage, though after divorce, during the lifetime of the first spouse, was made felony by statute, such marriage was also held void.⁵ The absence of the innocent party unheard of for seven years does not avoid the prohibition.⁶ The effect of the prohibition in another State is discussed below.

When the Divorce Has Been Granted in a Different State—Conflict of Laws.—It is usually said that a divorce valid where granted is valid everywhere, but such a rule is neither strictly correct nor of much assistance. The validity of a divorce may be limited to the State where it is granted, if granted in a mode which neither law nor comity requires other States to recognize;⁷ or it may extend throughout the United States, if granted in one of the States, by virtue of the "full faith and credit" clause of the constitution;⁸ or it may extend everywhere by comity and international law.⁹ A divorce, too, may be valid as to one party

guilty party for whose misconduct a divorce *a vinculo matrimonii* is found may be prosecuted for bigamy if he marries a second time during the life of the woman to whom he was first married; but the act forbidding him to marry the second time does not declare the latter marriage void. (2.) The law is more regardful of nuptial than of ordinary contracts; and persons incapable of contracting generally may contract marriage. (3.) Unlawful marriages are not void unless declared to be so." See § 53, Stewart on Marriage and Divorce.

1. *Cropsey v. Ogden*, 11 N. Y. 228, 235.

2. *Moore v. Moore*, 8 Abb. (N. Y.) N. C. 171, 173.

3. *State v. Weatherby*, 43 Me. 258; *People v. Hovey*, 5 Barb. (N. Y.) 117.

4. *State v. Weatherby*, 43 Me. 258. "Where the wife was divorced for the fault of the husband, and he married another, and cohabited with her without having obtained a like divorce, he does not thereby commit the crime of adultery either by the laws of this State or at common law." *Com. v. Putnam*, 1 Pick. (Mass.) 136.

5. *Calloway v. Bryan*, 6 Jones (N. Car.) L. 569.

6. *Borrowdale v. Borrowdale*, 28 Hun (N. Y.) 336.

7. *When the Divorce Has Been Granted in a Different State—Conflict of Laws.*—Cook v. Cook, 56 Wis. 195.

"Although marriage is a *status*, and every State has the right to fix, regulate and control the same as to every person within its jurisdiction, even though one of the parties may at the time actually reside in another State, yet a judgment of divorce granted in another State, under statutes making jurisdiction dependent entirely upon the residence then of the party applying for the divorce, at the suit of a husband against a wife who resided in this State, and who was not personally served with notice and did not appear in the action, but was ignorant of its pendency until after the judgment was rendered, it is not a bar to a subsequent action by such wife in this State for a divorce, alimony and a division of the property of such husband situated within this State, especially where such foreign judgment was based upon an alleged cause of action which was false in fact."

8. Constitution of U. S., art. 4, § 51; *Pennoyer v. Neff*, 95 U. S. 714, 734; *Cheever v. Wilson*, 9 Wall. (U. S.) 105, 223.

9. *Harvey v. Farnie*, L. R., 5 P. D. 153, at 157: "Much may be said in favor of our recognizing in such circumstances the decree of the foreign court. For assuming that we protect the interests of society in England against the dissolution of the marriage of English persons abroad for some cause for which it could not be dissolved here, there seems no reason why by the comity of

and not as to the other,¹ and it may destroy the marriage status and yet not affect certain property or personal right of the parties.² Certain rules may be stated, leaving the effect of fraud out of consideration, to wit (see title CONFLICT OF LAWS, vol. 3, p. 499):

1. A divorce granted by a divorce court in due conformity with the law of such court is valid in the State where it is granted.³

2. Such a divorce, if both parties are domiciled in such State,⁴ or if only one of them is so domiciled and the other is duly served with process in such State,⁵ or voluntarily appears in the suit,⁶ is valid throughout the United States by virtue of the United States constitution,⁷ and properly everywhere by the principles of international law.⁸

3. Such a divorce, if only one of the parties is domiciled in such State, and the other, though not duly served with process, had an actual notice of the suit and an opportunity to defend it, would probably be held valid everywhere by comity, as no injustice would be done.⁹

4. Such a divorce, if only one of the parties is domiciled in such State, and the other has no actual notice at all of the suit, but a mere notice by publication, the divorce would probably be held valid in such other States as by their legislatures or courts have adopted the policy or recognized the justice of divorce granted on constructive notice,¹⁰ but not in such other States as have not adopted such policy but regard it as contrary to natural justice,¹¹ except so far as this is necessary under the United States

nations we should not recognize the decree of a foreign court which proceeded upon principles in accordance with the English law." *Thompson v. State*, 28 Ala. 12; *Dougherty v. Dougherty*, 28 N. J. Eq. 581, 586; *People v. Baker*, 76 N. Y. 78, 88.

1. *People v. Baker*, 76 N. Y. 78; *Stilphen v. Stilphen*, 58 Me. 508; *Wright v. Wright*, 24 Mich. 180; *Dougherty v. Dougherty*, 28 N. J. Eq. 581; *Cook v. Cook*, 56 Wis. 195.

2. *Garner v. Garner*, 56 Md. 127; *Gould v. Crow*, 57 Mo. 200.

3. *Niboyet v. Niboyet*, L. R., 4 P. D. 1, 9; *Pennoyer v. Neff*, 95 U. S. 714, 735; *Ditson v. Ditson*, 4 R. I. 87, 108.

4. *Garner v. Garner*, 56 Md. 127; *Hunt v. Hunt*, 72 N. Y. 217, 240; *Stewart Mar. & Div.*, §§ 217a, 220.

5. Cases last cited; *People v. Baker*, 76 N. Y. 78, 83.

6. *Kinnier v. Kinnier*, 45 N. Y. 535, 539, and see *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Garner v. Garner*, 56 Md. 127; *Gould v. Crow*, 57 Mo. 200; *People v. Baker*, 76 N. Y. 78.

7. *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 123. "The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana." If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States. 2 Story on the Constitution, § 1313; *Christmas v. Russell*, 5 Wall. (U. S.) 302.

8. See note 9, p. 505, and *Niboyet v. Niboyet*, L. R., 4 P. D. 1, 8.

9. *Hunt v. Hunt*, 72 N. Y. 217, 226. "We do not think the allegation of fraud is maintained . . . had early and ample notice in fact of the commencement of the proceedings, of the nature of them." See also *Doughty v. Doughty*, 28 N. J. Eq. 581, 586.

10. *Hood v. State*, 56 Ind. 263, 271; *Hunt v. Hunt*, 72 N. Y. 217, 237-239; *Ditson v. Ditson*, 4 R. I. 87, 106; *Cook v. Cook*, 56 Wis. 195.

11. *Shaw v. Atty. Gen.*, L. R., 2 P. & D. 156, 162; *Doughty v. Doughty*, 28 N. J. Eq. 581, 586; *People v. Baker*, 76 N. Y. 78, 84.

constitution;¹ that is to say, except as to the status of the party domiciled,² and the property situate² in the State where the divorce was granted.

5. Such a divorce, if neither of the parties was domiciled in the State granted the divorce, has no extraterritorial validity, although both parties submitted themselves to the jurisdiction of the court.³

No attempt will be made to discuss these rules in this article.

A statute providing in general terms that the guilty party shall not marry after divorce applies only to divorces granted within the State.⁴ But whether the prohibition has any effect out of the State where the divorce is granted has been much disputed. In most States such a prohibition is regarded as a penalty,⁴ and therefore is deemed to have no extraterritorial force;⁵ but in Maryland⁶ and in North Carolina,⁷ it is held not to be a penalty, but a denial of relief and a continuation of that incapacity to marry which arises from an existing marriage. In these last States, therefore, the capacity to marry depending upon domicile,⁸ the prohibition would have equal effect, no matter where the party tried to marry, so long as such party retained his or her domicile;⁹ but in the first mentioned States the prohibition can be easily evaded. A New Yorker, prohibited by a New York court, has but to step into New Jersey to be married, and the New York courts will hold the marriage valid.¹⁰

1. *Pennoyer v. Neff*, 95 U. S. 714, 734.

2. *Thompson v. State*, 28 Ala. 12, 19; *Garner v. Garner*, 56 Md. 127, 129; *Gould v. Crow*, 57 Mo. 200; *Turner v. Turner*, 44 Ala. 437, 450; *Doughty v. Doughty*, 28 N. J. Eq. 581; *People v. Baker*, 76 N. Y. 78; *Colvin v. Reed*, 55 Pa. St. 375; *Cook v. Cook*, 56 Wis. 195.

3. *Harrison v. Harrison*, 20 Ala. 629. "No other State has jurisdiction to annul or materially to impair, the marriage relation between citizens of this State; and having no jurisdiction of the subject matter, consent of parties cannot confer it." See also *Harvie v. Farnie*, L. R., 6 P. & D. 35; *Shaw v. Atty. Gen.*, L. R., 2 P. & D. 156; *House v. House*, 25 Ga. 473; *Hood v. State*, 56 Ind. 263, 370; *Whitcomb v. Whitcomb*, 46 Iowa 437; *Litowich v. Litowich*, 19 Kan. 451; *Sewall v. Sewall*, 122 Mass. 156; *People v. Dawell*, 25 Mich. 247; *State v. Armington*, 25 Miss. 29, 36; *Leith v. Leith*, 39 N. H. 20, 33; *Van Fossen v. Van Fossen*, 37 Ohio St. 317; *Platt's Appeal*, 80 Pa. St. 501, 504; *Hare v. Hare*, 10 Tex. 355.

4. *Bullock v. Bullock*, 122 Mass. 3. "A person against whom a divorce has been obtained for adultery in another

State, by the law of which, in such a case, both parties may marry again, may contract a valid marriage in this commonwealth, without obtaining the leave of court provided for by the Gen. Stat., ch. 107, § 26, and the Stat. of 1864, ch. 216." *Van Voorhis v. Brintnall*, 86 N. Y. 18, 28; 40 Am. Rep. 505; citing most of the cases decided prior to 1881. In such States the incapacity to marry depends entirely on the prohibition; the marriage relation is wholly dissolved. *People v. Hovey*, 5 Barb. (N. Y.) 117, 119; *Moore v. Hegeman*, 27 Hun (N. Y.) 68; *Dickson v. Dickson*, 1 Yerg. (Tenn.) 110, 114.

5. Above cases and *Fuller v. Fuller*, 40 Ala. 301, 351, 356; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Com. v. Lane*, 113 Mass. 458; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Ex parte Webb*, 1 Tuck. (N. Y.) 372; *Van Storck v. Griffin*, 71 Pa. St. 240.

6. *Garner v. Garner*, 56 Md. 127, 129; *Elliott v. Elliott*, 38 Md. 357.

7. *Williams v. Oates*, 5 Ired. (N. Car.) 535, 538.

8. See last cited case.

9. See note 7. *supra*.

10. *Van Voorhis v. Brintnall*, 86 N. Y. 18.

6. **Consent of Parties**—*a. As to Its Necessity.*—Parties cannot become husband and wife without their mutual consent; consent is the very essence of a marriage; without it a marriage is null and void.¹ A mere marriage ceremony cannot make a man and woman husband and wife; so if they go through the forms of marriage in jest,² or supposing them mere preliminaries,³ it is no marriage. Nor can sexual intercourse make a marriage, the parties knowing or intending it to be unlawful.⁴ Though at the time of a marriage ceremony or consummation the mutual consent is wanting because one of the parties is mentally incompetent, or is not real, because of error, fraud or duress, and the marriage is therefore void, the necessary consent may be subsequently given when the party becomes sane⁵ or regains his freedom,⁶ or discovers the deception or mistake,⁷ and the marriage may be thus confirmed.⁸ Consent may be absent owing to error, fraud or duress.

Error.—Mistake of person but of nothing else affects the validity of a marriage.⁹ Thus, if a man and woman go through a marriage ceremony in masquerade, one supposing the other to be someone else, it is no marriage.¹⁰ So if a scamp, by pretending to be a known respectable man, and assuming his name, induced a woman to marry him;¹¹ though this, as all other mistakes induced by the other party, belongs rather to the subject of

1. *Town of Mountholly v. Town of Andover*, 11 Vt. 226, 227. "The case found by the jury is, that the ceremony of marriage was had before the justice without the consent of the parties. It was a marriage by force and duress.

Such a marriage has always been held void. Marriage is a contract, and requires the *consensus animorum* as much as any other contract." See also *Maguire v. Maguire*, 7 Dana (Ky.) 181, 183; *True v. Ranney*, 21 N. H. 52, 54; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Rundle v. Pegram*, 49 Miss. 751.

2. In *McClurg v. Terry*, 21 N. J. Eq. 225. "A marriage ceremony, though actually and legally performed, when it was in jest and not intended to be a contract of marriage, and it was so understood at the time by both parties, and is so considered and treated by them, is not a contract of marriage. Intention is necessary, as in every other contract."

3. *Clark v. Field*, 13 Vt. 460, 472.

4. *Peck v. Peck*, 12 R. I. 485, 488. "It is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife presently, and though cohabitation, following an engagement,

is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it, and as such open to rebuttal by counter proof. 1 Bishop on Mar. & Div., §§ 253, 254; *Forbes v. Countess of Strathmore*, Ferg. 113; *The Queen v. Millis*, 10 Cl. & Fin. 534, 782; *Robertson v. State*, 42 Ala. 509; *Post v. Post*, 70 Ill. 484; *Cheney v. Arnold*, 15 N. Y. 345."

5. See *Cole v. Cole*, 5 Sneed (Tenn.) 57. *Ante*, II, 5, *b*.

6. See *ante*, II, § 5, *e*; *infra*, DURESS.

7. See *Hampstead v. Plaistow*, 49 N. H. 84, 98; *Tompert v. Tompert*, 13 Bush (Ky.) 326.

8. See *post*, part 4, § 4, note.

9. 1 Bishop M. & D., § 208; *Rex v. Burton*, 3 Maule & S. 537; *State v. Farquharson*, 3 Add. Ec. R. 282; La. Civ. Code, 1875, § 91.

10. *Queen v. Millis*, 10 Clark & Fin. 534, at 785: "For it will be found that novelists and dramatists give validity to marriage in masquerade, where the parties were entirely mistaken as to the persons with whom they are united; marriages which could hardly be supported in the ecclesiastical court, in a suit of jactitation, or for restitution of conjugal rights."

11. *Rex v. Burton*, 3 Maule & S. 537.

fraud. Mistake of character, fortune, health, makes no difference,¹ the parties take each other for better or worse.²

Fraud.—Deceit is an essential of marriage, or false representations which induce consent, especially where the deceived party is weak in mind, or young,³ and more certainly if there has been no consummation,⁴ will invalidate a marriage.⁵ Thus, where a girl of fifteen was inveigled into marriage by her father's coachman, who obtained both her consent and the celebration of the marriage by falsehood and fraud, and where she repudiated the marriage before consummation, it was held void.⁶ So where a man induced a woman to go through a regular marriage service, pretending it to be a mere betrothal.⁷ So where a woman, having consented to have sexual intercourse with a man, conceals witnesses, and just before the act makes him agree that it means marriage, he not intending it as such.⁸ So where a felon, by assuming a false name and character, induces a woman to marry

1. *Ewing v. Wheatley*, 2 Hagg. Const. 175, 182; *Wakefield v. Mackay*, 1 Phillim. 134, 137, note; *Clowes v. Jones*, 3 Curt. Ecc. 185.

2. *Long v. Long*, 77 N. Car. 304, 308. "And we cannot but say that nothing could be more dangerous than to allow those who have agreed to take each other in terms *for better, for worse*, to be permitted to say that one of the parties is worse than expected." See also *Scroggins v. Scroggins*, 3 Dev. (S. Car.) 535, 545; *Hawk v. Harman*, 5 Binn. (Pa.) 43, 50.

3. *Youthfulness.*—*Lyndon v. Lyndon*, 69 Ill. 43. "On bill to annul a marriage, and declare the contract void, it appeared that the complainant was a young school girl, only about fifteen years old at the time of the marriage; that the defendant was employed as her father's coachman, and while in such employ took advantage of his position, while driving the children out, to inveigle the complainant into the marriage; that he procured the licence through perjury, by swearing positively that the complainant was of age; and that she never consummated the marriage by cohabitation, but immediately repudiated the same. *Held*, that the marriage, under such circumstances, ought not to be held valid, but ought to be declared void; but that, had the parties voluntarily lived together as man and wife, the latter knowing that the crime of perjury had been committed, it would have been held valid."

Harford v. Morris, 2 Hagg. Ecc. 423; *Browning v. Reane*, 2 Phillim. 69; *Rex v. Wakefield*, 2 Lew. C. C. 279; *Hull*

v. Hull, 5 Eng. L. & Eq. 589. See note 7 below.

Old Age.—Where an old man, who had lost his eyesight and was more or less deaf and otherwise broken, was put under the influence of drugs and liquor and was induced to marry a woman he had no affection for, but who wanted his money, the marriage was annulled. *Gillett v. Gillett* (Mich.), 43 N. W. Rep. 1101.

4. See last note and *Robertson v. Cole*, 12 Tex. 356.

5. See cases cited in above notes and *Tomppert v. Tomppert*, 13 Bush (Ky.) 326; *Guilford v. Oxford*, 9 Conn. 321.

6. See note 3 above, where this case is quoted at length.

7. *Clark v. Field*, 13 Vt. 460, at 465. "We, however, are satisfied that the court of chancery, under its common equity jurisdiction, may rescind or relieve against a marriage contract or annul a contract solemnized before a magistrate or minister of the gospel, if obtained by force, fraud or imposition, or under a mistake as to the legal effect of such solemnization by one of the parties, if the other party knew the legal effect, and also knew that the party was under such mistake, when such ceremony has not been followed by consummation or cohabitation. Even when followed by consummation there may be extraordinary cases of fraud and imposition which require the aid of the court of chancery to prevent consequences in a high degree disastrous if that aid was not afforded."

8. *Barr v. Fairie*, 5 Mon. Dic. Supp.

him, and she repudiates the marriage before consummation.¹ So where a party who is physically incompetent conceals this;² or a woman who is pregnant by another man conceals it.³ But it is not fraud if the pregnancy is by the man she marries,⁴ nor if he has been put on his guard as to her virtue by antenuptial connection with her;⁵ nor if she, by falsely pretending to be pregnant by him induces him to marry her.⁶ On the other hand, mere antenuptial unchastity concealed is no fraud except by statute,⁷ nor are false representations as to character, health or fortune,⁸ nor false pretences of affection,⁹ nor marrying to escape punishment with the intention to immediately desert,¹⁰ nor the mere assumption of a false name.¹¹ A conspiracy by which one of the parties, with the help of others, brings about a marriage for an ulterior object, may be in this sense fraud, but the fraud must be upon one of the parties. Third parties cannot complain.¹²

Duress.—The fact that a party marries under actual compulsion invalidates the marriage.¹³ It does not suffice that he married unwillingly;¹⁴ he must have been forced by fear of bodily harm.¹⁵ But it is not duress when a man marries a woman after seducing her to avoid trouble with the overseers of the poor,¹⁶

921; cited 1 Bish. M. & D., § 202.

1. *Rex v. Burton*, 3 Maule & S. 537; *Heffner v. Heffner*, 3 Maule & S. 265.

2. *Meyer v. Meyer*, 49 How. (N. Y.) Pr. 311, 313; *Benton v. Benton*, 1 Day (Conn.) 111, 114.

3. *Baker v. Baker*, 13 Cal. 87, 103; and see Ala. R. C. 1879, § 2686; *Ritter v. Ritter*, 5 Blackf. (Ind.) 81; *Frith v. Frith*, 18 Ga. 273; Ga. R. C. 1878, § 1712; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Carris v. Carris*, 24 N. J. Eq. 516, 523; *Long v. Long*, 77 N. Car. 304.

4. *States v. States*, 37 N. J. Eq. 195, 196. Plain inference from the cases cited above; and see *Scroggins v. Scroggins*, 3 Dev. (S. Car.) 535.

5. *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412. *Crehore v. Crehore*, 97 Mass. 330. "If a man marries a woman whom he knows to be unchaste, having had sexual intercourse with her; this court will not declare the marriage void for the reason that she, on the day thereof, at the time being pregnant with a bastard child of which he was not the father, assured him that she was not pregnant, and he married her on faith in that assurance." But see *Moss v. Moss*, 2 Ired. (N. Car.) 55.

6. *Hoffman v. Hoffman*, 30 Pa. St. 417, 421.

7. *Farr v. Farr*, 2 McArthur (U. S.) 35; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Leavitt v. Leavitt*, 13

Mich. 452; *Carris v. Carris*, 24 N. J. Eq. 516; Md. Rev. Code, 1878, p. 480; Va. Code 1860, p. 530; see 1 Bish. M. & D., § 179 n. 1.

8. *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Carris v. Carris*, 24 N. J. Eq. 516; *Long v. Long*, 77 N. Car. 304.

9. *Benton v. Benton*, 1 Day (Conn.) 111, 113.

10. Same case.

11. *Clowes v. Jones*, 3 Curt. Ecc. 185.

12. *McKinney v. Clarke*, 2 Swan (Tenn.) 321, 324. "No more startling or absurd proposition can be conceived than that a marriage, legal in form, acquiesced in and held obligatory by the parties, and recognized as valid by law, might be annulled at the instance of a third person, for any cause whatever."

13. *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 298. "It would seem to require no argument to show that a consent given under actual duress obtained by force is no consent; and although the form of the marriage has been observed, the essence of the contract is wanting." See also *Hurford v. Morris*, 2 Hagg. Const. 453; *Pyle v. Pyle*, 10 Phila. (Pa.) 58; *Collins v. Collins*, 2 Brewst. (Pa.) 515.

14. *Stevenson v. Stevenson*, 7 Phila. (Pa.) 386, 387.

15. *Stevenson v. Stevenson*, 7 Phila. (Pa.) 386, 387.

16. *Jackson v. Winne*, 7 Wend. (N. Y.) 47, 51.

or to avoid a prosecution,¹ though it is if in such case he is actually unlawfully imprisoned, and marries to get free,² or if he does not even formally consent.³ Duress cannot be predicated of compulsion to discharge a legal duty.⁴

b. As to Its Form.—The contract which is essential to a valid marriage may be expressed in words, written or oral,⁵ or in signs,⁶ or implied from conduct.⁷ No technical words are necessary, even when a celebration is required;⁸ it need only appear that the parties intend to live together and produce children under the shield and sanction of the law.⁹ Letters are often evidence of this contract, but it is doubtful whether parties can actually marry by letter;¹⁰ it would seem that in such case the present assumption of the marriage status could not be contemplated.¹¹ So as to marriage by telephone¹² or by proxy.¹³

Essence of the Contract.—The contract must be in substance, "to be husband and wife under the law."¹⁴ If the object of the

1. *Williams v. State*, 44 Ala. 24. "Marriage contracted through fear of imprisonment is not void, when the fear was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy."

See also *Honnett v. Honnett*, 33 Ark. 156, 160; *Sickles v. Carson*, 26 N. J. Eq. 440; *Scott v. Shufeldt*, 5 Paige (N. Y.) 43; *Johns v. Johns*, 44 Tex. 40.

2. *Bassett v. Bassett*, 9 Bush (Ky.) 696; *Collins v. Collins*, 2 Brewst. (Pa.) 515; 1 Bish. M. & D., § 213. Not if lawfully; *Johns v. Johns*, 44 Tex. 40.

3. See *Kopke v. People*, 33 Mich. 41, 44, 45.

4. *State v. Davis*, 79 N. Car. 603, 605. "But the duress was not made out. It is true he was sued by the feme for a breach of promise of marriage and seduction, and was under arrest, but the arrest was lawful. A promises to pay B a hundred dollars, and B sues him for a breach of promise and compels him to pay; that is *compulsion*, but is not *duress*."

5. *Dickerson v. Brown*, 49 Miss. 357. "With reference to the consent necessary to consummate marriage, nothing more is needed than that, in language which is mutually understood, or in any words declaratory of intention, the parties accept of each other as husband and wife, and the doctrine is laid down that if the words do not of their natural meaning, or by common use, "conclude matrimony," yet if the parties intend marriage, and their intent sufficiently appears, they are inseparably husband and wife, not only before God,

but also before men. 1 Bish. M. & D. 229. Consent may be either verbal or written, and where there was no ceremony, but the parties merely live together as husband and wife, for many years, they were held to be, in law, married. A maxim of law is, *consensus, non concubitas, facit matrimonium*."

6. See last note and *Harrod v. Harrod*, 1 Kay & J. 4, 16; *People v. Taylor*, 1 Mich. N. P. 198, 199.

7. See note 5 above, and *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; 4 Eng. Ec. 485; *Francis v. Francis*, 31 Gratt. (Va.) 283, 287. "It is not necessary that the parties shall have expressly agreed to live together as husband and wife. The agreement or understanding may be implied, as in other cases, from their conduct and declarations."

8. *Harrod v. Harrod*, 1 Kay & J. 4, 16. *Stewart on M. & D.*, § 92, 99.

9. See note 5 above.

10. 1 Bish. M. & D., § 231; *Swinb. Spousals* (2nd ed.) 162, 181; *Ingles v. Robertson*, 1 Fras. Dom. Rel. 157; *Campbell v. Sassen*, 2 Wils. & S. 309.

11. See dissenting opinion in *Dumaresq v. Fishly*, 3 A. K. Marsh. (Ky.) 1198, 1204.

12. Marriages by telephone would probably stand on the same footing as marriages by letter.

13. Marriages by proxy have taken place at various times in history, generally between members of royal families of different countries.

14. The case of *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; 4 Eng. Ec. 485-523, contains all the cases up to 1811

parties be the assumption of the legal status of marriage, an agreement to live together for life will suffice,¹ though so extensive an agreement is not necessary, as the law may allow divorce,² and even divorce at pleasure.³ But this must appear to be their object, and since an agreement to live together as husband and wife is not necessarily an agreement to be husband and wife, it will not suffice;⁴ nor will an agreement for a conjugal union such as their consciences and religion sanction;⁵ nor for cohabitation as long as they can agree.⁶ If legal marriage is their object, any stipulations inconsistent with the law are simply void.⁷ The apparent contract is not affected by a secret reservation of one of the parties.⁸ After taking a woman as his wife, she deeming herself such, a man cannot say he meant only to take her as his mistress.⁹ But if both parties have or know of an ulterior object, which alone is meant to be secured by an apparent contract, there is no marriage, as when a man wrote a letter to a woman he had seduced, acknowledging her as his wife, it being their sole object to gain admission for her to a lying-in hospital,¹⁰ or to void another alliance by pretending to be married.¹¹ The contract may be intended to take effect at once or in the future.

Consent per Verba de Præsentis.—The contract must be to be husband and wife thenceforth; it must contemplate the present assumption of the marriage status.¹² Thus, "this is your wed-

on this point. Amongst other cases that of *McAdam v. Walker*, 1806, is quoted at page 504. "In that case Elizabeth Walker had cohabited with Mr. McAdam and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so, he said, 'This is my lawful wife, and these my lawful children.' On the same day, without having been alone with Walker during the interval, he put a period to his existence. The court held the children to be legitimate." See also *Jewell v. Jewell*, 1 How. (U. S.) 219; *Letters v. Cady*, 10 Cal. 533; *Rundle v. Pegram*, 49 Miss. 751; *Barnett v. Kimball*, 35 Pa. St. 13, 19; *State v. Tachanatah*, 64 N. Car. 614.

1. *Roche v. Washington*, 19 Ind. 53, 57. "What, then, constitutes the thing called a marriage? What is it in the eye of the *jus gentium*? It is the union of one man and one woman, 'so long as they both shall live,' to the exclusion of all others, by an obligation which, during that time, the parties cannot of their own volition and act dissolve, but which can be dissolved

only by the State. Nothing short of this is marriage."

2. See *DIVORCE*, vol. 5, p. 745, of this work.

3. *Wall v. Williams*, 8 Ala. 48, 51; *Boyer v. Dively*, 58 Mo. 510; but see *State v. Tachanatah*, 64 N. Car. 614; *Roche v. Washington*, 19 Ind. 53, 57.

4. *Letters v. Cady*, 10 Cal. 533; and see *Jewell v. Jewell*, 1 How. (U. S.) 219.

5. *State v. Miller*, 23 Minn. 352; *Reynolds v. U. S.*, 98 U. S. 145, 161.

6. *Randall v. Randall*, 5 City H. Rec. (N. Y.) 141.

7. *Dickerson v. Brown*, 49 Miss. 357; *Barnett v. Kimmell*, 35 Pa. St. 13, 19, 20; *Harrod v. Harrod*, 1 Kay & J. 4, 16.

8. *Barnett v. Kimmell*, 35 Pa. St. 13, 20.

9. *Robertson v. Stewart*, 1 Sess. Cas. S. 4th Ser. 532; *Bell v. Graham*, 13 Moore P. C. C. 242; *Stewart v. Menzies*, 2 Rob. App. 547; *Hamilton v. Hamilton*, 9 Clarke & F. 327. But see *Cunningham v. Cunningham*, 2 Dow. 482. Consummation must be had. *Locky v. Sinclair*, 8 Sess. Cas. S. 2nd Ser. 582, 605.

10. *McInnes v. More*, Ferg. Cons. 33.

11. *Stewart v. Menzies*, 2 Rob. App. 547.

12. *Peck v. Peck*, 12 R. 1. 485, 488.

ding ring, we are married," followed by cohabitation, may be a good marriage contract.¹ It is not sufficient, on the other hand, to agree to present cohabitation, and a future regular marriage when more convenient,² or when a wife dies,³ or when a ceremony can be performed;⁴ nor can "I will marry you in six weeks if you will sleep with me to-night"⁵ be anything but a promise to marry. To this rule there is one exception.

Consent per Verba de Futuro cum Copula.—In one case, a contract looking to a future assumption of the marriage status is sufficient. In States where no marriage celebration is necessary, and when such contract is followed by sexual intercourse between the parties, the law, so as not to presume fornication, presumes that parties who have promised to marry mean sexual intercourse following such promise to be the consummation of such agreement.⁶ But this presumption may be rebutted by any facts which show that the parties knew or intended their intercourse to be illicit, as where at the time they were looking forward to being married with a ceremony.⁷ This mode of contracting marriage is said to be *per verba de futuro cum copula*.⁸ But these cases

"It is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife *presently*, and though cohabitation following an engagement is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it, and as such open to rebuttal by counter proof. 1 Bish. on Mar. & Div., §§ 253, 254; *Forbes v. Countess of Strathmore*, Ferg. 113; the *Queen v. Millis*, 10 Cl. & Fin. 534, 782; *Post v. Post*, 70 Ill. 484. See also *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio St. 181." See also *Clark v. Field*, 13 Vt. 460, 475; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Askew v. Dupree*, 30 Ga. 173.

1. *Bissell v. Bissell*, 55 Barb. (N. Y.) 325.

2. *Robertson v. State*, 42 Ala. 509, 511. "That the defendant told her that he could not get a licence for them to marry at that time because 'all the old licences had run out,' but that 'as soon as the new licences come in,' he would get a licence and marry her, and that upon this agreement they cohabited. The agreement to marry here had reference to the future. It was an agreement to marry at a future time upon the occurrence of an antecedent event—the procurement of a licence. The cohabitation was necessarily before the occurrence upon which the agreement to marry was to be consummated. The cohabitation was, therefore, not in fulfilment of a matrimonial agreement,

but in advance of an anticipated marriage. It was obviously understood to be an adulterous connection."

3. *Duncan v. Duncan*, 10 Ohio St. 181.

4. *Estate of Beverson*, 47 Cal. 621; *Van Tuyl v. Van Tuyl*, 57 Barb. (N. Y.) 235; *Fryer v. Fryer*, Rich. (S. Car.) Eq. Cas. 85, 97.

5. *Reg. v. Millis*, 10 Clark & F. 534, and cases cited in note 12, p. 512.

6. *Cargile v. Wood*, 63 Mo. 501. "Where parties have cohabited together and held themselves out as man and wife, and there are circumstances from which a present contract may be inferred, the law, out of charity, and in favor of innocence and good morals, will presume matrimony. The law in general presumes against vice and in favor of innocence and good morals, and on this ground holds acknowledgment, cohabitation and reputation presumptive evidence of marriage; but cohabitation and reputation must both exist before the presumption can be raised." See III, §§ 3, 4 and 11 below; *Stoltz v. Doering*, 112 Ill. 34. "At common law, the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage. The copula must have been in fulfilment of the agreement to marry."

7. *Peck v. Peck*, 12 R. I. 485; *Fryer v. Fryer*, Rich. (S. Car.) Eq. Cas. 85, 97.

8. *Dalrymple v. Dalrymple*, 2 Hagg. Const. 66; 4 Eng. Ec. 490.

must be distinguished from those of seduction following promise of marriage.¹

c. As to Its Effect.—In many States no ceremony of any kind is essential to a valid marriage, and in such States a contract between parties competent to marry constitutes marriage, known, as the case may be, as marriage *per verba de præsenti*, or as marriage *per verba de futuro cum copula*.² In States where a celebration is necessary, this contract must exist at the time of such ceremony or afterwards.³

7. Celebration or Ceremonies of Marriage—*a. Their Necessity.*—All States have statutes providing for the celebration of marriages; what permission must be gotten or notice given before the marriage; who must perform the marriage, and what record of the marriage must be made; but generally such provisions do not affect the validity but only the legality of the marriage.⁴ Whether or not any of such provisions must be complied with to render the marriage valid depends (1) upon whether by the pre-existing common or unwritten law any such formality were necessary, and (2) whether, if they were not, there is a provision in the statutes stating that noncompliance with it shall render a marriage void; and it is a general rule that no celebration of marriage is necessary at all except in States in which it is held that a celebration was necessary at common law, and in States where the statute, as in Kentucky, contains words of nullity.⁵

By the Common or Unwritten Law.—No celebration is neces-

1. *Cheney v. Arnold*, 15 N. Y. 345, 351. "It follows that the doctrine of the canon law that a contract of marriage *per verba de futuro*, followed by carnal intercourse, was a valid marriage did not become the law of this State by force of our adoption of the common law of England, for it was not a part of that common law. . . . Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises they do not become husband and wife until they have actually given themselves to each other in that relation. . . . If a man seduce a woman under a promise of marriage, we allow an action for the seduction at the suit of the father, and an action for a breach of the promise at the suit of the daughter."

2. *Dickerson v. Brown*, 49 Miss. 357, 372; *Hutchins v. Kimmell*, 31 Mich. 126. See § 6, *b*, above.

3. See § 6, above and IV, §§ 6 and 7 below.

4. *Meister v. Moore*, 96 U. S. 76, 79. "A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner;

but an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a licence or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent; and such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity." *Cotteral v. Sweetman*, 1 Rob. Ecc. 304, 312; *Campbell v. Gullatt*, 43 Ala. 57, 69; *Post v. Post*, 70 Ill. 484; *Carmichael v. State*, 12 Ohio St. 553. But see *Com. v. Munson*, 127 Mass. 459; *Bashaw v. State*, 1 Yerg. (Tenn.) 177, which ignore this rule.

5. See note 4 above, and notes 5, 6, 7 and 8, p. 515.

sary by the law of nature,¹ or by the canon law prior to the council of Trent,² or by the civil law,³ or by the law of Scotland.⁴ Whether or not one is necessary by the common law of England is doubtful. In England, after much hesitation, it is settled that it is,⁵ and this view has been sustained in Maryland,⁶ Massachusetts⁷ and North Carolina.⁸ But the contrary has been held in Tennessee,⁹ and by the Supreme Court of the United States,¹⁰ and in Alabama,¹¹ California,¹² Georgia,¹³ Illinois,¹⁴ Iowa,¹⁵ Kentucky,¹⁶ Michigan,¹⁷ Minnesota,¹⁸ Mississippi,¹⁹ Missouri,²⁰ New York,²¹ Ohio,²² Rhode Island,²³ Pennsylvania,²⁴ and the English decision has been disapproved in Canada.²⁵ One was necessary by the Mexican law.²⁶ The result of these decisions combining with the statutes in the several States is given in the notes below.²⁷

1. By the Common or Unwritten Law.

—Richard v. Brehm, 73 Pa. St. 140; Lindo v. Belisario, 1 Hagg. Const. 216, 4 Eng. Ecc. 367; Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368, 370. It would seem that citation of authorities for this proposition is unnecessary.

2. Dalrymple v. Dalrymple, 2 Hagg. Const. 54; 4 Eng. Ec. 485; Reg. v. Millis, 10 Clark & F. 534; Hallett v. Collins, 10 How. (U. S.) 174; Succession of Prevost, 4 La. An. 347, 349.

3. Hallett v. Collins, 10 How. (U. S.) 174, 181.

4. Wright v. Wright, 15 Sess. Cas., § 767; McAdam v. Walker, 1 Dow, 148; Dalrymple v. Dalrymple, 2 Hagg. Const. 54; 4 Eng. Ec. 485.

5. Beamish v. Beamish, 9 H. L. Cas. 274 (England). "It being settled by the decision in The Queen v. Millis, 10 Cl. & F. 534, that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid." Du Moulin v. Druitt, 13 Ir., C., L. R. 212; Catherwood v. Cazlon, 13 Mees. & W. 261; 8 Jur. 1076.

6. Denison v. Denison, 35 Md. 361.

7. Com. v. Munson, 127 Mass. 459.

8. State v. Samuel, 2 Dev. & B. (N. Car.) 177, 179.

9. Grisham v. State, 2 Yerg. (Tenn.) 589.

10. Meister v. Moore, 96 U. S. 76, 78. "It certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de presenti*. That such a contract constitutes a

marriage at common law there can be no doubt, in view of the adjudications made in this country from its earliest settlement to the present day."

11. Campbell v. Gullatt, 43 Ala. 57, 69.

12. Graham v. Bennet, 2 Cal. 503, and Sharon v. Sharon, 75 Cal. 1, 25.

13. Askew v. Dupree, 30 Ga. 173.

14. Post v. Post, 70 Ill. 484.

15. Blanchard v. Lambert, 43 Iowa 228.

16. Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368.

17. Hutchins v. Kimmell, 31 Mich. 126.

18. State v. Worthingham, 23 Minn. 528.

19. Hargroves v. Thompson, 31 Miss. 211.

20. Dyer v. Brannock, 66 Mo. 391.

21. Fenton v. Reed, 4 Johns. (N. Y.) 52; Rose v. Clark, 8 Paige (N. Y.) 573.

22. Carmichael v. State, 12 Ohio St. 553.

23. Mathewson v. Phœnix, 23 Am. L. R. 401.

24. Guardians of Poor v. Nathans, 2 Brewst. (Pa.) 149, 152.

25. Breakey v. Breakey, 2 U. C. Q. B. 349.

26. Rice v. Rice, 31 Tex. 174.

27. The Ala. code of 1876, § 2674, etc. that marriages are to be solemnized "by any licenced minister of the gospel in regular communion with the Christian church or society of which he is a member; by a judge of the supreme, circuit or city court, or by a chancellor within the State; or by the judge of probate or any justice of the peace within their respective counties."

What Law Governs.—The necessity of the celebration depends upon the law of the place where the parties enter into the contract which is essential to a valid marriage. Thus, if the parties desire to marry in Maryland they must not only have a celebration, but a religious one.¹ If, on the other hand, Marylanders desire to avoid this, they need only step into Pennsylvania.²

b. Nature.—Supposing some ceremonies to be necessary, it is another question to determine what portion of the various ceremonies may be omitted. For the ceremonies or celebration of marriage include not only the act of a civil or religious officer declaring the parties to be husband and wife, but the prerequi-

Vol. 3, supplement of 1880, Code of California, § 5070. "Marriage may be solemnized by either a justice of the supreme court, judge of the superior court, justice of the peace, priest or minister of the gospel of any denomination." Civ. Code 1881, § 55; McCausland v. McCausland, 52 Cal. 568.

The Georgia Code of 1882, § 1698, provides that to constitute a valid marriage there must be (1) Parties able to contract. (2) An actual contract. (3) Consummation according to law.

Section 1703 provides that ministers enumerated as in Cal. Code, justices of peace, etc., shall solemnize and return certificate, etc.

The Revised Statutes of Illinois, 1885, page 806, § 4, enumerate who may solemnize marriage; like the preceding statutes, no words are here found declaring marriage void if not celebrated in conformity therewith.

The case of Cartwright v. McGown, 121 Ill. 388, was decided in Illinois in 1888 after the above statute was in force, and the court held: "Marriage being a civil contract by which persons of opposite sexes agree to take each other for man and wife during their joint lives, unless it is annulled according to law, and to discharge toward each other the duties growing out of the relation assumed, may be entered into without any licence from the State, in the absence of a statute making it essential by declaring a marriage without it void. The only essentials at common law are that the parties must be capable of assenting, and that they must in fact consent to assume the new relation. . . . While the statute prescribes certain formalities to be observed in marriages, and certain steps to be taken

to preserve the evidence of the same; it does not declare a marriage void which is legal by the common law merely because not entered into in accordance with its provisions."

The case of Sharon v. Sharon, 75 Cal. 1, is to the same effect, and holds that a celebration is not necessary.

The recent case of Beverlin v. Beverlin, 29 W. Va. 732, decided that the statute must be followed in that State in order to make a valid marriage. Thus West Virginia is added to Maryland, Massachusetts and North Carolina (see notes 8, 9 and 10 above) in the view that a celebration is necessary. We have seen, n. 5, p. 515, that in England a celebration is necessary. In Delaware (Rev. Code 1873, p. 473; Pettyjohn v. Pettyjohn, 1 Houst. (Del.) 332); Maine (R. S. 1871, p. 454, 486; State v. Hodgskins, 19 Me. 155), Virginia (Code 1873, p. 864; O'Neale v. O'Neale, 17 Gratt. (Va.) 582); Tennessee (Stat. 1871, §§ 24, 39; Grisham v. State, 2 Yerg. (Tenn.) 589; but see Johnson v. Johnson, 1 Cold. (Tenn.) 626; Rice v. State, 7 Humph. (Tenn.) 14, 15; Andrews v. Page, 3 Heisk. (Tenn.) 653); Texas (R. S. 1879, p. 410; Rice v. Rice, 31 Tex. 174), a celebration is probably necessary. In all the other States it is believed that the question is undecided. Notes above give those States which have held that a celebration is unnecessary.

1. Denison v. Denison, 35 Md. 361. "A marriage contracted in this State merely *per verba de presenti* or *per verba de futuro cum copula* is not lawful. To constitute a lawful marriage some religious ceremony must be superadded to the civil contract."

2. Redgrave v. Redgrave, 38 Md. 93, 98; Stewart on Mar. & Div., § 108.

site authority for such act, and the duties resulting therefrom; not only the ceremony proper,¹ but the consent of parents,² or licence (consent of the State),³ or banns (consent of the church),⁴ and the registry of the fact that the marriage has been celebrated.⁵

Consent of Parents, Licence, etc.—Consent of parents, licence, publication of banns, registry of the marriage, though all or some of them everywhere necessary to the legality of a marriage, are nowhere, under English or American law, necessary to the validity thereof; they were not so by the pre-existing law, and no statute has made them so.⁶

Celebration Proper, by Whom Performed.—There could have been no valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or deacon.⁷ The principle of freedom of thought and statutes have extended the right to celebrate marriages to ministers of any church,⁸ and in most States to judges, chancellors and magistrates;⁹ and special provisions have been made for quakers.¹⁰ If the minister or judge, etc., were so *de facto*, and the parties have acted in good faith, the marriage is good, though he were not minister or judge, etc., *de jure*,¹¹ generally by statute.¹² Parties cannot marry themselves with a ceremony when a celebration is required; there must be a celebrant.¹³ The celebrant must be a third party; a minister cannot marry himself.¹⁴ He must not only be present, but must be there as the celebrant of the marriage.¹⁵

1. See n. 7-15, *infra*; n. 1-3, p. 518.

2. *De Barros v. De Barros*, L. R., 3 P. D. 1, 7. See note 6 above.

3. *Askew v. Dupree*, 30 Ga. 193. See note 6 above.

4. *Gompertz v. Kensit*, 13 L. R. Eq. 369. See note 6 above.

5. *State v. Horsey*, 14 Ind. 185; See Ill. R. S. 1880, p. 705.

6. See the extract from the Ill. case in note 28 above.

Stewart on M. & D., § 57. "Parents' consent is a mere matter of form, and generally not necessary, under the statutes, to the validity of a minor's marriage." See cases quoted in § 97, *Stewart on M. & D.*

We have seen in section 7 above that most of the States hold that compliance with the requirements of statutes is not necessary to the validity of the marriage.

7. *Beamish v. Beamish*, 9 H. L. 274. "It being settled by the decision in *The Queen v. Millis*, 10 Cl. & F. 534, that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of

a clergyman in holy orders; the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid.

8. See the statutes in note 27, p. 515, enumerating those who are permitted to perform the ceremony.

9. See last note.

10. See *e. g.* Md. Rev. C. 1878, art. 51, § 8.

11. *Pearson v. Howey*, 11 N. J. L. 12, 20; *Taylor v. State*, 52 Miss. 84; *Reg. v. Millis*, 10 Cl. & F. 534; *Dormer v. Williams*, 1 Curt. Ecc. 870; *Kibbe v. Antram*, 4 Conn. 134; *State v. Willis*, 9 Ark. 196; *Com. v. Spooner*, 1 Pick. (Mass.) 235; *State v. Bray*, 13 Ired. (N. Car.) 289; *State v. Winkley*, 14 N. H. 480; *State v. Abbey*, 29 Vt. 60.

12. See Rev. Stat. of Mass. 1882, p. 811; Maine 1871, p. 456; Neb. 1881, p. 342; Nev. 1873, § 216; N. H. 1878, p. 429; Vt. 1880, p. 2319; Va. 1873, p. 844; Wis. 1878, § 2337.

13. See note 7 above.

14. See note 7 above.

15. See note 7 above.

Ceremony Proper, What Essential.—The celebrant need only take notice that the parties are before him to be married, and pronounce them husband and wife.¹ Thus at a marriage by an Episcopal clergyman, "the directions contained in the rubric respecting the opening address to the congregation, the adjuration to the persons about to be married as to confessing any lawful impediment to their union, the putting on the ring, etc., are not absolutely essential to the validity of the marriage; the essential part of the service is the reciprocal taking each other for wedded wife and wedded husband."² In the case of a religious celebration, the man and woman need not belong to that religion; thus protestants may be married by a Roman Catholic priest.³

c. Effect.—A marriage celebration will have no effect if the parties are not at the time competent to marry.⁴ Nor will it, if they do not intend to marry,⁵ though their consent may be presumed from their going through the ceremony,⁶ and to negative the presumption the absence of consent must be clearly shown.⁷ It is only where no celebration is had that a consummation is ever required,⁸ but from a consummation a celebration is often presumed.⁹

8. Consummation of Marriage.—The consummation of a marriage may be either subsequent sexual intercourse between the parties,¹⁰ or the assumption of the rights, duties and obligations of husband and wife, from which such intercourse may be implied.¹¹ There are two principal ends of marriage—a lawful indulgence of the passions to prevent licentiousness, and the procreation of children under the shield and sanction of the law.¹² If the par-

1. **Ceremony Proper—What Essential.**—*Beamish v. Beamish*, 9 H. L. 274; at 333: "Take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there be opposed a just impediment; and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife."

2. In the above case, at page 337, LORD CAMPBELL said: "There ought to be a public form of celebration to which no reasonable person can object, admitting by means of registration of easy, certain and perpetual proof, the addition of a religious ceremony being highly desirable, although not absolutely necessary."

3. *Burr v. Fontaine*, 4 L. C. Rev. L. 163, S. C. 1872.

4. See II, § 4, etc., above.

5. See II, § 6 above.

6. See II, §§ 6 and 6, *b*, above, and *Fleming v. People*, 27 N. Y. 329, 335.

7. Clearly strong evidence must in all cases be produced to contradict and prove the opposite of what the party by his words and actions has testified to, etc.

8. *Dumaresly v. Fishly*, 3 A. K. Marsh (Ky.) 379, and next section.

9. See III, § 11 below.

10. **Consummation of Marriage**—*Dumaresly v. Fishley*, 3 A. K. Marsh (Ky.) 368, 377, dissenting opinion. "Thus I would say that a marriage executed according to the forms of law should be binding at all events, and that those made in other modes should require consummation evidenced by cohabitation, while in those which exist in bare words, and which had the offer of consummation on one side and a refusal on the other, I would leave the *locus penitentia* to the party rejected." Cal. Civ. Code 1881, § 55.

11. See last note and III, §§ 11 and 13 below.

12. *Deane v. Aveling*, 1 Rob. Ecc. 279, 298. "I apprehend that we are all agreed that, in order to constitute the

ties know their intercourse to be contrary to law, even though it is sanctioned by their religion, it cannot be an element of marriage, but is mere fornication.¹

Sexual intercourse between the parties is necessary to a marriage *per verba de futuro*,² and the assumption of the marriage status usually raises a presumption of marriage;³ but in general no consummation is necessary to the validity of a marriage, whether it be formed by celebration⁴ or by mere consent,⁵ *consensus non concubitus facit matrimonium*.⁶ Thus, a marriage is valid though one of the parties absolutely refuse intercourse,⁷ or abandon the other at once.⁸ Statutes may modify this.⁹ By voluntary consummation, imperfections in the consent may be waived.¹⁰ And after consummation a marriage will be less readily set aside for fraud, etc.¹¹ Sexual intercourse is, however, a marriage right, and refusal or abuse of it gives rise to various questions.¹²

III. PROOF OF MARRIAGE—1. In General.—The question whether or not a valid marriage has been formed between a man and a woman may be relevant in any suit, before any tribunal, between any parties; and whether or not the evidence adduced establishes a marriage must be judicially determined *on proof*, or this question may be the issue in a suit instituted in a particular tribunal by one of the parties against the other, or by some third party against them both for the express purpose of determining the validity of an alleged marriage between them; and whether or not there has been a valid marriage is judicially determined by a decree. (See NULLITY SUITS, *post*, part 4.)

2. Presumptions.—In proving marriage, four different presump-

marriage bond between young persons there must be the power, present or to come, of sexual intercourse. Without that power, neither of two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence." Briggs v. Morgan, 3 Phillim. 325; 1 Eng. Ec. 408. See II, § 5, c, above.

1. Port v. Port, 70 Ill. 484; State v. Miller, 23 Minn. 352; Dalrymple v. Dalrymple, 2 Hagg. Const. 54; 4 Eng. Ec. 485.

2. Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368. "Though cohabitation is necessary to render a marriage valid when entered into *per verba de futuro*, it is not so when the marriage was entered into *per verba de presenti*."

3. See III, §§ 4 and 11 below.

4. Potier v. Barclay, 15 Ala. 439, 449; Wier v. Still, 31 Iowa 107.

5. See cases in last four notes and Jackson v. Winne, 7 Wend. (N. Y.) 47,

50; Gise v. Com., 81 Pa. St. 428. But see Com. v. Jackson, 11 Bush (Ky.) 679; Jewell v. Jewell, 1 How. (U. S.) 219, 234.

6. See II, § 6, above.

7. Potier v. Barclay, 15 Ala. 439; Cowles v. Cowles, 112 Mass. 298. See DIVORCE, vol. 5, p. 745, at 789.

8. See DIVORCE, vol. 5, p. 745.

9. Cal. Civ. Code 1881, § 55; Ga. Code 1878, § 1608.

10. Hampstead v. Plaistow, 49 N. H. 84, and Stewart on M. & D., §§ 150, 151.

11. See the case of Lyndon v. Lyndon, 69 Ill. 43, quoted in notes 3, 4, 5, 6, p. 509.

12. Stewart on M. & D., § 175. "Cohabitation is a matrimonial duty, and refusal to cohabit is not justified by any conduct short of a cause for divorce. The ecclesiastical courts, on the application of the other party, would enforce cohabitation on the part of the delinquent husband or wife. . . . Suits of this kind are still

tions may be brought into play: 1. The general presumption in favor of marriage; 2, that of innocence; 3, that of life; and, 4, that of the due performance of their duties by public officers. All these presumptions are rebuttable.¹ It is doubtful whether they will all act in favor of third parties;² for instance, creditors.³

3. Presumption of Marriage.—It is not necessary for the party alleging a marriage to prove, in order to make out a *prima facie* case, the separate existence of each of the essentials, for marriage is favored in law.⁴ Thus, if the celebration of a marriage be proved, the contract,⁵ the capacity of the parties,⁶ in fact, the validity of the marriage⁷ is presumed. So, if the contract be proved, the capacity of the parties is presumed.⁸

4. Presumption of Innocence.—The presumption of innocence sometimes gives rise to a presumption of marriage.⁹ A man and woman cohabiting without being married are guilty of fornication,¹⁰ so when such cohabitation is under color and claim of

brought in England, but have never been known in the United States." See title HUSBAND AND WIFE.

1. *Port v. Port*, 70 Ill. 484. "The cohabitation of two persons of different sexes, and their behavior in other respects as husband and wife, always afford an inference, of greater or less strength, that a marriage has been solemnized between them; yet such inference is destroyed by evidence that no marriage, in fact, ever was solemnized. *Philbrick v. Spangler*, 15 La. An. 46, 47; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Guardians of Poor v. Nathans*, 2 Brewst. (Pa.) 149.

2. See note 3 below.

3. *Benavis v. Barba*, 32 La. An. 1264. "The presumption of marriage, which results from reputation and long cohabitation, must yield to positive evidence to the contrary. *Semble* that such presumption only exists in favor of either party to the supposed marriage and of their children, but not of creditors, especially when both said parties deny ever having been married and having lived as husband and wife."

4. *Piers v. Piers*, 2 H. L. Cas. 331, 362; *De Thoren v. Atty. Gen.*, L. R., 1 App. C. 686; *Wilkie v. Collins*, 48 Miss. 496; *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 127; *Peck v. Peck*, 12 R. I. 485. See note 7 below.

5. See note 7 below.

6. See note 7 below.

7. *Wilkie v. Collins*, 48 Miss. 496. "Society rests upon marriage, the law favors it, and when a man and woman

have contracted marriage in due form the law will require clear proof to remove the presumption that the contract is legal and valid. A husband left his home in Mississippi, October 30th, 1859, and went to Louisiana on business, where he was last heard from by letter to his wife, November 30th, 1859, announcing that he was then sick in bed, and would return as soon as able to travel. He was of habitual delicate health, and his domestic relations had always been most agreeable. It was the belief of his family that he was dead, and on December 22nd, 1861, his wife married again. The absent husband was never heard of alive. *Held*, that under the circumstances the absent husband must be presumed dead, and that the second marriage is valid."

8. *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177.

9. *Blanchard v. Lambert*, 43 Iowa 228. "Where a husband and wife separate and the former lives and cohabits for years with a woman whom he claims and who is reputed to be his wife, the law presumes a divorce from the first wife, and the latter may legally marry again. If the marriage was originally void, subsequent marriage will be presumed to have occurred, if the parties continued to cohabit together after the removal of the legal impediment." *Holmes v. Holmes*, 6 La. 463; *Cargile v. Wood*, 63 Mo. 501, 512; *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177; *Peck v. Peck*, 12 R. I. 485; *Carroll v. Carroll*, 20 Tex. 731.

10. *State v. Miller*, 23 Minn. 352.

marriage, a marriage is often presumed;¹ but such presumption is to save the innocence of the parties, and will not arise if it will leave or involve one of them in guilt—as if a man is so cohabiting with two women,² or if one of the parties is proved to be married to someone else.³ So, sometimes, if a second marriage is proved, a previous divorce of the first one may be presumed,⁴ though in general a divorce can be proved only by the record;⁵ so death may, in such case, be presumed.⁶

5. Presumption of Life.—A party is, independently of statute, presumed alive for seven years after he is last heard of. After seven years he is presumed dead;⁷ but when presumed dead there is no presumption as to the precise time of his death;⁸ this from all the facts is to be determined by the court.⁹ But in marriage cases the presumption of life often conflicts with that of innocence,¹⁰ as where a husband, believing his wife dead, but having heard from her within seven years, marries again.¹¹ In such cases the two presumptions neutralize each other, and the court

1. *Green v. State*, 59 Ala. 68, 71; *Lowry v. Coster*, 91 Ill. 182; *Proctor v. Bigelow*, 38 Mich. 282; *Redgrave v. Redgrave*, 38 Md. 93; *Jones v. Reddick*, 79 N. Car. 290; *Com. v. Stump*, 53 Pa. St. 132.

2. *George v. Thomas*, 10 U. C. Q. B. 604; *Chamberlain v. Chamberlain*, 71 N. Y. 423.

3. *Breaky v. Breaky*, 2 U. C. Q. B. 340, 353; *Williams v. State*, 44 Ala. 24; *Case v. Case*, 17 Cal. 508; *Blanchard v. Lambert*, 43 Iowa 228; *Harrison v. Lincoln*, 48 Me. 205; *Jones v. Jones*, 45 Md. 144; *Emerson v. Shaw*, 56 N. H. 418; *Senser v. Bower*, 1 P. & W. (Pa.) 450; *Weinberg v. State*, 25 Wis. 370.

4. See note 9, p. 520, and *Hall v. Rawls*, 27 Miss. 471.

5. That of course is the best evidence. *Com. v. Boyer*, 7 Allen (Mass.) 306; *Streeter v. Streeter*, 43 Ill. 155; *State v. McElmurray*, 3 Strobb. (S. Car.) 33, 41.

6. See the next five notes and *Carroll v. Carroll*, 20 Tex. 731.

7. *Queen v. Lumley*, Law R., 1 C. C. 196. "On a trial for bigamy, it was proved that the prisoner married A in 1836, left him in 1843, and married again in 1847. Nothing was heard of A after the prisoner left him, nor was any evidence given of his age. *Held*, that there was no presumption of law either in favor of or against the continuance of A's life up to 1847; but that it was a question for the jury, as a matter of fact, whether or not A was alive at the date of the second marriage."

Gilleland v. Martin, 3 McLean (U. S.) 490; *Moffit v. Varden*, 5 Cranch

(C. C.) 658; above case of *Queen v. Lumley*, at 199. LUSH, J., "The legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz: that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That as we have said, is always a question of fact." See note on PRESUMPTION OF DEATH, *ante*, part 2. § 2.

8. *Rex v. Harbone*, 2 Ad. & E. 540; *Knight v. Nepean*, 5 Barn. & Adol. 86, 94; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653; *Gilleland v. Martin*, 3 McLean (U. S.) 490; *Moffit v. Varden*, 5 Cranch (C. C.) 658; *Whiting v. Nicholl*, 46 Ill. 230; *Tisdale v. Connecticut Mut. etc. Ins. Co.*, 26 Iowa 170; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Bailey v. Bailey*, 36 Mich. 181; *Learned v. Corley*, 43 Miss. 687; *Hancock v. American Life Ins. Co.*, 62 Mo. 26, 30; *Spencer v. Roper*, 13 Ired. (N. Car.) 333; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Puckett v. State*, 1 Sneed (Tenn.) 355; *Gorman v. State*, 23 Tex. 646.

9. See note 7 above, and *Murray v. Murray*, 6 Oreg. 17, 25; *Cameron v. State*, 14 Ala. 546.

10. See note 9, p. 520, and *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653; 664; *Dixon v. People*, 18 Mich. 84; *Gibson v. State*, 38 Miss. 313; *Senser v. Bower*, 1 P. & W. (Pa.) 450, 452; *O'Gara v. Eisenlohr*, 38 N. Y. 296, 301.

11. See note 7 above.

(judge or jury) decides as a matter of fact whether or not at the time of the second marriage the first was dissolved by death;¹ the leaning, however, is generally towards the presumption of innocence.²

6. Presumption of Performance of Duties.—That a celebrant as a public officer has done his duty is, presumed.³ Thus, if a marriage celebration be proved, it is presumed that the celebrant was duly authorized,⁴ that the proper preliminaries, as obtaining a licence,⁵ had been complied with;⁶ that the place⁷ and the forms used were legal.⁸

7. Proof in General.—The proof of a marriage may be direct or indirect; evidence may be given of the fact that competent parties have contracted marriage with proper celebration and consummation, or of the fact that they have lived together as husband and wife, and have been generally reputed as such. In some cases either kind of evidence will suffice; in some, direct evidence is necessary. In a question of a marriage *vel non*, the issue is the existence of the essentials of a valid marriage; if the celebration of a marriage is proved, the validity of the marriage,⁹ the contract¹⁰ and capacity of parties¹¹ is presumed as already shown; if the contract of a marriage is proved, if no celebration is necessary, the validity of the marriage,¹² the capacity of parties,¹³ is likewise presumed.¹⁴ So that the celebration or the con-

1. Kelly v. Drew, 12 Allen (Mass.) 107, 110.

2. See note 9, p. 520, and Williams Estate, 13 Phila. (Pa.) 325; Yates v. Houston, 3 Tex. 433, 449; Canady v. Gorge, 6 Rich. (S. Car.) Eq. 103, 109.

3. People v. Calder, 30 Mich. 85, 90. "Where the evidence shows that the parties appeared at a church and that the officiating minister then publicly, and in the presence of other persons in attendance, in fact performed a ceremony of marriage between such parties, and further, that the parties appeared to regard themselves as then married, it is fairly to be presumed, in the absence of anything to the contrary, that the ceremony was regular and legal, although the evidence fails to show what words were used by the parties or the minister, or the particulars of the ceremony, or what specific kind of ceremony was or would be according to the forms, usages or customs of such church."

Goshen v. Stonington, 4 Conn. 209; Vaughn v. Bijgers, 6 Ga. 188; Damon's Case, 6 Me. 148.

4. Patterson v. Gaines, 6 How. (U. S.) 550; State v. Winkley, 14 N. H. 480; State v. Robbins, 6 Ired. (N. Car.) 23.

See II, §§ 15, 16, 17 above.

5. See Piers v. Piers, 2 H. L. Cas. 331, and notes 4-10, p. 520.

6. See note 8, p. 520.

7. Sichel v. Lambert, 15 C. B., N. S. 781; Reg. v. Creswell, 1 Q. B. D. 446. We have seen that there is a presumption which favors marriage.

8. Rayaham v. Canton, 3 Pick. (Mass.) 293; People v. Calder, 30 Mich. 85, see note 3 above; Fleming v. People, 27 N. Y. 329.

9. Proof in General.—Wilkie v. Collins, 48 Miss. 496, 510, 511. See notes 5 to 8, p. 520, and note 1, p. 523.

10. Fleming v. People, 27 N. Y. 329, 335.

11. Blanchard v. Lambert, 43 Iowa 228, 230.

12. See also notes 5 to 8, p. 520. This results from the same presumption which favors marriage. In those States which hold that a celebration is not necessary, the marriage is held just as valid as where a celebration is required in England and some of the United States. The incidents of the marriage the marriage having been established, are the same. See Wilkie v. Collins, 48 Miss. 496, 511.

13. Hull v. Rawls, 27 Miss. 471.

14. Caujolle v. Ferrie, 26 Barb. (N.

tract may be the real issue. A contract without a celebration is, of course, no evidence of a celebration, but it is sometimes deemed so;¹ in such cases the marriage is said to be proved by indirect evidence.² The fact of the celebration is generally proved by the record thereof,³ or by witnesses present.⁴ The latter is considered stronger evidence,⁵ but it is not necessary under the rule for the best evidence to produce the record⁶ or the celebrant,⁷ unless, perhaps, the other evidence is purely circumstantial.⁸ The fact of the contract is generally proved by cohabitation and repute, hereafter discussed. The distinction generally made between proof of the fact of marriage and proof of the fact of matrimonial cohabitation applies properly only to cases when a celebration is necessary to the validity of the marriage,⁹ or is made an issue in the case.¹⁰

8. Marriage Records, Certificates, etc.—When the law requires a marriage to be recorded, such record, or the proper copy thereof,¹¹

Y.) 177; *Starr v. Peck*, 1 Hill (N. Y.) 270.

1. *Redgrave v. Redgrave*, 38 Md. 93, 97. "Evidence of such facts as those just stated, when clear of suspicion, has always been received as competent and sufficient upon which to found a presumption, as matter of fact, of the evidence of legal marriage. Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. 1 Taylor's Ev., §§ 140, 517; *Hervey v. Hervey*, 2 W. Bl. 877; *Goodman v. Goodman*, 28 L. J., Ch. 1; *Jewell v. Jewell*, 1 How. (U. S.) 219, 232. Indeed, the most usual way of proving marriage, except in actions for criminal conversation, and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment. *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; *Boone v. Purnell*, 28 Md. 607. This case is altogether unlike that of *Denison v. Denison*, 35 Md. 361."

2. *State v. Winkley*, 14 N. H. 480. See III, § 11. *Camden v. Belgrade*, 78 Me. 204. "On the question of whether there was a marriage, a living together for many years, being charged to have been without marriage, evidence of what kind of a family the woman came from and what kind of a home she left is competent."

3. *Jackson v. People*, 3 Ill. 231.

4. *Com. v. Norcross*, 9 Mass. 492,

was a case of an indictment for adultery. "The recording of marriages was intended to perpetuate the evidence of the fact, after the witnesses present shall have died. But a copy of such record is not so satisfactory evidence as the testimony of witnesses. These last, indeed, are necessary to prove the identity of the parties. *State v. Clark*, 51 N. H. 456.

5. See last note and *Warner v. Com.*, 2 Va. Cas. 95, 101.

6. *Jackson v. People*, 3 Ill. 231. "On a trial for bigamy, a copy of the marriage licence and certificate of the officer or person solemnizing the marriage, properly authenticated by the clerk of the county commissioners' court, in whose office the original licence and certificate were filed, is admissible in evidence to prove such marriage. Under the statute of Illinois, it is optional with the prosecuting attorney, whether to use the marriage licence and certificate or other record evidence, or to prove the marriage by such other evidence as is admissible to prove a marriage in other cases." *State v. Morison*, 35 N. H. 22.

7. *Coleman v. Coleman*, 6 City H. Rec. 3, 4.

8. *Com. v. Littlejohn*, 15 Mass. 163.

9. *Hubback on Succession*, 237; *Steadman v. Powell*, 1 Add. Ec. R. 58, 64.

10. *Redgrave v. Redgrave*, 38 Md. 93. See III, § 13 below.

11. *State v. Potter*, 52 Vt. 33. "On trial on indictment for adultery, the State to prove marriage of respondent, offered in evidence a certified copy of a

is direct evidence of the marriage¹ in criminal and civil cases alike;² but such record proves only what is required to be recorded,³ and is not conclusive.⁴ Such evidence, too, are certificates given by the celebrant to the parties,⁵ though this has been denied;⁶ but the delivery and custody of such certificates must be proved.⁷ So private records kept by a clergyman,⁸ certainly after his death;⁹ so entries in a family bible;¹⁰ so foreign records, if this is consistent with the law of the forum.¹¹ But in such

record in the town clerk's office, which purported to be a record, not of a copy of the minister's record, but of the minister's certificate of the marriage, which certified the fact and date of the marriage, and stated the names, age and residence of the parties, the occupation of the respondent and the name of the minister, but did not state those items in separate columns. The copy contained no certification of what it was a copy, nor of what town the clerk whose name was signed thereto was clerk, nor of the name of the town wherein the record was made. *Held*, that under the maxim *omnia presumuntur*, etc., it was to be presumed that the record was made in, and that the clerk was the clerk of, the proper town; and that the record contained all that was necessary under the statute to make it authentic and valid as evidence of the fact of marriage." See also *State v. Wallace*, 9 N. H. 515.

1. See *Jackson v. People*, 3 Ill. 231, quoted in note 6, p. 523, and cases cited *Woods*, 2 Curt. Ecc. 516; *Damon's Case*, 6 Me. 148; *Shorter v. Boswell*, 2 Harr. & J. (Md.) 359; *Milford v. Worcester*, 7 Mass. 48; *Jacocks v. Gillian*, 3 Murph. (N. Car.) 47; *State v. Wallace*, 9 N. H. 515; *Jackson v. King*, 5 Cowen (N. Y.) 237, 238.

2. See *Jackson v. People*, 3 Ill. 231, quoted in note 6, p. 523, and *Woods v.* in last note.

Tucker v. People, 122 Ill. 583. "On a prosecution for bigamy, the marriage may be shown by a certified copy of the marriage certificate, without an infringement of the constitutional right of the accused to meet his witnesses face to face."

3. *State v. Colby*, 51 Vt. 291, at 295. "The copies given in evidence do not contain that, but only a statement by the town clerk. . . . This is not one of the things required by the statute to be stated in the certificate to be issued by him. . . . This was not done, and so the copies of record fail to show the

fact of marriage by lawful documentary evidence." *Wiheh v. Law*, 3 Stark 63; *Perry v. Block*, 1 Mo. 484.

4. *Rice v. State*, 7 Humph. (Tenn.) 14; *Woods v. Woods*, 2 Curt. Ecc. 516; *Cunningham v. Cunningham*, 2 Dow 482.

5. *Stockbridge v. Quicke*, 3 Carr. & K. (England 1853) 305. "The clergyman gave the parties a certificate, and also made an entry of it in a register book which he kept. *Held*, that in support of a plea of coverture the certificate was receivable in evidence, as being a part of the transaction; but that the register book was not admissible in evidence."

See also *Sichel v. Lambert*, 15 C. B., N. S. 781; *Wheeler v. McWilliams*, 2 U. C. Q. B. 77; *Squire v. State*, 46 Ind. 459; *Jones v. Jones*, 18 Me. 308; *Moon v. Com.*, 9 Leigh (Va.) 639. But see *Com. v. Morris*, 1 Cush. (Mass.) 391; *Dower v. Kingdom*, 1 Thomp. & C. (N. Y.) 492.

6. *Hill v. Hill*, 32 Pa. St. 511; *People v. Lambert*, 5 Mich. 349, 364; *Gaines v. Relf*, 12 How. (U. S.) 472.

7. *Com. v. Morris*, 1 Cush. (Mass.) 391. This rule is simply in accord with the general rules of evidence relating to the production and authentication of writings.

8. *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 189; *Clarke v. St. James*, 21 Hun (N. Y.) 95. This comes under one of the well recognized exceptions to the rule which excludes hearsay evidence, namely, entries made in the regular course of business. See *Evidence* in this work.

9. *Weaver v. Leiman*, 52 Md. 708; *Kennedy v. Doyle*, 10 Allen (Mass.) 161; *Whitcher v. McLaughlin*, 115 Mass. 167, 170; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 461.

10. *Weaver v. Leiman*, 52 Md. 708, 719; *Hubbard v. Lees*, L. R., 1 Ex. 255.

11. 1 Bish. M. & D., § 475; *Finlay v. Finlay*, 31 L. J. Mat. Cas. 1495;

cases the identity of the parties must always be shown,¹ though after lapse of time slight evidence thereof will suffice.² So a valid decree of divorce is evidence of a marriage.³

9. Witnesses of the Marriage.—Any person present at the marriage may testify thereto, whether a third party⁴ or the celebrant,⁵ and, in general, even the parties themselves.⁶ Such witnesses need not be able to testify to the sufficiency of the celebration;⁷ that is presumed until the contrary is shown.⁸ The celebrant may testify to his own qualifications.⁹ And, in general, it is sufficient to show that he was in the habit of acting in this capacity,¹⁰ or that he held himself out as qualified in the particular case.¹¹ In pedigree cases, members of the family may testify that a marriage was reputed in the family to have taken place.¹²

Caujolle v. Ferrie, 26 Barb. (N. Y.) 177; 186.

1. Birt v. Barlow, 1 Dougl. 171, 174. "If neither the minister nor the clerk, nor any of the subscribing witnesses were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bell ringers were called, and proved that they rang the bells and came immediately after the marriage, and were paid by the parties; suppose the handwriting of the parties were proved; suppose persons called who were present at the wedding dinner, etc., etc."

Damon's Case, 6 Me. 148; State v. Winkley, 14 N. H. 480; Com. v. Norcross, 9 Mass. 493; Northfield v. Plymouth, 20 Vt. 582.

2. See note 4, p. 520.

3. A divorce always presupposes a valid marriage. There cannot be a divorce unless there has been a marriage. See also Halbrook v. State, 34 Ark. 511; Amory v. Amory, 26 Wis. 152.

4. Brewer v. State, 59 Ind. 101, 103. "Each of the marriages is proved by persons who witnessed the ceremony, and the first, by the record of the licence and marriage. . . . No case can be found which holds that oral proof is not admissible on the question of marriage." See St. Devereux v. M. Dew Church, 2 Black W. 145; Patterson v. Gaines, 6 How. (U. S.) 550, 589; Nixon v. Brown, 4 Blackf. (Ind.) 157; State v. Williams, 20 Iowa 98; Com. v. Norcross, 9 Mass. 493; State v. Clark, 54 N. H. 456. See note 1 above.

5. Bird v. Com., 21 Gratt. (Va.) 800, 808; People v. Wigham, 1 Wheel. (C. C.) 115; State v. Goodrich, 14 W. Va. 834.

6. Mills v. U. S., 1 Pinn. (Wis.) 73.

7. Sussex v. Sussex, 11 Clark & F. 85; Wottrich v. Freeman, 71 N. Y. 601; Bird v. Com., 21 Gratt. (Va.) 800; American etc. Co. v. Rosenagle, 77 Pa. St. 507.

8. See last six sections above.

9. State v. Abbey, 29 Vt. 60; State v. McNally, 34 Me. 210; Bird v. Com., 21 Gratt. (Va.) 800.

10. State v. Abbey, 29 Vt. 60. "Upon a trial for bigamy, evidence that the person by whom a marriage ceremony was performed was reputed to be and that he acted as a magistrate or minister is admissible, and is sufficient *prima facie* proof of his official or ministerial character. Goshen v. Stonington, 4 Conn. 209; Damon's Case, 6 Me. 148; State v. Kean, 10 N. H. 147; State v. Robbins, 6 Ired. (N. Car.) 23; Warner v. Com., 2 Va. Cas. 95, 110.

11. See section 7, 6, of II, above; Rex v. Brampton, 10 East 282; Patterson v. Gaines, 6 How. (U. S.) 550, 589; Goshen v. Stonington, 4 Conn. 209; Murphy v. State, 50 Ga. 150; Verholf v. Van Honnenlenger, 21 Iowa 429; People v. Calder, 30 Mich. 85; State v. Winkley, 14 N. H. 480; State v. Rood, 12 Vt. 396.

12. Kelly v. McGuire, 15 Ark. 555, 557. "Reputation or hearsay is admissible in all matters of pedigree; and so the repeated declarations of the father that he had married and by the marriage had two children, naming them; his recognition of them as his legitimate children their recognition of him as their father and of each other as brother and sister; and the fact that the marriage and legitimacy of the children were spoken of and known in the family, are sufficient to prove the marriage of the father and the legitimacy of the children." See also Chinac

10. **The Parties as Witnesses.**—By the common law, families were, by intermarriage, incapacitated from testifying for or against each other;¹ thus, a man being prosecuted for bigamy, his real (first) wife could not prove their marriage.² But the husband or wife could prove the marriage in a case affecting neither of them.³ Statutes have, in many States, abolished this incapacity, entirely or in part. But a statute abolishing incapacity from interest does not affect incapacity from marriage. Even by the common law, if no marriage exists, there can be no incapacity from marriage; therefore, parties can prove that an alleged marriage between them was no marriage,⁴ unless estopped,⁵ or unless there is sufficient evidence before the court to establish a *prima facie* marriage.⁶ Thus, in a prosecution for bigamy the prisoner's real wife cannot testify against him,⁷ but his second wife can.⁸ Under the Maryland statute, a party cannot prove the marriage after the other party's death;⁹ but can by Pennsylvania law.¹⁰ In criminal prosecutions, as for bigamy or adultery, the prisoner's confession of his marriage is sufficient proof of it.¹¹ In

v. Reinecker, 2 Pet. (U. S.) 613; *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290; *Chapman v. Chapman*, 2 Conn. 347; *Greenwood v. Spiller*, 3 Ill. 502; *Briary v. Harris*, 3 A. K. Marsh. (Ky.) 1164; *Jones v. Jones*, 45 Md. 144; *Waldron v. Tuttle*, 4 N. H. 371; *Jackson v. Browner*, 18 Johns (N. Y.) 37.

1. *Cotton v. State*, 62 Ala. 12, 13. "The common law excluded the husband and wife as a witness in any case, civil or criminal, in which either was a party. The principle of the rule required its application to all cases in which the interests of husband or wife were involved. Therefore, 'the wife is not a competent witness against any codefendant tried with her husband if the testimony concern the husband, though it be not directly given against him.' 1 Greenl. Ev., §§ 334-35."

On this subject see EVIDENCE, WITNESSES, and for a full discussion see HUSBAND AND WIFE, vol. 9, at p. 806 etc.

2. See *Cotton v. State*, 62 Ala. 12, quoted in last note, and *Queen v. Madden*, 14 U. C. Q. B. 588; *Canton v. Bentley*, 11 Mass. 441; *State v. Patterson*, 2 Ired. (N. Car.) 346; *Wilson v. Hill*, 13 N. J. Eq. 143; *Finney v. State*, 3 Head (Tenn.) 544; *State v. Wilson*, 22 Iowa 364.

3. *Wottrich v. Freeman*, 71 N. Y. 601.

4. See article HUSBAND AND WIFE, vol. 9, p. 806, etc.; *Miles v. U. S.*, 103 U. S. 304; *Robertson v. State*, 42 Ala.

509; *Reckstriker v. State*, 31 Ark. 207; *Johnson v. State*, 61 Ga. 305; *State v. Brown*, 28 La. An. 279; *Com. v. Wateman*, 122 Mass. 43; *Lebrun v. Lebrun*, 55 Md. 496; *Greenawalt v. McEnelly*, 85 Pa. St. 352; *Mann v. State*, 44 Tex. 642.

5. See section 46 *Stewart on Mar. & Div.*

6. *Rose v. Niles*, 1 Abb. Adm. 411. This would not be so in case of marriage by fraud or force. *Rex v. Hevice*, 2 Yeates (Pa.) 114; *Brown v. Brown*, 1 Vt. 243.

7. See note 1 above. *Finney v. State*, 3 Head (Tenn.) 544; *Queen v. Madden*, 14 U. C. Q. B. 588; *Miles v. U. S.*, 103 U. S. 304, 313; *Johnson v. State*, 61 Ga. 305; *Finn v. Finn*, 12 Hun (N. Y.) 339.

8. See above cases. She is not a wife at all; hence the reasons which would prevent do not exist.

9. *Denison v. Denison*, 35 Md. 361, 381; *Redgrave v. Redgrave*, 38 Md. 93.

10. *Greenawalt v. McEnelly*, 85 Pa. St. 352.

11. *Reg. v. Simmonsto*, 1 Car. & K. (Eng.) 164. "On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the law of the country where the marriage was solemnized." *Cameron v. State*, 14 Ala. 546; *Squire v. State*, 46 Ind. 459; *Cook v.*

civil suits, the declarations and admissions of the husband and wife are generally admissible to prove their marriage;¹ in the case of the husband, being admissions against interest;² and in any case, being part of the *res gestæ* of cohabitation and repute.³ (See title HUSBAND AND WIFE, vol. 9, p. 806.)

11. Cohabitation and Repute.—When a marriage is proved by the fact that the parties lived together and were reputed to be husband and wife, it is said to be proved by cohabitation and repute. The facts that parties have publicly acknowledged each other as husband and wife,⁴ have assumed marriage rights, duties and obligations;⁵ have been generally reputed in the place of their residence to be husband and wife,⁶ are relevant to prove a contract of marriage between them, and, consequently, in cases where no celebration is necessary, a valid marriage.⁷ But in

State, 11 Ga. 53; Ham's Case, 11 Me. 391; Stanglein v. State, 17 Ohio St. 453; State v. Medbury, 8 R. I. 543; O' Neale v. Com., 17 Gratt. (Va.) 582. But see State v. Roswell, 6 Conn. 446; West v. State, 1 Wis. 209.

1. Jones v. Reddick, 79 N. Car. 290; Patterson v. Gaines, 6 How. (U. S.) 550; Williams v. State, 54 Ala. 131; Fuller v. Fuller, 17 Cal. 605, 611; Murphy v. State, 50 Ga. 150; Squire v. State, 46 Ind. 459; Barnum v. Barnum, 42 Md. 251; State v. Libby, 44 Me. 469; State v. McDonald, 25 Mo. 176; Chamberlain v. Chamberlain, 71 N. Y. 423; Kenyon v. Ashbridge, 35 Pa. St. 157.

Womack v. Tankersley, 78 Va. 242. "Statements by a man and woman that they are husband and wife, cohabitation as such and recognition of offspring, held sufficient evidence of marriage."

2. Greenawalt v. McEnelly, 85 Pa. St. 352. "The admissions of a party of the fact of his marriage are against his interest, and when made under circumstances of deliberation are entitled to great weight. Denials, on the contrary, being declarations in his own interest, are entitled to little weight in opposition thereto."

3. Guardians of Poor v. Nathans, 2 Brewst. (Pa.) 149, 178.

4. Kansas Pac. R. Co. v. Miller, 2 Colo. 442 at 461. "It will be conceded that a declaration made by Buger as to the fact of his marriage would be held admissible. Caujolle v. Ferrie, 23 N. Y. 104; State v. Greenwell, 4 Gill & J. (Md.) 414. . . . The behavior of two persons of different sexes as husband and wife always affords an inference of greater or less strength that a marriage has been solemnized between

them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral, and credit is to be given to their own assertions and acts, whether express or implied, of a fact peculiarly within their own knowledge. We have this man and woman travelling together, surrounded with small children; their wearing apparel and bedding in the same trunks, and their initials on them. These facts certainly indicate a very intimate relation, and one that would warrant the presumption of marriage on the principle above stated." Barnum v. Barnum, 42 Md. 251, 296; Chamberlain v. Chamberlain, 71 N. Y. 423; *In re Taylor*, 9 Paige (N. Y.) 611, 617; Jones v. Reddick, 79 N. Car. 290.

5. Com. v. Hurley, 14 Gray (Mass.) 411. "Evidence that a woman occupied the same bed with the defendant in this tenement and was seen getting dinner and doing other household duties there in his absence is competent to prove her to be his wife."

6. Boone v. Purnell, 28 Md. 607, 627. The opinion must not be divided. Cunningham v. Cunningham, 2 Dow 482, 511; Yardley's Estate, 75 Pa. St. 207, 212. But see Badger v. Badger, 88 N. Y. 546.

7. Green v. State, 59 Ala. 68, 70. "Marriage may be proved by cohabitation and the confessions of the parties." This case was an indictment for fornication or adultery. See also notes 4 and 5 above and Breadalbane v. Breadalbane, Law R., 1 H. L. S. 182, 189; Holmes v. Holmes, 1 Abb. (U. S.) 525; Budington v. Munson, 33 Conn. 481, 487; Bowers v. Van Winkle, 41 Ind. 432; Miller v. White,

cases where a celebration is necessary, evidence of a contract only is not relevant to prove the celebration;¹ still, if the parties have cohabited, such evidence may be, in certain cases, deemed relevant, on the presumption already discussed, that such cohabitation was lawful.² Cohabitation and repute may thus be direct or indirect evidence of a valid marriage; it is in neither case more than *prima facie* evidence,³ and may be rebutted by showing absence of the essential contract⁴ or capacity;⁵ whether it is so rebutted or not being left to the court or jury to determine from all the facts.⁶ As generally stated, "where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume they have been legally married."⁷ Such presumption is generally rebutted by showing that the parties intended their connection to be illicit,⁸ or that there was an impediment to their marriage.⁹ If, when the connection began, it was intended to be illicit, this intention is presumed to continue, unless evidence is produced (it may be slight) of a change of mind.¹⁰ If, when the connection began, the parties desired or intended marriage, but an impediment existed, and this desire or intention is shown to have continued after the impediment was removed, and if, at such later time, the parties cohabited even temporarily in a place where marriage without celebration is valid,

80 Ill. 580; Proctor v. Bigelow, 38 Mich. 282; Redgrave v. Redgrave, 38 Md. 93; Henderson v. Cargill, 31 Miss. 367; Richard v. Brehm, 73 Pa. St. 140.

1. See II, section 7 above.

2. See III, section 4 above and Cargile v. Wood, 63 Mo. 501; Case v. Case, 17 Cal. 598, 600.

3. Wilkinson v. Payne, 4 Term Rep. 468, 469; Myatt v. Myatt, 44 Ill. 473; Guardians of Poor v. Nathans, 2 Brewst. (Pa.) 149, 153.

4. As that the union was illicit it must be borne in mind that very often the appearances of surrounding of those living in illicit intercourse and of married people are identically the same. Breadalbane v. Breadalbane, Law R., 1 H. L. S. 182; Floyd v. Calvert, 53 Miss. 37, 45; Barnum v. Barnum, 42 Md. 251, 296; Goldbeck v. Goldbeck, 18 N. J. Eq. 42, 43.

5. As that one was already married. Breaky v. Breaky, 2 U. C. Q. B. 349, 353; Case v. Case, 17 Cal. 598, 600; Clark v. Cassidy, 64 Ga. 662, 665; Cram v. Burnham, 5 Me. 213, 215; Collins v. Collins, 80 N. Y. 1, 9; Emerson v. Shaw, 56 N. H. 418.

6. Breaky v. Breaky, 2 U. C. Q. B. 349; Rose v. Niles, 1 Abb. Adm. 411, 417; Allen v. Hall, 2 Nott & McC. (N. Car.) 114, 116.

7. Redgrave v. Redgrave, 38 Md. 93, 97.

8. See note 3 above.

9. See note 4 above.

10. Minnesota v. Worthingham, 23 Minn. 528, at 536. "The point is presented by counsel for the State that no presumption of marriage can arise in this case from any cohabitation of the parties occurring after the defendant's divorce because of its illicit character in the beginning. An intercourse originally unlawful and lustful from choice undoubtedly raises the presumption that its character remains such during its continuance. But this is a presumption not of law, but of fact for the consideration of the jury in connection with the particular facts and circumstances of the case." Cargile v. Wood, 63 Mo. 501; Barnum v. Barnum, 42 Md. 251, 297; and see Lapsley v. Grier, 1 H. L. Cas. 498, 503; Cunningham v. Cunningham, 2 Dow 482; Cram v. Burnham, 5 Me. 213, 215.

their marriage is proved;¹ and, if they were in a place where a celebration was necessary, upon slight additional evidence, a new celebration will be presumed;² at all events, the jury may decide in cases where proof by cohabitation and repute is proper, whether or not there was at any time a valid marriage.³ The weight of such evidence must depend upon the circumstances of each particular case.⁴ Courts have failed to note in every case the distinction between proof of a marriage *per verba de presenti* and proof of a marriage by celebration.

12. When Proof by Cohabitation and Repute Is Sufficient.—(1) In all cases, except when a celebration is alleged, as hereafter shown, in which no celebration is necessary to the validity of the marriage, the marriage may be proved by cohabitation and repute.⁵ (2) In all cases, except those mentioned in the next section, though a celebration is necessary to the validity of the marriage, it may be proved by cohabitation and repute.⁶ Thus, this is sufficient to prove marriage in actions by the widow for her dower.⁷

1. *Blanchard v. Lambert*, 43 Iowa 228. "When a husband and wife separate and the former lives and cohabits for years with a woman whom he claims and who is reputed to be his wife, the law presumes a divorce from the first wife and the latter may legally marry again. If the marriage was originally void, subsequent marriage will be presumed to have occurred if the parties continued to cohabit together after the removal of the legal impediment."

Collins v. Collins, 80 N. Y. 1, 9. But see *Cram v. Burnham*, 5 Me. 213; *O' Gara v. Eisenlohr*, 38 N. Y. 296, 302; *Hunt's Appeal*, 86 Pa. St. 294, 297.

2. *Wilkinson v. Payne*, 4 Term Rep. 468; *Breaky v. Breaky*, 2 U. C. Q. B. 349; *Rose v. Clark*, 8 Paige (N. Y.) 574; *Physick's Appeal*, 2 Brewst. (Pa.) 179, 187; *State v. Whaley*, 10 S. Car. 500; *Williams v. Williams*, 46 Wis. 464, 475. See also *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Hunt's Appeal*, 86 Pa. St. 294.

3. See note 10, p. 528.

4. This is a self-evident proposition. *Steadman v. Powell*, 1 Add. Ec. R. 58, 64, 65; *Weatherford v. Weatherford*, 20 Ala. 548, 557; *Cram v. Burnham*, 5 Me. 213, 215; *Jackson v. Claw*, 18 Johns. (N. Y.) 346; *Rose v. Clark*, 8 Paige (N. Y.) 574, 580; *Senser v. Bower*, 1 P. & W. (Pa.) 450, 452; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507; *Bartlett v. Musliner*, 28 Hun (N. Y.) 235. "It cannot be shown by general reputation that no marriage existed."

5. *Richard v. Brehm*, 73 Pa. St. 140, 14 C. of L.—34

144. "What kind of evidence is held to be satisfactory? Marriage may be proved in civil cases by reputation, declarations and conduct of the parties and other circumstances usually accompanying that relation. 2 Greenl. Ev., § 462. For civil purposes reputation and cohabitation are sufficient evidence of marriage. *Senser v. Bower*, 1 P. & W. (Pa.) 450. In all civil cases involving merely the right of property the fact of marriage may be proved by long continued cohabitation as man and wife. *Thorndell v. Morison*, 1 Casey (Pa.) 326. Both cohabitation and reputation are necessary to establish a presumption of marriage, where there is no proof of actual marriage. *Com. v. Stump*, 3 P. F. Smith (Pa.) 132." See also *De Thoren v. Atty. Gen., L. R.*, 1 App. C. 686; *Campbell v. Campbell*, Law R., 1 H. L. S. 182, 200; *Langtry v. State*, 30 Ala. 536; *Murphy v. State*, 50 Ga. 150; *Squire v. State*, 46 Ind. 459; *State v. Wilson*, 22 Iowa 364; *Com. v. Jackson*, 11 Bush (Ky.) 679; *Blasini v. Blasini*, 30 La. An. 1388; *Cayford's Case*, 7 Me. 157; *State v. Armington*, 25 Minn. 29, 35; *Com. v. Holt*, 121 Mass. 61. As to what cohabitation and repute is, see § 11 *ante*.

6. See cases in notes to section 11 above.

7. *Sellman v. Bowen*, 8 Gill & J. (Md.) 50. "In an action at law for dower, . . . general reputation, cohabitation and acknowledgment are sufficient evidence of marriage in all

or marriage rights,¹ or for the death of her husband;² by an heir;² by the husband and wife, as, of detinue,³ or ejectment;⁴ or against the husband and wife;⁴ or by the husband for slander of his wife;⁵ or against the husband for a debt of his wife;⁶ in actions for necessities;⁷ in cases of legitimacy;⁸ in suits for alimony;⁹ and in divorce cases.¹⁰

13. When Celebration and Actual Marriage Must be Proved.—In all cases in which a party alleges that a marriage was celebrated at a particular time and place, he must prove that it was so celebrated at that time and place, and cannot prove cohabitation and repute to raise a presumption of a marriage at some other time and place.¹¹

2. In all cases (if a celebration is necessary to the validity of the marriage) when proof of a marriage would render one of the parties criminally liable, as in prosecutions for bigamy,¹² adultery,¹³ or incest,¹⁴ and in actions for criminal conversation,¹⁵ the

cases, except in actions for criminal conversation and in prosecutions for bigamy." See also *Fleming v. Fleming*, 8 Blackf. (Ind.) 234; *Young v. Foster*, 14 N. H. 114, 118; *Pearson v. Howey*, 11 N. J. L. 12, 13; *Chambers v. Dickson*, 2 Serg. & R. (Pa.) 475.

1. *Stover v. Boswell*, 3 Dana (Ky.) 232.

2. *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361. "A man was found dead on a railroad. . . . Marriage in Pennsylvania is a civil contract and is provable in all civil actions by cohabitation, reputation, acknowledgment of the parties, reception of the family, and any other circumstances from which it may be inferred." *Fleming v. Fleming*, 4 Bing. 266.

3. *Crozier v. Gano*, 1 Bibb (Ky.) 257.

4. *Hammick v. Bronson*, 5 Day (Conn.) 290, 293; *Newburyport v. Boothbay*, 9 Mass. 414.

5. *Hobdy v. Jones*, 2 La. An. 944.

6. *Tracey v. M'Arlton*, 7 Dowl. Pr. 532.

7. See last note.

8. *Eaton v. Bright*, 2 Lee 85; 6 Eng. Ec. 47; *Cheseldine v. Brewer*, 1 Har. & McH. (Md.) 152; *Clayton v. Wardell*, 5 Barb. (N. Y.) 214.

9. *Trimble v. Trimble*, 2 Ind. 76; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507.

10. See DIVORCE. *Patrickson v. Patrickson*, L. R., 1 P. & D. 86; *Morris v. Morris*, 20 Ala. 168, 172; *Harman v. Harman*, 16 Ill. 85, 88; *Burns v. Burns*, 13 Fla. 369; *Wright v. Wright*, 6 Tex. 3; *Hitchcox v. Hitchcox*, 2 W. Va. 435;

Mitchell v. Mitchell, 11 Vt. 134; and compare *Case v. Case*, 17 Cal. 598.

11. *Redgrave v. Redgrave*, 38 Md. 93, 98. "And the appellee having assumed to prove that a valid marriage was celebrated on the particular occasion testified to by this witness, herself being a party to the transaction, it was incumbent upon him to show affirmatively that such marriage was in all respects in conformity to law; and failing in this, he cannot be permitted to rely upon other facts and circumstances of the case as the ground of a presumption that a marriage may have taken place between the parties on some other and different occasion from that spoken of by the witness. *Blackburn v. Crawford*, 3 Wall. (U. S.) 175."

12. See notes 7, p. 529, and 2 above. *Breaky v. Breaky*, 2 U. C. Q. B. 349, 358; *Brown v. State*, 52 Ala. 338; *Case v. Case*, 17 Cal. 598; *People v. Humphrey*, 7 Johns. (N. Y.) 314; *Weinky v. State*, 25 Wis. 370, 377.

13. *Buchanan v. State*, 55 Ala. 154. "In criminal prosecutions for adultery, marriage is a necessary ingredient of the offence, and must be proved; and while the declarations and conduct of the parties living together, holding out to the world that such relation exists between them, are competent evidence, general reputation is not." *Case v. Case*, 17 Cal. 598; *Wedgwood's Case*, 8 Me. 75; *Com. v. Norcross*, 9 Mass. 492.

14. *State v. Roswell*, 6 Conn. 446.

15. *Proctor v. Bigelow*, 38 Mich. 282. "Marriage is provable by conduct and reputation in all civil cases involving

celebration must be proved.¹ In such cases cohabitation and repute is not evidence.²

14. Proof of Foreign Marriages.—In setting up a marriage which took place in another country or state, it is usual to prove first the foreign law, then a marriage by contract or by celebration, as required thereby.³ If the fact of a celebration is proved, it is presumed in conformance with the foreign law,⁴ though that the special requirements of such law must be shown to have been complied with, has been sometimes held.⁵ If no foreign law be proved, there is a presumption that it recognizes as a valid marriage any cohabitation of competent parties with matrimonial consent.⁶ And courts will not presume the existence of marriage laws differing from those of the forum.⁷ A foreign marriage may also be proved by proper copies of the records.⁸ The more difficult the proof, the less will be the strictness of the court.⁹

15. Special Statutes.—In some of the States a statute provides for the proof of marriage; thus, in Massachusetts, where the record or cohabitation and repute is evidence of a marriage in any case,¹⁰ so in Minnesota.¹¹ But the California statute seems simply declaratory of the law heretofore stated.¹²

property rights, but not in criminal cases nor actions for seduction." *Birt v. Barlow*, 1 Doug. 171; *Catherwood v. Caslon*, 13 Mees. & W. 261.

1. As *ante* sections 7 to 13.

2. See § 11 above, notes 1-6, p. 528.

3. *The People v. Lambert*, 5 Mich. 349. "Where, in a prosecution for bigamy, the first marriage is alleged to have taken place in another State, proof not only of a marriage in fact, but of a valid marriage, according to the laws of that State, must be made by the prosecution." *Montague v. Montague*, 2 Add. Ec. R. 375; 2 Eng. Ecc. 350, 451; *Reg. v. Savage*, 13 Cox (C. C.) 178; *Wottrich v. Freeman*, 71 N. Y. 601; *Warner v. Com.*, 2 Va. Cas. 95, 104.

4. *Reed v. Hudson*, 13 Ala. 570; and see *Breaky v. Breaky*, 2 U. C. Q. B. 349, 360; *Ward v. Dey*, 1 Rob. Ecc. 759; *Steadman v. Powell*, 1 Add. Ec. R. 58; 2 Eng. Ec. 26; *Starr v. Peck*, 1 Hill (N. Y.) 270, 272; *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177, 185; *Bird v. Com.*, 21 Gratt. (Va.) 800. See section 4, PRESUMPTION OF INNOCENCE.

5. *Catherwood v. Caslon*, 13 Mees. & W. 260, 265. "Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that

relation is not enough . . ." *Smith v. Smith*, 1 Tex. 621, 629; *Reg. v. Smith*, 14 U. C. Q. B. 565.

6. *Hutchins v. Kimmell*, 31 Mich. 126, 132; *Williams v. State*, 54 Ala. 131, 137; *Redgrave v. Redgrave*, 38 Md. 93, 97; *Com. v. Kenney*, 120 Mass. 387; *Starr v. Peck*, 1 Hill (N. Y.) 270; *Evans v. Reynolds*, 32 Ohio St. 163; *Hynes v. McDermott*, 82 N. Y. 41, 44.

7. *State v. Patterson*, 2 Ired. (N. Car.) 346, 356.

8. See section 8 above, and *State v. Goodrich*, 14 W. Va. 834, 840; *Finlay v. Finlay*, 31 Law J., M. C. 149; *State v. Dooris*, 40 Conn. 145, 147; *American etc. Co. v. Rosenagle*, 77 Pa. St. 507, 514.

9. *Phillips v. Gregg*, 10 Watts (Pa.) 158, 169.

10. Mass. P. L. 1882, p. 811, 812; *Com. v. Morris*, 1 Cush. (Mass.) 391; *Means v. Welles*, 12 Met. (Mass.) 356, 361; *Com. v. Hurley*, 14 Gray (Mass.) 411; *Com. v. Holt*, 121 Mass. 61. "Upon an indictment for adultery, the fact that the defendant was married may, under the Gen. Stat., ch. 106, § 22, be proved by his admissions or by general repute."

11. Minn. Stat. 1878, p. 806; *State v. Armington*, 25 Minn. 29, 35, and cases there cited.

12. Cal. Civ. Code 1881, § 57; *Case v. Case*, 17 Cal. 598, 602, and the whole

IV. NULLITY SUITS—1. **In General**.—A nullity suit is a suit brought for the purpose (1) of having a void marriage judicially declared to be void, or (2) of having a voidable marriage judicially made void. Nullity suits are frequently in statutes and in decisions called divorce suits,¹ and there seems to be precedent for so calling them,² but properly a divorce suit is a suit for the purpose of dissolving a marriage,³ and the consequences of a divorce are very different from those of a decree of nullity, as the latter does not only destroy marriage rights, but declares they never existed.⁴

2. **Jactitation of Marriage**.—A suit, which may partake of the nature of a nullity suit, but which in modern times is very rare,⁵ is the suit of jactitation of marriage. This is where a party, whether a man or a woman, complains in the ecclesiastical courts⁶ that another party falsely, maliciously and without authority, boasts that they are married.⁷ There are three defences: (1) denial of the boasting; (2) allegation of a marriage justifying it; (3) or of authority to assert the marriage.⁸ When the second

law on the subject is stated in Sharon v. Sharon, 75 Cal. 1, where it is held that a ceremony is not necessary in California to the validity of a marriage. See the last three sections above.

1. Thus Maryland Code 1888, p. 143, provides that *divorces* may be granted for any cause rendering the marriage null and void *ab initio*. Bishop M. & D., § 226; Shelford M. & D. 182, 365; 1 Fras. Dom. Rel. 709.

Stewart on M. & D., § 198. "A decree declaring void a voidable or a void marriage is a decree of nullity, and should be distinguished from a decree of divorce. The word 'divorce' is, however, improperly used in both these senses, and most divorce statutes include grounds of nullity among the enumerated causes for divorce."

2. SIR JOHN NICHOLL, in the case of Elliott and Sugden v. Gurr, 2 Phillim. 16, 1 Eng. Ecc. 166, at 168, quoted LORD COKE, Co. Litt. 33a. "If a marriage de facto be voidable by divorce, in respect of consanguinity, affinity, precontract, or such like, whereby the marriage would have been dissolved, etc."

3. See article on DIVORCE, vol. 5, p. 745.

4. Stewart on M. & D., § 141. "The decree is simply declaratory; it declares, it does not make, the marriage void." Rawdon v. Rawdon, 28 Ala. 565; Powell v. Powell, 18 Kan. 371; Minvielle v. Minvielle, 15 La. An. 342; Lincoln v. Lincoln, 6 Rob. (N.

Y.) 525, 528; Smith v. Morehead, 6 Jones (S. Car.) Eq. 360; Patterson v. Gaines, 6 How. (U. S.) 550, 582.

5. Walton v. Rider, 1 Lee 16; 5 Eng. Ecc. Reports 289. "This is a cause of jactitation of marriage brought by the Rev. William Walton against Rachel Rider by letters of request from Ely. Jactitation confessed; Rider justified, and pleaded marriage."

Note (a). "Suits for jactitation of marriage were of very familiar occurrence in the ecclesiastical courts of this country till the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy before the House of Lords."

These suits are unknown in the United States, there being no ecclesiastical courts.

Doughty v. Doughty, 28 N. J. Eq. 581, at 588. "If the appellant, as he claimed, was not married to the respondent, but she was claiming that he was married, and he wished to put an end to such boastings, such a controversy was a private one between these two parties . . . and must be settled in the same way as other litigations are put to the test."

6. See note 5 above.

7. See above and Bodkin v. Case, Milw. 355, 366; Hawke v. Carrie, 2 Hagg. Const. 280; 4 Eng. Ecc. 543. See fully 2 Bishop M. & D., §§ 290, 750, 759.

8. See above cases.

defence is made, the suit is really one of nullity. Whether the decree in such case binds anyone but the parties is doubtful;¹ it does not if collusively obtained.²

3. Kinds of Nullity Suits.—As already stated, there are two kinds of nullity suits; one, in cases where the marriage is void anyhow, or is voidable without decree, and the decree is declaratory only; the other, in cases where the marriage is voidable and requires a decree to render it void. The two suits are distinct as to jurisdiction, procedure and causes, and the distinction must be carefully maintained.³

4. Suits to Declare Marriage Void Where No Decree Is Necessary.—A marriage which is void *per se ab initio*, may, by judicial decree, be declared void;⁴ such are marriages void for want of capacity⁵ or celebration.⁶ Likewise a marriage which is voidable by the parties;⁷

1. *Duchess of Kingston*, 20 How. St. Tr. 355; *Clews v. Bathurst*, 2 Strange 960; *Da Costa v. Villa Real*, 2 Strange 961.

2. *Duchess of Kingston*, 20 How. St. Tr. 355, 538; *Walton v. Rider*, 1 Lee 16; 5 Eng. Ecc. 289, 290 note.

3. *Schafberg v. Schafberg*, 52 Mich. 429.

4. Anonymous, 24 N. J. Eq. 19. "The court of chancery is restricted in its jurisdiction in suits for divorce to the legislation on the subject, and in suits for nullity of marriage to cases within the inherent and undoubted jurisdiction of equity. This court will, outside of its statutory jurisdiction, annul a contract of marriage only when the contract is void; not when it is voidable merely . . ." At p. 20. "In *McClurg v. Terry*, a decree of nullity was granted on the ground that no marriage contract was in fact intended by the parties; that it was a marriage in jest. In *Selah v. Selah*, 8 C. E. Green (N. J.) 185, decided in May term 1872, CHANCELLOR ZABRISKI says: 'In the case of *McClurg v. Terry*, it was held that this court has the power not only to dissolve legal contracts, which is the proper meaning of the word divorce as used in the constitution and statutes on the subject, but also to declare contracts of marriage void when entered into under circumstances that make such contracts invalid.'

. . . In the case of *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343, the marriage contract was annulled for want of mental capacity to contract in one of the parties. In *Ferlat v. Gogon*, Hopk. (N. Y.) 478, it was annulled for fraud." See also *Crump v. Morgan*, 3

Ired. (N. Car.) Eq. 91, 98; *Waymire v. Jetmore*, 22 Ohio St. 271; *Clark v. Field*, 13 Vt. 460; *Fuller v. Fuller*, 33 Kan. 582.

It is important to distinguish these suits from suits for nullity under the ecclesiastical law; in these cases the marriage is void without decree; in the others a decree is necessary. *Schafberg v. Schafberg*, 52 Mich. 429.

5. See II, sections 2 to 5, *g*, as to capacity.

6. See II, section 7, *a*, *b*, *c*, as to the celebration.

7. We have seen in II, section 2 above, what a voidable marriage is. It is a well recognized principle in the United States that no court can decree void a marriage otherwise valid except by statute. See *Stewart on M. & D.*, § 144; 1 Bish. M. & D., § 72; *Hopkins v. Hopkins*, 39 Wis. 165, 171. But see *Rose v. Rose*, 9 Ark. 507.

Dissent Avoiding Marriage.—When the contract essential to the validity of a marriage is wanting because a party is unable to give the required consent or does not really consent, being induced thereto by fraud, error or duress, such party on becoming free to consent, or when the deception has been exposed, or the pressure removed, may or may not recognize the marriage; if he does, he assents, he confirms it (*Reading v. Ludlow*, 52 Vt. 628, 632); if he does not, he dissents, he avoids it. *Waymire v. Jetmore*, 22 Ohio St. 271, 273; *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343, 344; *Crump v. Morgan*, 3 Ired. (N. Car.) Eq. 91, 96; *Coonce v. Wallace*, 7 Jones (N. Car.) 194, 198; *People v. Slack*, 15 Mich. 193, 198; *People v. Bennett*, 39 Mich. 208, 209;

such are marriages voidable for lunacy,¹ nonage,² or want of consent;³ for fraud,⁴ error⁵ or duress.⁶ In such cases courts of equity, in the exercise of their ordinary jurisdiction, independently of any provision of the divorce law, may pass such a decree.⁷ Other courts, by special provision, such as divorce courts, may pass such a decree.⁸ In general, either party may complain;⁹ but one cannot allege his own fraud¹⁰ or duress,¹⁰ nor can one allege want of consent if he has ratified the marriage.¹¹ A lunatic may apply if he recovers his mind,¹² otherwise his guardian or committee applies.¹³ A sane party who has married a lunatic in ignorance and good faith may also complain.¹⁴ Per-

McDeed v. McDeed, 67 Ill. 545, 550.

Since a marriage without consent is void unless confirmed, a failure to assent is sufficient dissent (*Shaffer v. State*, 20 Ohio 1, 6, 7; *Crump v. Morgan*, 3 Ired. (N. Car.) Eq. 91, 96; *Jenkins v. Jenkins*, 2 Dana (Ky.) 102), though dissent is generally expressed by refusal to cohabit or to acknowledge the marriage. *McDeed v. McDeed*, 67 Ill. 545, 550; *People v. Slack*, 15 Mich. 193, 198. In general, only the party whose consent was not given may dissent; but in cases of want of age (*People v. Bennett*, 39 Mich. 208, 209) and perhaps of want of mental capacity (see *Hancock v. Peaty*, L. R., 1 P. & D. 335, 341; *Banker v. Banker*, 62 N. Y. 409) either party may.

1. See II, section 5, *a*, above and *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343, quoted in note 4, p. 533.

2. *Walls v. State*, 32 Ark. 565, 570; see II, section 5 above.

3. See II, section 6, *a*, *b*; *Clark v. Field*, 13 Vt. 460, 472; *McClurg v. Terry*, 21 N. J. Eq. 225.

4. *Ferlat v. Gogon*, Hopk. (N. Y.) Ch. 478, and note 3 above.

5. *Reg. v. Millis*, 10 Clark & F. 534, 785; and note 3 above.

6. As to this class of cases see *Stewart on M. & D.*, §§ 139-141; *Ferlat v. Gogon*, Hopk. (N. Y.) Ch. 478, and above note 3; also *ante*, part II, § 6.

7. *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343, 347. "If a man marry his mother or his sister, they are husband and wife, say the old cases, until a divorce and the marriage be judicially dissolved (39 Edw. III, 31 *b*; 9 Hen. VI, 34; 18 Hen. VI, 32; Bro. tit. *BASTARDY*, pl. 23; 1 Roll. Abr. 340, A. 1, 4, 357, A. 3) . . . All matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal courts. . . . and when the

spiritual courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals. I apprehend, then, that the power is necessarily cast upon this court." See also cases quoted in note 4, p. 533. *Rawdon v. Rawdon*, 28 Ala. 565; *Tefft v. Tefft*, 35 Ind. 44, 50; *Powell v. Powell*, 18 Kan. 371; *True v. Ranney*, 21 N. H. 52; *Scott v. Shulfeldt*, 5 Paige (N. Y.) 43; *Crump v. Morgan*, 3 Ired. (N. Car.) Eq. 91, 98; *Waymire v. Jetmore*, 22 Ohio St. 271; *Lebarron v. Lebarron*, 35 Vt. 365.

8. See Md. R. C., 1878, art. 51, § 12, p. 480; Cal. Civ. Code 1881, § 82; Del. Laws 1875, p. 475; Mass. P. S. 1882, p. 809; Vt. Laws 1882, §§ 2320, 2347, 2351.

9. See cases cited in note 7; *Stewart on M. & D.*, §§ 58, 61, 67, 72 and 79.

Fuller v. Fuller, 33 Kan. 582. "A man who innocently marries a woman having an undivorced husband living may, independent of the statutes relating to divorce and alimony, maintain an action to have the colorable marriage declared null."

10. This would be in direct conflict with the well known and universally recognized equitable maxims of "He who seeks equity must do equity," and that complainants must come into court with clean hands. See *Stewart on M. & D.*, §§ 46, 150, 151.

11. Such assent is usually given by cohabitation or acknowledgment of the marriage or by the assumption or continuance of the marriage status. See generally *Cauleton v. Hood*, 56 Ala. 519; *McDeed v. McDeed*, 67 Ill. 545, 550; *People v. Slack*, 15 Mich. 193.

12. *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343.

13. *Waymire v. Jetmore*, 22 Ohio St. 271. See also II, section 5, *a*.

14. *Banker v. Banker*, 63 N. Y. 409.

haps, ever after the death of the parties, a decree could be obtained on the application of anyone interested.¹

Statutes sometimes provide for all the proceedings in these cases.

The decree in this class of nullity suits is simply declaratory: it declares, it does not make, the marriage void²; it is a judicial determination of the status of the parties, and though perhaps not binding on persons not parties to the suit,³ it practically settles the question of the validity or invalidity of the marriage. Of course it settles the existence or not of any marriage personal or property rights.⁴

5. Nullifying Voidable Marriage Where Decree Is Necessary—*a. Jurisdiction.*—Jurisdiction in the United States to declare void a marriage otherwise valid, as is the case with jurisdiction to grant a divorce,⁵ depends entirely upon statute.⁶ In England the ecclesiastical courts alone granted divorces and declared marriages void for the canonical impediments of impotence and consanguinity and affinity,⁷ and as no courts in the United States have succeeded to the ecclesiastical jurisdiction,⁸ courts of equity, for example, cannot as such avoid a marriage for impotency⁹ or consanguinity.¹⁰ Statutes sometimes confer this jurisdiction in unequivocal terms, but quite often include it with divorce jurisdiction, providing, for example, as in Maryland, that a divorce may be granted for impotence, etc. In such cases the word "divorce" will be construed to mean decree of nullity;¹¹ and even where jurisdiction in such cases is not expressly given it has sometimes been held to be impliedly given with divorce jurisdic-

"In an action to annul a marriage upon the ground of lunacy of the husband it appeared that two days after the marriage an inquisition in such proceedings was found declaring the husband to be of unsound mind and that he had been so for six months previous." Complainant did not prove lunacy was permanent, and for this and other reasons complaint was dismissed. See *Hancock v. Peaty*, L. R., 1 P. & D. 335, 341.

1. Inferences from cases in note 7, p. 534.

2. *Rawdon v. Rawdon*, 28 Ala. 565; *Powell v. Powell*, 18 Kan. 371; *Minvielle v. Minvielle*, 15 La. An. 342; *Lincoln v. Lincoln*, 6 Rob. (N. Y.) 525; *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343; *Smith v. Morehead*, 6 Jones (N. Car.) Eq. 360; *Patterson v. Gaines*, 6 How. (U. S.) 550, 582.

3. *Duchess of Kingston*, 25 How St. Tr. 355, 538.

4. 2 Bish. M. & D. 756; *Perry v. Meddowcraft*, 10 Beav. 122; *Harrison v. Southampton*, 17 Eng. L. & Eq.

364, 367; *Clews v. Bathhurst*, 2 Strange 960; *Da Costa v. Villa*, 2 Strange 961.

5. See title DIVORCE, vol. 5, p. 745.

6. *Hopkins v. Hopkins*, 39 Wis. 167. "Courts of law or equity in this country in matters of divorce have only the power conferred on them by statute." *Bishop M. & D.*, § 72. But see *Rose v. Rose*, 9 Ark. 507.

7. *Elliott v. Garr*, 2 Phillim. 16, 1 Eng. Ecc. 166, 168; see II, sections 4 to 7.

8. *Anon.*, 24 N. J. Eq. 19; *Penquet v. Phelps*, 48 Barb. (N. Y.) 566; *Burtis v. Burtis*, Hopk. (N. Y.) Ch. 557, 565; *Perry v. Perry*, 2 Paige (N. Y.) 501; *Bowers v. Bowers*, 10 Rich. (S. Car.) Eq. 55; *Lebarron v. Lebarron*, 35 Vt. 365. But see *Wightman v. Wightman*, 4 Johns. (N. Y.) Ch. 343.

9. *Anon.*, 24 N. J. Eq. 19; *Burtis v. Burtis*, Hopk. (N. Y.) Ch. 557.

10. *Bowers v. Bowers*, 10 Rich. (S. Car.) Eq. 19.

11. Md. Code, 1888, p. 143; *Mattison*

tion.¹ Statutes, also in some States create additional causes for avoiding marriages.² As to the persons and their status, jurisdiction, as in divorce cases, depends upon domicil.³

The principles applied and procedure as to the canonical disabilities is like that of the ecclesiastical courts,⁴ and, in general, is like that in divorce suits.⁵

b. Causes.—The causes of nullity are those of the canonical law, to wit: impotence⁶ and consanguinity and affinity;⁷ and such as may be created by statute,⁸ as the existence of a previous marriage honestly supposed to have been dissolved, under a New York statute,⁹ and absence of parent's consent under a Scotch law.⁹

c. Parties.—A voidable marriage may, in general, be avoided on the application of either party,¹⁰ but the decree must be passed during the lifetime of both the parties or the marriage will be binding.¹¹ Under statutes, the State is sometimes given power to apply for avoidance of the marriage where the cohabitation is incestuous or otherwise criminal.¹² Third persons whose property rights are affected should be made parties defendant,¹³

v. Mattison, 1 Strobh. (S. Car.) Eq. 387.

1. *Johnson v. Kincade, 2 Ired. (N. Car.) Eq. 470, 475; Head v. Head, 2 Ga. 191; Hamaker v. Hamaker, 18 Ill. 137, 140.*

2. See II, § 5, *g*.

3. *Blumenthal v. Tannenholz, 31 N. J. Eq. 194, 195.* "This is a suit for a decree annulling a marriage for fraud.

... The complainant was, when the suit was brought, and still is, a minor. Her parents reside in Canada. There is no evidence that she has been emancipated. ... Unless one of the parties was domiciled here when the suit was brought the court has no jurisdiction in the case. ... Her domicile must be that of her parents."

4. *Stewart on M. & D., § 224.* "Courts granting divorces, so far as empowered by statute, apply the principles and practice of the ecclesiastical courts so far as they are suited to our condition and the general spirit of our laws." *Lovett v. Lovett, 11 Ala. 763; Bauman v. Bauman, 18 Ark. 320; Finch v. Finch, 14 Ga. 362; Southwick v. Southwick, 97 Mass. 327; J G v. H G, 33 Md. 401; Gray v. Askew, 3 Ohio 466.*

5. "This rule applies as well to nullity suits as to divorce suits proper." *Stewart M. & D., § 224; J G v. H G, 33 Md. 401; Lebaron v. Lebaron, 35 Vt. 365; Jeans v. Jeans, 2 Har. (Del.) 38. 42.*

6. See II, § 5, *c*; *Anon., 24 N. J. Eq. 19;*

Burtis v. Burtis, Hopk. (N. Y.) Ch. 557.

7. See II, § 5, *d*, *Bowers v. Bowers, 10 Rich. (S. Car.) Eq. 551.*

8. See *Stewart on M. & D., §§ 73-79; Boyer v. Tassin, 9 La. An. 491; Cropsey v. McKinney, 30 Barb. (N. Y.) 47, 55.*

N. Y. R. S. 1882, p. 2332, § 6; Val-leau v. Valteau, 6 Paige (N. Y.) 207; White v. Lowe, 1 Redf. (N. Y.) 376; Cropsey v. McKinney, 30 Barb. (N. Y.) 47, 55.

9. In Scotland a marriage can, within a year, but not afterwards, be avoided for want of parents' consent. *Rex v. Jacobs, 1 Moody 140.*

10. 2 *Bish. M. & D., § 320; Shelford M. & D. 179.*

11. *A v. B* and another, *L. R., 1 P. & D. 559.* "The validity of a marriage cannot be impeached on the ground of impotence after the death of one of the parties. The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband." *Combs v. Combs, 17 Abb. (N. Y.) 265.*

12. See *Md. R. C. 1878, art. 51, § 8, p. 479; Harrison v. Harrison, 1 Phila. (Pa.) 389, 391; Burgess v. Burgess, 1 Hagg. Const. 384; Ray v. Sherwood, 2 Curt. Ecc. 516, 529; 7 Eng. Ecc. 181, 187.*

13. *Kashaw v. Kashaw, 3 Cal. 312,*

and in some cases third persons may even apply for a decree of nullity.¹

d. Effect of Decree.—The decree makes void what might otherwise have been valid. In the absence of statute it renders the marriage void *ab initio*; it declares no marriage ever existed.² Thus, the children are illegitimate;³ the alleged husband has no rights in the alleged wife's property,⁴ nor have his creditors;⁵ and the sale of her chattel by him as husband is void.⁶ She can sue him for her property which he has taken,⁶ or for her services rendered to him before the decree.⁷ The communications between them are not privileged,⁸ and a town settlement depending on the marriage is void.⁹ Such a putative marriage is, however, sufficient consideration to support a marriage settlement.¹⁰ Such a decree is usually conclusive on all persons.¹¹ Not being properly a decree of divorce, alimony is not incident to it,¹² though if there has been a form of marriage, alimony *pendente lite* and counsel fees will be allowed.¹³ Under statutes, the effect of the decree is different; it may make the marriage null only from its

322; *Foster v. Hall*, 2 J. J. Marsh. (Ky.) 540; *Murray v. Murray*, 1 Edw. (N. Y.) Ch. 380; *Sackett v. Giles*, 3 Barb. (N. Y.) Ch. 204; *Damon v. Damon*, 28 Wis. 510, 515; but see *Uhl v. Uhl*, 52 Cal. 250.

1. This is a doubtful question and the weight of authority is perhaps against the right of a third party. Thus in *Ray v. Sherwood*, 1 Curt. Ecc. 173. "The service of a citation sufficient to constitute pendency of suit. *Held*, that the father, *qua* father, has not sufficient interest to institute a suit in the civil form for the purpose of annulling the marriage of his daughter when of age." See also *Woods v. Woods*, 2 Curt. Ecc. 516; *Chick v. Ramsdale*, 1 Curt. Ecc. 34; *Farnemouth v. Watson*, 1 Phillim. 355; *Wells v. Wells*, 3 Swab. & T. 364, 593.

2. *Aughtie v. Aughtie*, 1 Phillim. 201. "Marriage annulled by reason of affinity . . . the marriage being void *ab initio*, the husband has acquired no right over the property of the wife." *Cage v. Acton*, 1 Ld. Raym. 515, 521.

3. *Aughtie v. Aughtie*, 1 Phillim. 201. "There can be no doubt, if this is the case, that such a marriage is prohibited by law, and voidable. The facts necessary to be proved are the two marriages, and that the two husbands were brothers . . . ten children issue of first marriage . . . one child issue of second marriage. . . . I pronounce for the nullity."

4. See language in note 2.

5. *Kelly v. Scott*, 5 Gratt. (Va.) 479, 490; *Sellars v. Davis*, 4 Yerg. (Tenn.) 503.

6. *Lawson v. Shotwell*, 27 Miss. 630, 637. "Where the marriage is declared void, the wife, of course, can recover at law her property; because, in such case, the title never vested in the alleged husband." And see *Anon.*, 1 Dyer 13; *Fox v. Dawson*, 8 Mart. (La.) 94; *Young v. Naylor*, 1 Hill (S. Car.) Eq. 383, 386.

7. *Higgins v. Breen*, 9 Mo. 497, 501; *Blossom v. Barrett*, 37 N. Y. 434.

8. *Wells v. Fletcher*, 5 Car. & P. 12. Because the only reason in law for making the communications privileged—marriage—has never existed.

9. *Reading v. Ludlow*, 43 Vt. 628. "The marriage of a man to a woman who was before and at the time of the marriage ceremony a lunatic, incapable of entering into a valid marriage contract, does not confer the settlement of the husband on the wife where the marriage has been decreed to be a nullity on the ground of such lunacy."

10. *Ayers v. Jenkins*, L. R., 16 Eq. 275, 281.

11. See notes 1 and 2, p. 533, to part 4, § 2, and 2 Bish. M. & D. 756.

12. *Bird v. Bird*, 1 Lee 621, 5 Eng. Ecc. 470; *Bartlett v. Bartlett*, Clarke 460; *Chase v. Chase*, 55 Me. 21.

13. See *DIVORCE*, vol. 5, p. 745; *O'Dea v. O'Dea*, 31 Hun (N. Y.) 441. "A man brought a suit to have his marriage declared void on the ground that

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date;¹ the prior issue may be legitimate;² the court may have power to adjust the property rights of the parties.³

V. PENALTIES ATTENDING AN ILLEGAL MARRIAGE.—There are penalties in most States which parties may incur by omitting the various ceremonies prescribed for marriages. There are also various crimes which may attend the entrance into an illegal marriage, such as fornication, adultery, miscegenation, incest and bigamy, all of which will be found discussed under criminal law or under their respective names. Bigamy is also briefly discussed in this article, section II, 2.

MARRIAGE BROKER.—(See also **BROKERS**; **ILLEGAL CONTRACTS**.)

MARRIAGE SETTLEMENTS—(See also **CONFLICT OF LAWS**; **COMMUNITY PROPERTY**; **CONTRACTS**; **FRAUD**; **FRAUD, STATUTE OF**; **HUSBAND AND WIFE**; **IMPLIED TRUSTS**; **SURETYSHIP**.)

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the woman had a husband living. *Held*, that the court might allow the woman a council fee and alimony *pendente lite*."

1. Cal. Civ. Code, § 61. When there is a statute on the subject, that of course controls.

2. *Stewart M. & D.*, § 78. The proper application of such statutes is to save the legitimacy of the children." *Eubanks v. Banks*, 34 Ga. 407; *Hiram v. Pierce*, 45 Me. 367; *Earle v. Dawes*, 3 Md. Ch. 230; *Dyer v. Brannock*, 66 Mo. 391, 418; *Hartwell v. Jackson*, 7

Tex. 576; *Graham v. Bennet*, 2 Cal. 503.

3. *Vanvalley v. Vanvalley*, 19 Ohio St. 588. "Where a divorce is granted on the petition of a woman, on the ground that the defendant had another wife living at the time of the marriage annulled by the decree, it is competent under the provisions of our statute for the court in such proceeding to also decree reasonable alimony to the petitioner." See also *Strode v. Strode*, 3 Bush (Ky.) 227, 230; *State v. Smith*, 19 Wis. 531.

- (c) *Purchase by Married Woman in Her Own Name*, 582.
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- (f) *Resulting Trust*, 582.
- 18. *Life Insurance Policies*, 582.
- 19. *Suretyships*, 584.
 - (a) *Capacity Under General Powers*, 584.
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 - (d) *Implied Suretyship*, 586.
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DEFINITION.—A marriage settlement is an agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes inalienable.¹

I. ANTENUPTIAL MARRIAGE SETTLEMENTS—1. Validity and Scope of.—No agreement before marriage can destroy the personal rights and liabilities of the status of husband and wife.² Thus, though before marriage a husband agrees to live in a certain place, he can after marriage, in the exercise of his marriage rights, decide, without regard to his agreement, upon the residence of himself and his wife.³ So an antenuptial contract that a husband shall not be liable for his wife's debts is a nullity as to her creditors if he is so liable by the law as husband.⁴

But parties contemplating marriage can by contract settle the precise rights they shall respectively have in their own and each other's property during their married life, and what shall become of their property afterwards.⁵ And third persons may settle

1. Bouvier.

2. *Powell v. Manson*, 22 Gratt. (Va.) 177, 193. "It is too plain for discussion that upon the marriage the husband becomes responsible for all the debts of the wife contracted before the marriage. To what extent her separate estate may be subjected to such debts is not very well settled. But it is clear that a mere antenuptial settlement will not relieve the husband of the obligation cast upon him by the law to discharge the debts of the wife, provided the claim is asserted and the recovery had during the existence of the coverture. This responsibility rises upon the marriage and only ceases with its termination." See also *Nurse v. Craig*, 2 Bos. & P. N. R. 148; *Harrison v. Trader*, 27 Ark. 288; *Marshall v. Rutton*, 8 Term Rep. 547; *Hart's Cal. Civ. Code*, § 159.

3. *Hair v. Hair*, 10 Rich. (S. Car.) Eq. 163.

4. *Harrison v. Trader*, 27 Ark. 288. "The husband is liable for the debts of

his wife, created *dum sola*, and no contract entered into between the parties in contemplation of marriage, can change the responsibility and obligation of the husband in this respect, so as to affect the rights of parties outside of the marriage agreement."

5. *Andrews v. Jones*, 10 Ala. 400. "Where an adult daughter, in contemplation of marriage, joins with her intended husband in relinquishing her entire estate to her mother, who was its guardian, and in possession of it—there being no evidence to impugn the *bona fides* of the transaction, and the daughter and husband declaring their determination to abide by it, the release cannot be set aside at the instance of the creditors of the latter and the estate made chargeable to them."

Boardman's Appeal, 40 Conn. 169 at 195. Parties married in 1857 after a settlement had been made. Husband died in 1871. The settlement was that the wife should not have the right of

property on them, in consideration of their marriage, which they will hold, when married, subject to the terms of the settlement and not to the ordinary marriage estates.¹

All such contracts may in general be called *marriage settlements*.

The validity of such settlements may be specially affected by the form of the settlement, the execution and recording thereof, the capacity of the parties thereto, the consideration upon which it is made, and the fairness of the transaction; which matters will now be discussed.

2. Form of Antenuptial Marriage Settlements.—A marriage contract need not contain technical words;² it need only appear that there was a final, enforceable promise in regard to marriage rights in, to or over property, or in consideration of marriage.³ But a marriage settlement is subject to the operation and effect of all general laws as to the recording of instruments affecting rights in real estate or personalty,⁴ and there are generally special statutes besides, which must be complied with.

3. Form of Statutes.—In some states statutes require marriage

dower, but only such property as was devised; the consideration for this settlement being the permission to the wife to keep her small estate. The court upheld the settlement and denied the widow's right to dower. (At 196.) "This was received and accepted in lieu of dower and in full discharge of all claims to any distributory share in his estate, should she survive him; which, in the ordinary course of nature, was certainly to be expected." See also *Wollaston v. Berkeley*, 45 Law J., Ch. Div. 772; *Campion v. Cotton*, 17 Ves. 264; *English v. Foxall*, 2 Pet. (U. S.) 595; *Estate of Baubichon*, 49 Cal. 18; *Caulk v. Fox*, 13 Fla. 147; *Camp v. Smith*, 61 Ga. 449; *Jacobs v. Jacobs*, 42 Iowa 600; *Hanley v. Drumm*, 31 La. An. 106; *Naill v. Maurer*, 25 Md. 532; *Pierce v. Pierce*, 71 N. Y. 157; *Hicks v. Skinner*, 71 N. Car. 539; *Stilley v. Folger*, 14 Ohio 610; *Pa. Co. v. Foster*, 35 Pa. St. 134; *Peck v. Peck*, 12 R. I. 485; *McLeod v. Board*, 30 Tex. 238; *Woods v. Richardson*, 117 Mass. 276; *Ashurst's Appeal*, 77 Pa. St. 464; *Hunter v. Bryant*, 2 Wheat. (U. S.) 32.

1. *Coverdale v. Eastwood*, L. R., 15 Eq. 121; *Madox v. Newton*, Beat. 632; *Ayliffe v. Tray*, 2 P. Wms. 66; *Lee v. Lee*, 4 L. R., Ch. Div. 175; *Ogden v. Ogden*, 1 Bland 284; *McAskie v. McCay*, 2 Irish Eq. 1187; *Foster v. Foster*, 4 Cal. 231.

Marriage contracts may provide not only for the husband and wife, but for

the issue, for the issue of a former marriage, for collaterals or even strangers. They may affect all kinds of property, in possession or expectancy. They may be made without the intervention of a trustee, the husband being so regarded when one is required.

2. *Stoddert v. Bowie*, 5 Md. 18.

"Letters are good marriage contracts, provided they sufficiently furnish the terms of the agreement, and contain not only an express promise, but the nature and extent of it. Promises and agreements in consideration of marriage, in order to be binding, must be certain, positive and unqualified."

3. *Ogden v. Ogden*, 1 Bland 284; *Randall v. Morgan*, 12 Ves. Jr. 67; *Fauks v. Martin*, 1 Eden 309; *Kay v. Crook*, 3 Jur., N. S. 104; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496, and note 6 above.

It is not essential to the validity of a settlement that it should be recorded and delivered to the trustee named therein. *Smith's Appeal*, 115 Pa. St. 319.

4. *Foster v. Whitehill*, 2 Yeates (Pa.) 259. "Marriage articles, whereby the title of lands may be affected, should be recorded in six months under the act of March 18th, 1775, in the proper county; or those titles shall be postponed to a subsequent purchase without notice express or implied." *Southerland v. Southerland*, 5 Bush. (Ky.) 591; *Pickett v. Banks*, 11 Smed. & M. (Miss.) 445.

contracts to be witnessed, acknowledged, recorded, accompanied with a schedule, etc.¹ In general, the noncompliance with such statutes renders a marriage contract void as to creditors only;² between the parties it is valid although unrecorded, etc.,³ and as to creditors, it is valid if they have actual notice.⁴ Acknowledg-

1. Mo. Rev. Stat. 1879, § 3280. Marriage contracts, to be in writing, sealed, acknowledged or proved, etc. All marriage contracts, whereby any estate, real or personal, in this State, is intended to be secured or conveyed to any person or persons, or whereby such estate may be affected in law or equity, shall be in writing, sealed and acknowledged by each of the contracting parties, or proved by one or more subscribing witnesses. Tex. Rev. Stat., 1879, § 2848. Every matrimonial agreement must be acknowledged before some officer authorized by law to take acknowledgments to deeds, and attested by at least two witnesses.

2. *Cunningham v. Schilly*, 41 Ga. 426; *Strode v. Churchill*, 2 Litt. (Ky.) 75; *Moss v. Davidson*, 9 Miss. 112; *State v. St. Gemme*, 31 Mo. 230; *Abraham v. Cole*, 5 Rich. (S. Car.) Eq. 335; *Taylor v. Rickman*, 1 Busb. (N. Car.) Eq. 278; *Smith v. Castrix*, 5 Ired. (N. Car.) 518; *Bazemore v. Davis*, 55 Ga. 505; *Foster v. Whitehill*, 2 Yeates (Pa.) 259; *Anderson, 2 Call* (Va.) 198; *Thomas v. Gaines*, 1 Gratt. (Va.) 347. Absolutely void. *Ingham v. White*, 4 Allen (Mass.) 412. *Mary E. Ingham v. Sanford White*, 4 Allen 412. Contract upon two promissory notes, signed by the defendant and payable to his wife, Melita White or bearer, and by her transferred before her death to the plaintiff. Upon agreed facts, which are fully stated in the opinion, judgment was rendered in the superior court for the defendant; and the plaintiff appealed to this court.

The legal rights of the parties do not seem to be affected by the instrument intended to operate as an antenuptial contract. By the provisions of Stat. 1845, ch. 208, authorizing such contracts and prescribing the manner in which they are to be made, it is required that the contract, with a schedule of the property intended to be secured thereby, shall, within ninety days after the making of the same, be recorded in the registry of deeds for the county in which the husband resides, if he is a resident in the commonwealth; and it is further provided "if not so recorded

said contract shall be void." This contract was not so recorded in the county of Berkshire, where both parties resided. The language of the statute declaring the same void in such cases is direct and positive, and we must give effect to it. It was urged at the argument that the provision for recording was only required as a protection against creditors. That may have been one of the objects; but there may also have been other reasons for requiring their entry upon the public registry. We cannot feel authorized to introduce any limitation or exception to the plain words of the statute in relation to such contracts.

Neither Stat. 1855, ch. 304, nor Stat. 1857, ch. 249, enables the bearer of a promissory note given by a husband to his wife, for a valuable consideration, and payable to her or bearer on demand, to maintain an action thereon against the maker. Judgment for defendant.

3. *Pierce v. Turner*, 5 Cranch (U. S.) 154; *Maggmac v. Thompson*, 1 Bald. (U. S.) 344; *Reinhart v. Miller*, 22 Ga. 402; *West v. Creditors*, 1 La. An. 365; *Sherrod v. Callegahan*, 9 La. An. 510; *Logan v. Phillips*, 18 Mo. 22; *Lemay v. Poupenez*, 35 Mo. 71; *Perryclear v. Jacobs*, 2 Hill Ch. (S. Car.) 504; *Gibbes v. Cobb*, 7 Rich. (S. Car.) Eq. 187; *Dabney v. Kennedy*, 7 Gratt. (Va.) 317. But see *Ingham v. White*, 4 Allen (Mass.) 412; *Delane v. Moore*, 14 Har. 253.

In *Smith's Appeal*, 115 Pa. St. 319, a widower fifty-two years of age, with six children, and worth about \$178,000, married a woman forty-three years old who had no property. In an antenuptial settlement she released, in consideration of real estate producing \$1,200 a year, all her interest in his estate. The deed of settlement remained in the husband's possession and was never recorded. He died worth about \$400,000. In addition to the real estate settled he bequeathed to her the interest of \$15,000 for life. The residue of the estate he gave to his children. *Held*, that the settlement was valid and binding upon the wife.

4. *Wilson v. McCullough*, 23 Pa. St.

ment, when required, cannot be made after marriage.¹ If execution be proved, delivery will be presumed.²

The English Statute of Frauds,³ providing that no agreement in consideration of marriage shall be enforced unless in writing, and similar statutes, are also in force in many States.⁴ Under such statutes if the consideration be other than marriage, the statute does not apply.⁵ A note or memorandum of the contract, as by means of letters, etc., if it contains the terms of the contract, the consideration, as well as the promise, is sufficient writing, and binds the parties;⁶ though, if made after the marriage, not intervening creditors.⁷ The contract need be signed only by the party

440; *Cummins v. Boston*, 25 Ga. 277; *Lemay v. Poupenez*, 35 Mo. 71; *Hughes v. Pledge*, 1 Leigh (Va.) 443; *Gibbes v. Cobb*, 7 Rich. (S. Car.) Eq. 54; *Pickett v. Banks*, 11 Smed. & M. (Miss.) 445; *Scott v. Gibbons*, 5 Munf. (Va.) 86.

1. *Swift v. Fitzhugh*, 9 Port. (Ala.) 39; *Patton's Estate*, Myrick Prob. (Cal.) 241; *Banks v. Mitchell*, Rice Ch. (S. Car.) 389; *Jones v. Henry*, 3 Litt. (Ky.) 427; *Wilson v. McCullough*, 23 Pa. St. 440; *Johnson v. Walton*, 1 Sneed (Tenn.) 258.

2. *Moore v. Smith*, 5 N. J. Eq. 649.

3. 29 Car. II, ch. 3, § 4. No action shall be brought upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

4. Alex. Brit. Stat. 509, 528; *Caton Law R.*, 2 E. & J. Ap. 127. See Rev. Laws of Conn. 1875, p. 441; Del. 1874, p. 356; Ind. 1881, § 4964; Me. 1871, p. 786; N. J. 1887, p. 445; N. Y. 1881, p. 2327; Ohio 1880, § 4199; R. I. 1882, p. 552; Tex. 1879, p. 363; Vt. 1880, § 981. For further authorities see *Stewart on M. & D.*, § 35, and cases there cited. See also *Lloyd v. Fulton*, 91 U. S. 479.

5. *Stileman v. Ashdown*, 2 Atk. 478; *Bradley v. Saddler*, 54 Ga. 681; *Riley v. Riley*, 25 Conn. 154; *Napier v. Wightman*, Spears (S. Car.) Ch. 357; *Embry v. Robinson*, 7 Humph. (Tenn.) 444; *Child v. Pearl*, 43 Vt. 224.

6. *Stoddert v. Bowie*, 5 Md. 18. "Letters are good marriage contracts, provided they sufficiently furnish the terms of the agreement, and contain not only an express promise, but the nature and extent of it." See also *Og-*

den v. Ogden, 1 Bland (Md.) 284; *Stoddert v. Bowie*, 5 Md. 18; *Wain v. Waters*, 5 East 16.

7. *Bowie v. Bowie*, 1 Md. 86. This was an action of replevin brought to recover negroes alleged to belong to the estate of the appellant's testator, which had been delivered by the former to the latter in part execution of a marriage contract. The appellant claimed that he was entitled to the negroes because the marriage contract had not been reduced to writing before the marriage. "It is alleged on the part of the defence that in contemplation of a marriage between the appellee and the daughter of John T. Stoddert, an agreement was entered into between the fathers of the intended husband and wife, in which it was stipulated that John T. Stoddert should purchase a farm for the use of his daughter and her husband, and that R. W. Bowie should place on said farm personal property to a certain amount; that the farm was purchased and possession given to the husband and wife; that R. W. Bowie put upon the farm the negroes in dispute in part execution of the contract. It was urged in argument that at the time of the marriage the defendant had no knowledge of the agreement, and was therefore no inducement for the marriage. Here we have no direct or positive proof as to whether the appellee had or had not a knowledge of the contract prior to the marriage. But assuming that such knowledge must be shown to exist, positive proof need not be given. It may be inferred from circumstances. A voluntary settlement by parents after marriage is good against them and their immediate representatives. Indeed some authorities assert it to be valid against general creditors. But we need express no opinion on that sub-

to be charged.¹ If the contract is wholly performed, the statute does not apply;² as, if A, having orally promised to give B certain slaves when B married C, gives him the slaves, B can hold them against A's executor.³ So if it has been performed by the party seeking to charge⁴ (not if only by the party sought to be charged);⁵ as, where A and B about to marry agree orally that A shall have B's notes, bonds, etc., absolutely, if he pays her a certain allowance during her life; after her death her administrators cannot claim such notes, etc., on the ground that the contract was not in writing.⁶ But marriage itself is not part performance.⁷ If the statute is not pleaded, the court will decree performance of a marriage contract, though oral.⁸

4. Capacity of Parties.—1. The capacity of the parties, with certain exceptions as to age, is that required for the execution of any other contract.⁹

2. Statutes sometimes enable infants to make valid marriage contracts to bar dower, etc.¹ In the absence of such a statute, the marriage contract of an infant is binding on the other party (if adult); but voidable by the infant on attaining full age,² or

ject, as the rights of creditors are not presented in this issue. Judgment affirmed. See also *Albert v. Winn*, 5 Md. 66; *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144; *Hammersly v. De Beil*, 12 Clark & F. 45.

1. *Cochran v. McBeath*, 1 Del. Ch. 187.

2. *Dygart v. Remerschneider*, 39 Barb. (N. Y.) 417.

3. *Bowie v. Bowie*, 1 Md. 87.

4. *Ungley v. Ungley*, Law R., 5 Ch. Div. 887; *Houghton v. Houghton*, 14 Ind. 505; *Andrews v. Jones*, 10 Ala. 400; *Hussey v. Castle*, 41 Cal. 239; *Barnett v. Gaig*, 8 Black 284; *Livingston v. Livingston*, 2 Johns. (N. Y.) Ch. 537; *Gochenback v. Brouse*, 4 Watts & S. (Pa.) 546.

5. *Catin Law R.* 1 Ch. 137.

6. *Crane v. Gough*, 4 Md. 316.

7. *Warden v. Jones*, 2 De Gex & J. 76; *Herry*, 27 Ohio St. 14; *Flenner v. Flenner*, 29 Ind. 564; *Bradley v. Sadtler*, 54 Ga. 681.

8. *Kirksly*, 30 Ga. 156.

9. Since parties before marriage are still fully *sui juris*.

1. *Hart's Cal. Civ. Code*, § 181; *Mass. Rev. St.* 1882, p. 822; *Ala. R. C.* 1876, § 2236; *Alex. Brit. St.* 303; 27 Hen. 8, ch. 10.

2. *Miliner v. Harwood*, 18 Ves. 276; *Wilson v. McCullough*, 19 Pa. St. 77; *Whitman v. Abernatty*, 33 Ala. 154; *Hoyt v. Snar*, 53 Ill. 134; *Lowry v. Tiernan*, 2 Har. & G. (Md.) 34; *Webb*

v. Hall, 35 Me. 336; *Youse v. Norcourt*, 12 Mo. 549; *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Card v. Patterson*, 5 Ohio St. 319; *Duvall v. Graves*, 7 Bush (Ky.) 461; *Wilson v. McCullough*, 19 Pa. St. 77; *Satterfield v. Riddick*, 8 Ired. (N. Car.) Eq. 265; *Porch v. Fries*, 18 N. J. Eq. 204; *Webnor v. Kissan*, 3 Bosw. (N. Y.) 321; *Lester v. Frazer*, 2 Hill (S. Car.) Eq. 529.

In *Wilson v. McCullough*, 19 Pa. St. 77, an intended husband stipulated by marriage articles, with the guardian of his intended wife, that, after she attained full age, they, as trustees, should have a conveyance of the one-half of the wife's property to hold to her separate use, and that he should have no interest in it. It was held that the contract was binding on the husband, and it was not allowable for him to join or aid his wife to defeat the user of the articles by the execution of a mortgage after attaining her majority. The restraint upon her arose not from the articles, but by virtue of the coverture; but he was forbidden by the articles from aiding her in such attempt. After the execution of such marriage articles by the husband and the guardians of the female, the husband and wife, after she had attained her majority, executed a mortgage of the wife's land to secure a debt of her husband. It was held that such articles were binding on her husband, and the subsequent mortgage by the husband and wife, made after she attained full

within a reasonable time thereafter,¹ or by the infant's successors in estate,² or privies in blood.³ If not beneficial, it is absolutely void.⁴ Where the husband took her personalty absolutely by marriage, the wife's contract as to her personalty has been held valid.⁵ Infancy can be objected to only by the parties themselves.⁶ An infant may make a valid marriage contract through her guardian.⁷

5. Consideration.—1. The consideration of such a contract may be any valuable consideration, reciprocal stipulations, or the marriage itself.⁸

2. Marriage is a consideration of the highest value, and any contract or promise which brings about, or helps to bring about, a marriage is binding when the marriage has taken place,⁹

age, was inoperative to charge her interest in the land as reserved to her in the articles, in favor of anyone having notice of the marriage settlement.

1. *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601; *Matherson v. Davis*, 2 Cold. (Tenn.) 443. See *Chadbourne v. Rackliff*, 30 Me. 354; *Shallenberger v. Ashworth*, 25 Pa. St. 152; *Dandridge v. Minge*, 4 Sand. (N. Y.) 397; *Tabb v. Archer*, 7 Gratt. (Va.) 408.

In *Chadbourne v. Rackliff*, 30 Me. 354, it was held that when an infant had conveyed real estate, mere acquiescence for years would afford no proof of ratification; that some act must be performed from which it could be inferred, and that an entry was a sufficient disaffirmance. After her marriage she could properly act only in connection with her husband, and that a suit by a husband and wife to recover land, which she had deeded when an infant, is a disaffirmance of the act of sale; their uniting in this suit is equivalent to an entry for such a purpose.

2. *Whichcote v. Lyle*, 28 Pa. St. 73.

3. *Levering v. Heighe*, 3 Md. Ch. 369; 2 Md. Ch. 81.

4. *Succession of Wilder*, 22 La. An. 219; *Healy v. Rowan*, 5 Gratt. (Va.) 414; *Lee v. Stuart*, 2 Leigh (Va.) 176.

In *Healy v. Rowan*, 5 Gratt. (Va.) 414, it was held that marriage articles made between an infant *feme* and her intended husband, beneficial to her and her contemplated issue, are obligatory upon the parties and will be enforced in a court of equity by a settlement in conformity therewith, on the application of the issue of the marriage. Here the infant *feme* was no party to the marriage articles, which were made between her guardians on the one part, and her intended husband on the other, and

which cannot have the effect of divesting her property without holding that her guardians had authority, without her concurrence, to alienate her estate; this would be unwarranted by any sound principle, unnecessary for the validity of marriage agreements and settlements, and impolitic in subjecting minors to such dispositions of their property without their knowledge and against their will.

5. *Harvey v. Ashley*, 3 Atk. 607; *Ellison v. Elwin*, 13 Sim. 309; *Levering v. Heighe*, 3 Md. Ch. 365, 369.

6. *Jones v. Butler*, 30 Barb. (N. Y.) 641.

7. *Wilson v. McCullough*, 19 Pa. St. 77.

8. In the case of *Michael v. Morey*, 26 Md. 239, it was held that the consideration of marriage is a valuable consideration and not only sustains covenants in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage as a moral consideration. See also *Riley v. Riley*, 25 Conn. 154; *Brown v. Jones*, 1 Atk. 188; *Stileman v. Ashdown*, 2 Atk. 498; *Wheeler v. Caryl*, Amb. 121; *Magniac v. Thompson*, 7 Pet. (U. S.) 348; *Marshall v. Morris*, 16 Ga. 368; *Naill v. Maurer*, 25 Md. 532; *Armfield v. Armfield*, 1 Freem. (Miss.) 311; *Roberts v. Roberts*, 22 Wend. (N. Y.) 140; *De Barante v. Gott*, 6 Barb. (N. Y.) 492; *Rivers v. Thayer*, 7 Rich. (S. Car.) Eq. 136; *Neves v. Scott*, 9 How. (U. S.) 196; *Triplett v. Romine*, 33 Gratt. (Va.) 655; Ga. Laws, § 1782.

9. *Andrews v. Jones*, 10 Ala. 400; *Johnston v. Dilliard*, 1 Bay (S. Car.) 232; *Chambers v. Sallie*, 29 Ark. 407; *Weller v. Cole*, 6 Gratt. (Va.) 645; *Stokes v. Jones*, 18 Ala. 734; *Wood v.*

although it be invalid,¹ and even when it does not take place owing to the settlor's death,² against the settlor and those claiming under him, in favor of the husband and wife,³ their issue,⁴ the issue of a former marriage,⁵ collaterals,⁶ and even strangers;⁷ against the settlor's creditors, in favor of the husband and wife and their issue,⁸ although such issue were born before the mar-

Jackson, 8 Wend. (N. Y.) 9; Roberts v. Roberts, 22 Wend. (N. Y.) 140; Whillock v. Grisham, 3 Sneed (Tenn.) 237. See Stewart on M. & D., § 40; Yeaton v. Yeaton, Ill. App. 579; Succession of Mossey, 4 La. An. 337.

1. Ayerst v. Jenkins, L. R., 16 Eq. 275.

2. Smith v. Allen, 5 Allen (Mass.) 454.

3. Wallaston v. Tribble, L. R., 9 Eq. 44; Melbourne v. Melbourne, 62 L. R., ch. 84; Prewit v. Wilson, 103 Md. 22; Herring v. Wickham, 29 Gratt. (Va.) 628.

4. In Prewit v. Wilson, 103 U. S. 22, it was held that an antenuptial settlement of lands, though made by the settlor with a fraudulent design of defrauding his creditors, will not be set aside in the absence of the clearest proof of his intended wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

5. Michael v. Morey, 26 Md. 239. By an antenuptial agreement in consideration of the proposed marriage and of money, choses in action, book accounts and other personal property of the wife, amounting to \$4,250, thereby made over to the husband, the latter bound himself, his heirs, executors, etc., in the event of his surviving his wife, to pay a certain sum of money "to any child or children which she may leave, and in the event of leaving more than one child, to distribute and pay said sum of money equally among all, share and share alike." Held: 1st. That it would be a most unnatural and forced construction of the contract to confine its general terms, which are broad enough to include all the children of the covenantee, or *cestui que trust*, to those only which might be born thereafter, where such construction would exclude the issue of a former marriage from all benefit of the estate of the mother, acquired before the contract was made. 2nd. That the issue of the former marriage is clearly within the letter as well

as the spirit of the contract. 3rd. That the consideration of marriage is a valuable consideration, and not only sustains covenants in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage as a moral consideration. 4th. That in such cases the children are regarded as purchasers; they may enforce the obligations of the contracting parties, notwithstanding the nonperformance of mutual stipulations on the other side, unless they are conditional and dependent covenants. See also Nason v. Bell, 53 Ga. 416; Gale v. Gale, 6 Ch. Div. 414.

6. Never v. Scott, 9 How. 196; Parsons v. Ely, 45 Ill. 232; Buchanan v. Deshan, 1 Har. & G. (Md.) 280; De Barante v. Gott, 6 Barb. (N. Y.) 492; Eaton v. Tillinghast, 4 R. I. 276; Wallace v. McCullough, 1 Rich. (S. Car.) Eq. 426; Mitchell v. Moore, 16 Gratt. (Va.) 275.

In Neves v. Scott, 13 How. 268, it was decided that volunteers could claim the interference of chancery to enforce the marriage articles in question.

7. Merritt v. Scott, 6 Ga. 563.

8. Magniac v. Thompson, 7 Pet. (U. S.) 348. Upon principle and authority to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settlor alone intend the fraud and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage in contemplation of the law is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a strong resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors. See also

riage,¹ but not collaterals,² etc. Although an existing marriage is no consideration,³ a contract in consideration of a marriage made after the marriage, in pursuance of and conforming with an agreement made before, is as valid against the settlor as if made before;⁴ but is valid against intervening creditors only if the agreement made before were enforceable.⁵ When another consideration is expressed in the contract, marriage cannot be shown to have been the consideration;⁶ and where marriage is the consideration, the failure of the wife's fortune cannot be alleged as a failure of consideration.⁷

6. Fraud as Between the Parties.—As between the parties, any concealment by one party as to the value of his or her property will render a marriage contract relating thereto voidable.⁸ Persons about to marry "do not, like buyer and seller, deal at arms' length, but stand in a confidential relation requiring the exercise of the greatest good faith. If the provision secured to the wife is manifestly unreasonable and disproportionate to the means of

Cochran v. McBeath, 1 Del. Ch. 187; *Marshall v. Morris*, 16 Ga. 368; *Brunell v. Witherow*, 29 Ind. 123; *Gorin v. Gordon*, 38 Miss. 205; *Credle v. Carrawan*, 64 N. Car. 422; *Jones's Appeal*, 62 Pa. 324; *Frank's Appeal*, 59 Pa. St. 190; *Buckner v. Smyth*, 4 Dessaus. (S. Car.) Eq. 371; *Ramsay v. Richardson*, *Riley (S. Car.) Ch.* 271; *Triplett v. Romine*, 33 Gratt. (Va.) 655; *Smith v. Cherrill*, L. R., 4 Eq. 390; *Campion v. Cotter*, 17 Ves. 264.

1. *Herring v. Wickham*, 29 Gratt. (Va.) 628.

2. *Davenport v. Bishop*, 1 Phila. 701; *Barham v. Earl*, 10 Hare 133; *Ford v. Stuart*, 15 Beav. 505; *Wallaston v. Tribble*, L. R., 9 Eq. 44; *Sueton v. Chetwynd*, 3 Meriv. 249; *Smith v. Cherrill*, L. R., 4 Eq. 390.

3. *Costillo v. Thompson*, 9 Ala. 937.

4. *Shaw v. Jakeman*, 4 East 206; *Battersoll v. Farrington*, 1 Swanst. 106; *Reader v. Livingston*, 3 Johns. (N. Y.) Ch. 481; *Saunders v. Ferrill*, 1 Ired. (N. Car.) 97; *Davidson v. Graves*, *Riley (S. Car.) Ch.* 232; *Jones v. Henry*, 3 Litt. (Ky.) 427; *Lockwood v. Nelson*, 16 Ala. 294; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496; *Armfield v. Armfield*, *Freem. (Miss.)* 311; *Satterthwaite v. Emley*, 4 N. J. Eq. 489; *Reade v. Livingston*, 3 Johns. (N. Y.) Ch. 481; *Finch v. Finch*, 10 Ohio St. 501; *Izzard v. Middleton*, *Ball. (S. Car.) Ch.* 228; *Davidson v. Graves*, 1 Bail. (S. Car.) 268.

5. In *Albert v. Winn*, 5 Md. 66, it is decided that a written settlement, or an

agreement in writing to make one, before marriage in consideration thereof, is valid against creditors, but that a post nuptial settlement, reciting an antenuptial parol contract, is not valid against creditors, because as to them it is a voluntary conveyance, the subsequent written instrument not relating back to the prior parol agreement, so as to make the date of that the effective date of the settlement. See also *Smith v. Green*, 3 Humph. (Tenn.) 118; *Wood v. Savage*, 2 Doug. (Mich.) 316; *Andrews v. Jones*, 10 Ala. 400; *Dydgert v. Remerschneider*, 32 N. Y. 629; *Hussey v. Castle*, 41 Cal. 239; *Dundas v. Duteus*, 2 Cox 235; *Warden v. Jones*, 2 De Gex & J. 76.

6. *Betts v. Union Bank*, 1 Har. & G. (Md.) 175.

Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only. The greatest extent to which the authorities have gone has been to allow an additional consideration to be proved, which is not repugnant to the one mentioned in the deed; but where a deed is impeached for fraud, the party to whom the fraud is imputed need not be permitted to prove any other consideration in support of the instrument. See also *Galbreath v. Cook*, 30 Ark. 424.

7. *Marsh v. Marsh*, 1 Atk. 159.

8. *Frazer v. Boss*, 66 Ind. 1; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278; *Fay v. Rickinson*, 1 N. Car. 218; *Woodward v. Woodward*, 5 Sneed (Tenn.) 49.

the intended husband, it raises a presumption of intended concealment, and throws on him the burden of disproving the presumption.¹

7. Fraud as Against Creditors.—As against creditors, if both parties intend,² or if the settlor intends and the settlee has notice of such intent³ to hinder, delay or defraud his creditors, the contract, to the extent at least of the settlor's debts, is void, no matter what the consideration;⁴ but not if the settlee has no such intent or notice;⁵ and mere knowledge of the settlor's indebtedness or insolvency will not amount to fraudulent intent or notice,⁶ though they may go to prove it, just as the unreasonableness of

1. *Rieser's Appeal*, 92 Pa. St. 265; *Pierce v. Pierce*, 71 N. Y. 154; *Daubenscheck v. Biggs*, 71 Ind. 255; *Russell's Appeal*, 75 Pa. St. 269; *Pond v. Keen*, 2 Lea (Tenn.) 126.

In *Pierce v. Pierce*, 71 N. Y. 154, it is held that while an antenuptial contract by which the future wife releases all claims against the estate of her husband upon his decease, will be sustained when fairly made, yet, from the confidential relations between the parties, it will be regarded with the most rigid scrutiny; and where the circumstances establish that the woman has been deceived, or induced by false pretences to enter into the contract, it will be held null and void. It seems that the presumption is against the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith; and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate to the means of the husband. The relationship of parties who are about to enter into the married state is one of mutual confidence and far different from that of those who are dealing with each other at arm's length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an antenuptial contract, by a full disclosure of all facts and circumstances which may in any way affect the agreement.

2. In *Magniac v. Thompson*, 7 Pet. (U. S.) 348, MR. JUSTICE STORY, in delivering the opinion of the court, said: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the in-

tended fraud." See also *Prewitt v. Wilson*, 103 U. S. 22; *Pierce v. Harrington* (Vt.) 2 N. E. 802.

3. *Magniac v. Thompson*, 7 Pet. (U. S.) 348.

4. *Smith v. Cherrill*, L. R., 4 Eq. 390; *Bulmer v. Hunter*, L. R., 8 Eq. 46; *Cadogan v. Kennett*, 2 Cowp. 432; *Andrews v. Jones*, 10 Ala. 400; *Phillips v. Meyers*, 82 Ill. 67; *Jones v. Jones*, 62 Pa. St. 324; *Herring v. Wickham*, 29 Gratt. (Va.) 628; *Colombine v. Penhall*, 1 Small & G. 228; *Bulmer v. Hunter*, 38 Law J., Ch. 543; *Cason v. Murray*, 15 Mo. 378; *Ashmead v. Hearn*, 13 Pa. St. 584; *Bogman v. Draughan*, 3 Stew. (Ala.) 243; *Mosely v. Gainer*, 10 Tex. 393, 419. Conveyance to defeat judgment on breach of promise is void. *Smith v. Culbertson*, 9 Rich. (S. Car.) 106.

A gift of \$7,000 to his wife by a man whose assets were uncertain, but did not exceed in value the sum of about \$16,000, and whose debts were a little more than \$9,000, was held fraudulent as to creditors. *Kehr v. Smith*, 20 Wall. (U. S.) 31. See also *Hunter v. Scruggs*, 94 U. S. 22.

5. *Bridge v. Eggleston*, 14 Mass. 245; *Marshall v. Morris*, 16 Ga. 368; *Rivers v. Thayer*, 7 Rich. (S. Car.) Eq. 136; *Sisson v. Roath*, 30 Conn. 15; *Violett v. Violett*, 2 Dana (Ky.) 323; *Wright v. Stanard*, 2 B. Marsh. (U. S.) 311; *Blodgett v. Chaplin*, 48 Me. 322; *Palmer v. Henderson*, 20 Ind. 297; *Magniac v. Thompson*, 7 Pet. (U. S.) 348.

6. In *Lloyd v. Fulton*, 91 U. S. 479, in a voluntary settlement upon a grantor's wife, prior indebtedness is only presumptive and not conclusive proof of fraud. See also *Campion v. Cotton*, 17 Ves. 264; *Richardson v. Horton*, 7 Beav. 112; *Sisson v. Roath*, 30 Conn. 15.

In *Bean v. Patterson*, 122 U. S. 496

the settlement may.¹ A provision by which the settlor retains the property until his insolvency is void.²

8. Enforcement of.—A marriage contract is not merged or destroyed by the marriage of the parties.³ If executed, it will be upheld, in equity,⁴ and, after the dissolution of the marriage, at law;⁵ if executory, it may be specifically enforced during marriage, in equity,⁶ or sued upon after the dissolution of marriage, at law.⁷ If it carries out the intentions of the parties it cannot be modified or set aside unless all the parties interested consent, or are brought before the court;⁸ if it does not carry such intentions, it may be reformed in equity.⁹ If lost or destroyed, equity

it is held that a husband who has applied to the payment of his debts proceeds of his wife's real estate, purchased for her by him while solvent, may lawfully secure his indebtedness to her by a conveyance to her after he is insolvent.

1. Davidson v. Graves, Riley (S. Car.) Eq. 232; Bank v. Marchand, Charlt. (Ga.) 247; Marshall v. Morris, 16 Ga. 368; Croft v. Arthur, 3 Desaus. (S. Car.) Eq. 223; McBurnie v. McBurnie, 1 De Gex, M. & G. 441.

2. Hodgson, *Ex parte*, 19 Ves. Jr. 206.

3. In Camp v. Smith, 61 Ga. 449, where, pending an application by the wife for homestead in land, which she owned at the time of the marriage, the husband conveyed the premises to her by deed, in fee simple, with power of disposition by will, and such conveyance was made in execution of a parol antenuptial agreement stipulating that each party should, after marriage, have the same rights of property as before, the ordinary's subsequent approval of the application for homestead did not operate to invest the husband with any interest in the property which would survive the wife and postpone the entry of her devisee; more especially as no minor children were left at her death. In such case, the wife's devisee took the title, and nothing passed to the children of either consort by a prior marriage under section 2024 of the code. See also Mack v. Heirs (Mo.), 8 West. Rep. 201; Baron v. Lines, 118 Ill. 374; Brooks v. Austin, 95 N. Car. 474; Hafer v. Hafer, 36 Kan. 524, 525; Abbott v. Winchester, 105 Mass. 115.

4. Hunter v. Bryant, 2 Wheat. (U. S.) 32; English v. Foxall, 2 Pet. (U. S.) 595; Pond v. Obaugh, 16 Ark. 94; Smith v. Chapell, 31 Conn. 589; West v. Howard, 20 Conn. 581; Andrews

v. Andrews, 8 Conn. 79; Caulk v. Fox, 13 Fla. 147; Camp v. Smith, 61 Ga. 448; Croftwaight v. Hutchinson, 2 Bin. 407; Naill v. Maurer, 25 Md. 532; Miller v. Goodwin, 8 Gray (Mass.) 542; Tarbell v. Tarbell, 10 Allen (Mass.) 278; Kenley v. Kenley, 2 How. (Miss.) 751; Skillman v. Skillman, 2 Beas. (N. J.) 403; Grout v. Van Schoonbron, 1 Sandf. (N. Y.) Ch. 336; Siler v. Fleming, 1 Dev. (N. Car.) Eq. 185; Stilley v. Folger, 14 Ohio 610; Godard v. Wagner, 2 Strobbh. (S. Car.) Eq. 1; Prebble v. Boghurst, 1 Swan 309.

5. In Edelen v. Edelen, 11 Md. 415, it was decided that where a widow by the terms of an antenuptial agreement had waived and relinquished all her rights to any portion of her husband's estate, she cannot charge her husband's estate with the costs incurred in resisting the probate of his will. See also Pierce v. Pierce, 71 N. Y. 157.

6. Connel v. Buckle, 2 P. Wms. 242; Rippon v. Dawding, Amb. 565; Hunter v. Bryant, 2 Wheat. (U. S.) 32; Baldwin v. Carter, 17 Conn. 201; Jenkins v. Holt, 109 Mass. 261; Freeman v. Hill, 1 Dev. & B. (N. Car.) Eq. 389; Aucker v. Levy, 3 Strobbh. (S. Car.) Eq. 197; Prebble v. Boghurst, 1 Swan (Tenn.) 309.

7. Cage v. Acton, 1 Ld. Raym. 515; Patterson v. Patterson, 45 N. H. 164; Smiley v. Smiley, 18 Ohio St. 543.

8. Hildreth v. Eliot, 8 Pick. (Mass.) 293; Falk v. Turner, 101 Mass. 494; Crossland v. Shober, 1 Winst. (N. Car.) Eq. 10; Wright v. Tallmage, 15 N. Y. 307; Harper v. Scott, 12 Ga. 125; King v. Dunham, 31 Ga. 743; Kinnard v. Daniel, 12 B. Mon. (Ky.) 496.

9. Legg v. Goldwin, Forester 20; West v. Enissly, 2 P. Wms. 350; Love v. Graham, 25 Ala. 187; Denham v. Taylor, 29 Ga. 166; Burge v. Burge, 45

will revive it,¹ so, if countermanded fraudulently by the husband before marriage, its execution will be decreed.² A party does not lose his rights upon it by misconduct,³ or by failure to perform his part,⁴ or by divorce alone;⁵ but he may by long acquiescence.⁶ The issue, when interested, have a right to have it enforced.⁷

Ga. 301; *Clemmons v. Drew*, 2 Jones (N. Car.) Eq. 314; *Sanderlin v. Robinson*, 6 Jones (N. Car.) Eq. 155; *Russell's Appeal*, 75 Pa. St. 269; *Brown v. Brown*, 31 Gratt. (Va.) 502; *Burging v. McDowell*, 30 Gratt. (Va.) 236.

1. In *Barclay v. Waring*, 58 Ga. 86, where an antenuptial deed settled certain property of the wife, vesting the legal title in trustees for that purpose, "in trust, nevertheless, to and for the sole and separate use of the said Margaret Marshall for and during her natural life, not subject to the debts, contracts or control of the said Adelbert, her intended husband, or any future husband, and from and after her death, then in trust to and for the sole and separate use of such person or persons as the said Margaret may, by deed or will duly executed, appoint; and if the said Margaret should depart this life without making such appointment, either by deed or will, then in trust to and for the husband and children of the said Margaret, should they survive her," and where the said settlement had been mutilated by tearing off some of the signatures thereto and a postnuptial deed had been made by the husband, by virtue of his marital rights, settling property differently, and the wife had obtained a total divorce from the husband, and had died leaving an only child, and this child, by her guardian, brought a bill in equity to cancel the postnuptial and set up the antenuptial deed, on the ground that the latter had been fraudulently mutilated by her father in order to make the former deed, and alter the terms of settlement after the marriage, and where the father defended the case by alleging that the antenuptial deed was mutilated and destroyed before the marriage by the trustee in his presence and that of his wife and the trustee; and where both wife and trustee were dead at the time of the trial:—*Held*, that the husband, the other parties to the settlement *in esse* at its execution and alleged destruction being dead, was an incompetent witness to prove the destruction of the marriage settlement:

and as he was the only witness to prove its legitimate destruction before the marriage, the decree setting up the antenuptial and canceling the postnuptial deed was right, its original execution having been sufficiently established by proof. See also *Potts v. Cogdell*, 1 Desaus. (S. Car.) Eq. 454.

2. *Montacuts v. Maxwell*, 1 P. Wms. 620.

3. *Buchanan v. Buchanan*, 1 Ball & B. 206; *Sidney v. Sidney*, 3 P. Wms. 275; *Seagrave v. Seagrave*, 13 Ves. 443; *Crofton v. Ormsby*, 2 Schoales & L. 583; *Michael v. Morey*, 26 Md. 239; *Bowie v. Bowie*, 1 Md. 101.

In *Michael v. Morey*, 26 Md. 231, where there was no pretence of misconduct on the part of the wife beyond the use of intemperate language and separation from the husband because of domestic troubles, *held* that she did not lose her rights under an antenuptial agreement made with her husband.

4. *Ilston v. Key*, Law R., 6 Ch. 610; *Pyke v. Pyke*, 1 Ves. Jr., 67; *Bliss v. Sheldon*, 7 Barb. (N. Y.) 152; *Shoch v. Shoch*, 19 Pa. St. 252.

In *Bliss v. Sheldon*, 7 Barb. (N. Y.) 152, where a man in contemplation of marriage agrees to make a settlement on his wife, upon his death, in consideration of which she agrees to relinquish her rights in his property after his decease, and he dies without having made the settlement, the widow is not barred of any rights which she might have asserted if no such agreement had been executed.

5. *Barclay v. Waring*, 58 Ga. 86; *Bazemore v. Davis*, 55 Ga. 505; *Baggs v. Baggs*, 58 Ga. 590.

6. *Jones v. Higgins*, L. R., 2 Eq. 538; *Stone v. Stone*, L. R., 5 Ch. 748.

7. In *Bowie v. Bowie*, 1 Md. 87, 101, *ECCLESTON, J.*, in delivering the opinion of the court, said: "A failure to comply by one party to a marriage contract does not release the other after the marriage has been consummated. Such a contract is not similar to those of an ordinary character. Rights are secured to the husband and wife and to the issue of the marriage, which entitle them to

9. **Construction of.**—In construing marriage contracts the true intent of the parties will be carried out liberally, without regard to the strictly technical meanings of words used;¹ when possible,

compel a compliance by either party, although the other has failed to discharge his obligation. Unless, indeed, there is a condition precedent. But such a condition must appear clearly and unequivocally to have been intended by the terms of the contract." These positions are fully sustained in *MacQueen on Husband and Wife*, 235, 236, in 66 Law Lib. This author, in speaking of precedent conditions, says: "So strong is this rule that in a late case, where there were at least plausible grounds for maintaining that the covenants were intended to be dependent upon each other, and where default was made on one side, the court, nevertheless, gave effect to the claims of the children." The case he refers to is *Lloyd v. Lloyd*, 2 Myl. and Cr. 182; *Gale v. Gale*, L. R., 6 Ch. Div. 144.

1. *Hutchins v. Dixon*, 11 Md. 29. A husband executed a deed which recites that he was "disposed to invest his wife again with all the property" he acquired by marriage with her, "so that the same may be for her exclusive use and benefit as though she were a *feme sole*," and then conveys the property both real and personal, subject nevertheless to any debts she was answerable for at the time of the marriage, to a trustee in trust "for the use of the wife during the life of the husband, to be disposed of in any manner she shall direct during coverture; and if she survives the husband and makes no disposition thereof by last will and testament, then the same to descend to her legal heirs and representatives in the same manner as if they had never been married; provided, in case the husband died first, she should set up no claim to any part of his estate." On the same day the trustee executed a deed which refers to the deed of trust, and recites that the wife "had directed him to convey all said property to her," and then conveys the same to the wife, "to her sole use and benefit," to hold the same "for her sole use and benefit during her natural life, and after her death, in case she should not dispose of the same by last will and testament to her heirs and legal representatives forever, subject nevertheless to the provisions and conditions contained in the said deed of trust." The husband survived the wife and then died. *Held*, 1st. That as the

first deed did not make any provision for the event of the wife's dying first without disposing of the property as authorized by its terms, if the second deed had not been executed, and the wife had died first intestate, the title to the personal property would have been restored to the husband. 2nd. But the second deed having been executed by the direction of the wife, and as both deeds clearly manifest the intention of the parties to carry the title to the property beyond the period of the wife's death, and to exclude the husband, his estate is entitled to no part of the personal property conveyed by such deeds.

Technical words are not necessary to create a separate estate in a *feme covert*, but adequate language must be employed to manifest a decided intent to transfer a separate interest and to exclude the husband, and this effect may be produced without the interposition of a trustee. When the words "next of kin," "heirs" and "representatives" are used in marriage settlements to designate the persons who are to take at the wife's death they are generally construed as having been so employed for the purpose of excluding the husband. Deeds must interpret themselves without reference to the acts of the parties; the court cannot be aided in the construction of any agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may have put upon the instrument.

Where the parties evidently intended to make a final complete settlement it will be so regarded, although it be headed "Articles of agreement," etc. To effectuate the intent of the parties, one part of the instrument may be taken as a complete settlement, and another part as mere articles. *Neves v. Scott*, 9 How. (U. S.) 106.

In *Brown v. Ramsey*, 74 Ga. 210, marriage contracts in writing are to be liberally construed, to carry into the effect the intention of the parties; and no want of form or technical expression will invalidate them. The intention of the parties is the cardinal rule of construction. Attendant and surrounding circumstances may always be resorted to, and proof of the local usage or understanding of words is admissible to

issue will be included in the benefits of the contract,¹ and as issue, children of a former or subsequent marriage,² but not grandchildren.³ Statutes requiring the recording of such contracts will be strictly construed, and only in general for the protection of creditors.⁴

10. **Conflict of Laws as to.**—1. A marriage contract, if valid where made, is valid everywhere,⁵ unless prohibited in the place where it is sought to be enforced.⁶ So that when such a contract is valid in matter and in form (recorded, etc., if necessary) by the law of the place where it is made, its validity is not affected by the subsequent removal of the parties with the property into a State where it is not in form;⁷ but it may be invalid if in such place it is unlawful *per se*.⁸

2. A marriage contract invalid *per se* where made is invalid everywhere;⁹ but if invalid because wanting in form where made, but valid where it is sought to be enforced, it may in the latter place be enforced.¹⁰

arrive at the meaning intended by the parties. See also *Carswell v. Schley*, 56 Ga. 101; *Ardis v. Printup*, 39 Ga. 648; *Stratton v. Rogers*, 11 La. An. 380; *Hooks v. Lee*, 8 Ired. (N. Car.) Eq. 157; *Mintier v. Mintier*, 28 Ohio St. 307; *Creighton v. Clifford*, 6 Rich. (S. Car.) 188; *Brown v. Foote*, 2 Tenn. Ch. 255; *Burgin v. McDowell*, 30 Gratt. (Va.) 236; *Caulk v. Fox*, 13 Fla. 147; *May v. May*, 7 Fla. 207; and *Estate of Baubichon*, 49 Cal. 19.

1. *Lafitte v. Lawton*, 25 Ga. 305; *Brown v. Brown*, 31 Gratt. (Va.) 502; *Phelps v. Phelps*, 72 Ill. 545; *Wallace v. Wallace*, 82 Ill. 530.

2. *Michael v. Morey*, 26 Md. 239; *Ardis v. Printup*, 39 Ga. 648.

3. *Adams v. Law*, 17 How. 417.

4. Failure to record such an instrument as required by law will not, as a general rule, keep it from being valid with parties. *De Lane v. Moore*, 14 How. 283.

A verbal antenuptial agreement might, under special circumstances, be enforced in equity in order to prevent the party invoking the statute of frauds from perpetrating a fraud upon the other party, on the general principle that the statute is never to be so expounded as to make it a mere instrument in consummating a fraud upon the party against whom it is involved. *McAnulty v. McAnulty*, 120 Ill. 26. See also *Cunningham v. Schley*, 41 Ga. 426; *Doe d. Credle v. Carrawan*, 64 N. Car. 422.

5. *Besse v. Pellochoux*, 73 Ill. 285; *Hicks v. Skinner*, 71 N. Car. 539;

Scheferling v. Huffman, 4 Ohio St. 241.

In *Besse v. Pellochoux*, 73 Ill. 285, the court held that where there is a marriage between parties in a foreign country, and an express contract concerning their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced.

6. *Besse v. Pellochoux*, 73 Ill. 285.

7. *Delane v. Moore*, 14 How. 283. Where an antenuptial contract was made and recorded in one State, and the parties afterwards removed, with the property upon which it operated, to another State, the property is nevertheless protected against subsequent purchasers or creditors. *Bank of the U. S. v. Lee*, 13 Pet. (U. S.) 107; *O'Neill v. Henderson*, 15 Ark. 235; *Smith v. Chapel*, 31 Conn. 589; *Young v. Templeton*, 4 La. An. 254; *Succession of Wilder*, 22 La. An. 219; *Dubois v. Jackson*, 49 Ill. 49; *Scheferling v. Huffman*, 4 Ohio St. 241; *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84; *Townsend v. Maynard*, 45 Pa. St. 198; *L. Prince v. Guillemont*, 1 Rich. 187; *Lott v. Bertrand*, 26 Tex. 654.

8. *Besse v. Pellochoux*, 73 Ill. 285.

9. *Walker v. Forbes*, 31 Ala. 9; *Paine v. France*, 26 Md. 46; *Blanchard v. Russell*, 13 Mass. 1; *Reid v. Lamar*, 1 Strobb. (S. Car.) Eq. 27; *Kenaga v. Taylor*, 7 Ohio St. 134.

10. *Cox v. U. S.*, 6 Pet. (U. S.) 172; *Succession of Wilder*, 22 La. An. 219;

3. A marriage contract as to its effect is governed by the law of the place where it is made,¹ unless it is made by the parties with the intention of having it performed elsewhere; in which case it is governed by the law of the place where it is to be performed.²

4. A marriage contract to convey or charge real estate must be valid in matter and form by the law of the place where the land lies.³

II. POSTNUPTIAL MARRIAGE SETTLEMENTS. 1. **Validity and Scope of.**—The term *postnuptial settlement* used in this article includes all transfers of property, direct or indirect, between husband and wife, as well as all settlements made on them by third parties, such as have already been discussed. Transfers between husband and wife may depend for their validity upon; (1) the capacity of husband and wife to contract together (see title HUSBAND AND WIFE, vol. 9, p. 789); (2) the form of the settlement; (3) the consideration; (4) the absence of fraud or duress between the parties; (5) the absence of fraud on the rights of creditors. Such transfers may be wholly or partially valid or invalid.⁴ Thus, postnuptial settlements are usually valid between the parties;⁵ one may be binding on the settlor, his heirs and representatives, and his voluntary assignees,⁶ but invalid as against his creditors;⁷ valid as to some (subsequent) creditors;⁸ but invalid as to other

Hicks v. Skinner, 71 N. Car. 539; Adams v. Hayes, 2 Ired. (N. Car.) 261.

1. Walker v. Forbes, 31 Ala. 9; O'Neill v. Henderson, 15 Ark. 235; Peake v. Yeedell, 17 Ala. 636; Lafitte v. Lawton, 25 Ga. 305; McLeod v. Board, 30 Tex. 238.

2. McLeod v. Board, 30 Tex. 248; Mason v. Homer, 105 Mass. 116; Mason v. Fuller, 36 Conn. 160; Glenn v. Glenn, 47 Ala. 204; Davenport v. Karnes, 70 Ill. 465; Hale v. N. J. Steam Nav. Co., 15 Conn. 539; Bliss v. Houghton, 16 N. H. 90; Broadhead v. Noyes, 9 Mo. 56; Dalton v. Murphy, 30 Miss. 59; Carroll v. Renich, 7 Smed. & M. (Miss.) 798; Sherrod v. Callegan, 9 La. An. 510; Warder v. Arall, 2 Wash. (Va.) 282; Thompson v. Ketchan, 4 Johns. (N. Y.) 285; Smith v. Smith, 2 Johns. (N. Y.) 235.

3. Besse v. Pellochoux, 73 Ill. 281.

4. See Stewart on H. & W., ch. 6, § 100, and cases there cited.

5. In Cushman v. Cushman, 5 Md. 50, ECCLESTON, J., said: "A deed which is fraudulent against creditors may be impeached for their benefit, but it is good against all others. See the opinion of C. J. TANEY in White, Warner & Co. v. Winn and Ross, cited in 8 Gill 501. Such a deed cannot be success-

fully impeached by the parties to the fraud, or by their representatives or heirs at law. See also Stewart on H. & W., §§ 104, 115, 123.

6. In Garner v. Graves, 54 Ind. 188, 192, it is held that a transfer of property by a debtor to defraud his creditors is binding upon such debtor, and, on his decease, his administrator is likewise bound by such transfer, and cannot recover the possession of such property. See also Springer v. Drosch, 32 Ind. 486; Findley v. Cooley, 1 Blackf. (Ind.) 2nd ed., 261; Laney v. Laney, 2 Ind. 196; O'Neil v. Chandler, 42 Ind. 471; Jones v. Obenchain, 10 Gratt. (Va.) 259, 267; Rogers v. Fales, 5 Pa. St. 154, 158.

7. In Miller v. Johnson, 27 Md. 6, property conveyed by a husband to his wife as a gift cannot be reached by a subsequent creditor, unless there is evidence of fraud in fact. See also Williams v. Banks, 11 Md. 198; Atkinson v. Phillips, 1 Md. Ch. Dec. 507; Unger v. Price, 9 Md. 552. See also Stewart on H. & W., §§ 113-118.

8. Plummer v. Jarman, 44 Md. 632. It may be conceded that a valid gift by a husband to his wife, after marriage, may be made, and that courts of equity will uphold such gifts as against the hus-

(existing) creditors;¹ valid as to part of the property settled, but invalid as to the rest;² invalid as an absolute grant, but valid as a security.³ Whether a settlement is, when it is valid between the parties, but otherwise invalid, void, or voidable, does not seem to be clearly determined.⁴ Though "void" is usually the word used, the better opinion seems to be that it is voidable only.⁵ For, a *bona fide* purchaser for value from a settlee whose title is invalid against creditors, gets a valid title even against such creditors,⁶ which could not be the case if the original settlement was absolutely void against them; and this is true of both realty and personalty;⁷ so property previously conveyed in fraud of creditors does not pass by a deed from the settlor for the benefit of such creditors;⁸ so, only a creditor can allege the invalidity of the settlement.⁹ The reason the word "void" is so often used is that in the great mass of cases no special proceeding need be resorted to to have a settlement declared void, but the question of validity may be determined in any proceeding at law or in equity to which both the settlor and settlee or their respective successors are parties.¹⁰

2. **Form of.**—There is no particular form necessary, nor are tech-

band and those claiming under him; but as against subsisting creditors of the husband, if it be to their prejudice, such gift is utterly void. This is so upon general principles of equity and justice, and it is so by the statute law of the State.

Seitz v. Mitchell, 94 U. S. 580. A married woman claiming, in opposition to her husband's creditors, *property purchased after marriage*, must show that the consideration was paid out of her separate estate. *Moore v. Page*, 111 U. S. 117; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; *Mattingly v. Nye*, 8 Wall. (U. S.) 370; *Kehr v. Smith*, 20 Wall. (U. S.) 31; *Smith v. Vodges*, 92 U. S. 183; *Jones v. Clifton*, 101 U. S. 225; *Clark v. Killian*, 103 U. S. 766; *Wallace v. Penfield*, 106 U. S. 260.

1. *Crooks v. Crooks*, 34 Ohio St. 610, 615; *Smith v. Vodges*, 92 U. S. 183; *Jones v. Clifton*, 101 U. S. 225. In order to defeat a settlement made by a husband upon his wife it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene.

2. *Farmers' Bank v. Long*, 7 Bush. (Ky.) 337, 340; *Wickes v. Clarke*, 8 Paige (N. Y.) 161, 172; *Stewart on H. & W.*, § 106.

3. *Herschfeldt v. George*, 6 Mich. 456, 468; *Stewart on H. & W.*, §§ 106, 132.

4. See *Bump. Fraud. Convey.*, ch. 16; *Stewart on H. & W.*, § 114.

5. *Holland v. Cruft*, 20 Pick. (Mass.) 321, 338; *Schuman v. Peddicord*, 50 Md. 560, 563; *Mulford v. Peterson*, 35 N. J. L. 127, 132; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 527; 9 Am. Dec. 235.

6. *Bean v. Smith*, 2 Mason (U. S.) 252, 272; *Eldred v. Drake*, 43 Iowa 569, 570; *Oriental Bank v. Haskins*, 3 Met. (Mass.) 332, 340; 37 Am. Dec. 140; *Farmers' Bank v. Brooke*, 40 Md. 249, 257; *Phelps v. Morrison*, 24 N. J. Eq. 195, 198, 199; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 525, 530; 9 Am. Dec. 235. Not of course in case of notice. *Green v. Early*, 39 Md. 223, 229.

7. *Eldred v. Drake*, 43 Iowa 569, 570; *Farmers' Bank v. Brooke*, 40 Md. 249, 257.

8. *Scheffer v. Seltz*, Md. Law Rec. March 22nd, 1884.

9. *Cushwa v. Cushwa*, 5 Md. 44, 50. A deed fraudulent as to creditors may be impeached by them, but is good against all others; it cannot be impeached by the parties to the fraud, or by their representatives or heirs at law. The grantor in a fraudulent deed cannot rely upon the fraud either as plaintiff, claiming relief against the effect of the deed, or as defendant, resisting the claim of the grantee.

10. See *Stewart on H. & W.*, title Remedies, §§ 122-124, and cases there cited.

nical words required, in drawing postnuptial settlements, except where statutes apply. Some of the different forms which transfers are likely to take are discussed later in this article.

3. Statutes Applying to.—In some States all transfers of property between husband and wife must be recorded,¹ or ratified by a court;² in others, a wife must file a statement of all her separate property of which her husband has possession;³ and generally a married woman cannot release her marriage rights except by writing or deed.⁴ But acts requiring record of marriage settlements apply only to those in consideration of marriage, not to postnuptial settlements.⁵ Otherwise the formalities are the same as in transfers between strangers.⁶

4. Capacity of Parties.—The capacity of husband and wife to contract together has been discussed under the title HUSBAND AND WIFE, and the capacity of married women to contract will be discussed under the title MARRIED WOMEN.

5. The Consideration.—A consideration is necessary to render an executory contract enforceable, whether at law or in equity,⁷ and to render an executed settlement valid as against creditors;⁸ but voluntary settlements or executed gifts are binding between the parties.⁹ A voluntary settlement is one without consideration. *Love and affection* is a *meritorious* consideration;¹⁰ it serves often

1. *Teague v. Downs*, 79 N. Car. 280, 287; *Lewis v. Caperton*, 8 Gratt. (Va.) 148, 165; *De Lane v. Moore*, 14 How. 253.

Failure to record such an instrument as required by law will not, as a general rule, keep it from being valid *inter partes*. *De Lane v. Moore*, 14 How. (U. S.) 253.

2. *Bowman v. Kaufman*, 30 La. An. 1021, 1025; *Keller v. Ruiz*, 21 La. An. 283; *Atkinson v. Atkinson*, 15 La. An. 491, 492.

3. *Smith v. Hewett*, 13 Iowa 94, 96; *Jones v. Jones*, 19 Iowa 236, 239, 240. See *Stewart on H. & W.*, §§ 120, 121.

4. *Randles v. Randles*, 63 Ind. 93, 100. See *Stewart on H. & W.*, §§ 270-272.

5. *Stewart on M. & D.*, §§ 34-36; *Banks v. Brown*, 2 Hill (S. Car.) Ch. 558, 565; 30 Am. Dec. 380; *overruling Price v. White*, Bail. (S. Car.) Ch. 244, 263.

6. As to desirability of formalities, see *Stewart on H. & W.*, §§ 120, 121.

7. *Kesner v. Trigg*, 98 U. S. 50. A postnuptial contract made upon sufficient consideration, and wholly or partly executed, will be sustained in equity. 1 *Parsons Cont.* 427, *infra*, n. 2; *Crooks v. Crooks*, 34 Ohio St. 610, 615. No gift good without delivery. *Stewart H. & W.* §§ 120, 127.

8. *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229. A postnuptial voluntary settlement, made by a man who is not indebted at the time, upon his wife, is valid against subsequent creditors. The statute 13 Eliz., ch. 5, avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors. But it does not apply to subsequent creditors if the conveyance is not made with a fraudulent intent. 1 Am. L. C. 171; *Stewart H. & W.*, §§ 109, 113-118. As to scope of word "creditors," see *Stewart H. & W.*, § 115.

9. *Plummer v. Jarman*, 44 Md. 632, 637. It may be conceded that a valid gift by husband to wife, after marriage, may be made, and that courts of equity will uphold such gifts as against the husband and those claiming under him; but as against subsisting creditors of the husband, if it be to their prejudice such gift is utterly void. See also *Peirce v. Thompson*, 17 Pick. (Mass.) 391, 393; *Wilder v. Brooks*, 10 Minn. 50, 54; *Reid v. Gray*, 37 Pa. St. 508, 510; *Stewart H. & W.*, §§ 124, 127.

10. *Worthington v. Bullitt*, 6 Md. 172, 108. A father being indebted and in embarrassed circumstances, conveyed to his son land worth upwards of \$20,000, for the moneyed consideration expressed in the deed of \$12,000, of which

to explain a grantor's purpose and to disprove a fraudulent intent;¹ it is a good consideration as against the grantor and his representatives;² but it is not a valuable consideration,³ it will not sustain an executory contract at all,⁴ or a settlement in prejudice of the rights of creditors.⁵ *Existing marriage* is a consideration of the same kind;⁶ as is a husband's desire to make provision for the support he owes his wife.⁷

Each of the following is a *valuable consideration*: A release of dower,⁸ or homestead,⁹ or previous settlement,¹⁰ or separate prop-

erty but \$5,000 was in part paid in money by the son. *Held*, that this was a voluntary conveyance to the extent of the excess of the value of the land over the \$5,000, and was therefore void as to creditors who were such prior to and at its date. Whether such a voluntary deed can be supported or not, depends upon the condition of the grantor at its date; if he had then creditors who would be by it hindered and delayed in collecting their debts, though he was not in fact insolvent, still so far as it is a voluntary conveyance, or resting upon natural love and affection, it is void. *Wells v. Treadwell*, 28 Miss. 717, 726; *Whitaker v. Whitaker*, 52 N. Y. 368, 371; 11 Am. Rep. 711; *McMillan v. Peacock*, 57 Ala. 127, 129; *Clayton v. Brown*, 17 Ga. 217, 220; *Majors v. Everton*, 89 Ill. 56, 57; 31 Am. Rep. 65; *Horder v. Horder*, 23 Kan. 391, 392; *Orr v. Orr*, 8 Bush (Ky.) 156, 159; *Todd v. Wickliffe*, 18 B. Mon. (Ky.) 866, 906; *Peirce v. Thompson*, 17 Pick. (Mass.) 391.

1. *Wells v. Treadwell*, 28 Miss. 717, 726. A voluntary conveyance is presumed to be fraudulent as to subsequent purchasers; but this presumption may be destroyed, and if the conveyance, though voluntary, appear to have been made upon a meritorious consideration, without fraud or coercion, it is not void against a subsequent purchaser. Not all voluntary conveyances, but all fraudulent conveyances, are void.

CHANCELLOR KENT, in *Sterry v. Arden*, 1 J. C. R., sanctions the doctrine that voluntary conveyances are absolutely void as to subsequent purchasers, and holds that such is the rule held by the English authorities. On the contrary, CHIEF JUSTICE MARSHALL, in *Cathart v. Robinson*, 5 Pet. (U. S.) 264-281, held that the rule settled by the English cases at the period or time referred to by CHANCELLOR KENT, and the sound rule upon the subject is, that "a subsequent sale without notice, by a person who had made a settlement not upon a valuable con-

sideration, was presumptive evidence of fraud, which threw upon those claiming under such settlement the burden of proving that it was made *bona fide*. We consider this as the true exposition of the statute if it does not declare all voluntary conveyances, but all fraudulent conveyances, to be void. See also *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; *Kehr v. Smith*, 20 Wall. (U. S.) 31.

2. *Orr v. Orr*, 8 Bush (Ky.) 156, 159; *Peirce v. Thompson*, 17 Pick. (Mass.) 391, 393.

3. *Clayton v. Brown*, 17 Ga. 217, 220.

4. *Whitaker v. Whitaker*, 52 N. Y. 368, 371; 11 Am. Rep. 711.

5. *Clayton v. Brown*, 17 Ga. 217, 220.

6. *Lloyd v. Fulton*, 91 U. S. 479, 485; *Davidson v. Graves*, *Riley* (S. Car.) Eq. 232; *Stewart M. & D.*, §§ 33, 473.

7. *Dale v. Lincoln*, 62 Ill. 22, 26; *Herschfeldt v. George*, 6 Mich. 456, 465; *Wilder v. Brooks*, 10 Minn. 50, 54; *Crooks v. Crooks*, 34 Ohio St. 610, 615; *Jones v. Obenchain*, 10 Gratt. (Va.) 259, 262. Consult § 87, *Stewart H. & W.*

8. *Sykes v. Chadwick*, 18 Wall. (U. S.) 141; *Hort v. Sorrell*, 11 Ala. 386, 400; *Nalle v. Lively*, 15 Fla. 130; *Sedgwick v. Tucker*, 90 Ind. 271, 277; *Brown v. Rawlings*, 72 Ind. 505; *Randles v. Randles*, 63 Ind. 93; *Hollowell v. Simonson*, 21 Ind. 398, 400; *Unger v. Price*, 9 Md. 552; *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 538; 19 Am. Dec. 292; *Ward v. Crotty*, 4 Metc. (Mass.) 52; *Randall v. Randall*, 37 Mich. 563, 572; *Woodson v. Pool*, 19 Mo. 340, 344; *Garlick v. Strong*, 3 Paige (N. Y.) 440; *Searing v. Searing*, 9 Paige (N. Y.) 283; *Kelly v. Case*, 18 Hun (N. Y.) 472, 474; *Duffy v. Mechanics* etc. Ins. Co., 8 W. & S. (Pa.) 413, 434; *Banks v. Brown*, *Riley* (S. Car.) Ch. 131, 135; 30 Am. Dec. 380; *Payne v. Hutchinson*, 32 Gratt. (Va.) 812.

9. *Sproul v. Atchison v. Nat. Bank*, 22 Kan. 336, 340; *Keyes v. Rines*, 37 Vt. 260, 264.

10. *Phila. v. Riddle*, 25 Pa. St. 259, 262.

erty rights;¹ an antenuptial enforceable promise to make a settlement;² an existing debt though barred by limitations;³ a wife's equity of settlement;⁴ use of property with understanding that it should be replaced;⁵ cash received as a loan;⁶ rents collected as agent;⁷ wife's right of survivorship in mortgage to her.⁸ It is a valuable consideration for a settlement that a court of equity would have compelled its execution.⁹ If husband and wife, each

1. *Northington v. Faber*, 52 Ala. 45, 47; *Monaman v. Monaman*, 4 Metc. (Ky.) 84, 89; *Drury v. Briscoe*, 42 Md. 154, 162; *Teller v. Bishop*, 8 Minn. 226; *Butterfield v. Stanton*, 44 Miss. 15, 35; *Gicher v. Martin*, 50 Pa. St. 138, 140; *Peiffer v. Lytle*, 58 Pa. St. 386, 391; *Ready v. Bragg*, 1 Head (Tenn.) 511, 515; *Williams v. Powell*, 12 Gratt. (Va.) 372, 385; *Rose v. Brown*, 11 W. Va. 122, 136; *Wochoska v. Wochoska*, 45 Wis. 423, 426.

In the case of *Drury v. Briscoe*, 42 Md. 154, a married woman being entitled to a distributee's share of the proceeds of the real estate of her father, sold under proceedings for a partition, her share with the consent of her husband, and took the note of the purchaser for the purchase money. This note the husband collected as a loan by his wife to him upon an agreement with her to repay it to her with interest and gave her his note for the amount due her. Afterwards the husband, becoming embarrassed, in order to protect his wife's claim, paid two judgments against himself and caused them to be entered to her use. The validity of this transaction being impeached by subsequent creditors of the husband as in fraud of them, it was held: 1st. That the husband did not reduce the chose in action of his wife into his possession by virtue of his marital rights, but in pursuance of his agreement with his wife obtained control of the note, and his agreement to repay her the amount he collected on it was founded upon an adequate consideration. 2nd. That the claim of the wife was manifestly just and should be allowed.

2. *Mechanics v. Taylor*, 2 Cranch (C. C.) 507; *Andrews v. Jones*, 10 Ala. 400, 421; *Harper v. Scott*, 12 Ga. 125; *Lyne v. Bank of Ky.*, 5 J. J. Marsh. (Ky.) 545, 552; *Belford v. Crane*, 16 N. J. Eq. 265, 271; *Reade v. Livingston*, 3 Johns. (N. Y.) Ch. 481, 488; 8 Am. Dec. 510; *Saunders v. Ferrill*, 1 Ired. (N. Car.) 97, 102; *Caines v. Marley*, 2 Yerg. (Tenn.) 582, 588; *Stewart M. & D.* § 33;

Neilson v. Williams, 42 N. J. Eq. 291.

A promise by one to his intended wife before marriage that all he had or might have was to be hers, is not sufficient consideration for a deed made by him to her fourteen years after marriage and after he had failed.

3. *Wilson v. Sheppard*, 28 Ala. 623, 629; *Jones v. Brandt*, 59 Iowa 332, 347; *Latimer v. Glenn*, 3 Bush (Ky.) 535, 541; *Lehman v. Levy*, 30 La. An. 745, 750; *Peiffer v. Lytle*, 58 Pa. St. 386, 391; *French v. Motley*, 63 Me. 326, 318; *Stewart H. & W.* § 45.

4. *Montefiore v. Behrens*, Law R., 1 Eq. 171; *Bradford v. Goldsborough*, 15 Ala. 311, 315; *McCauley v. Rodes*, 7 B. Mon. (Ky.) 462; *McClanahan v. Beasley*, 17 B. Mon. (Ky.) 111, 114; *Oswald v. Hoover*, 43 Md. 360; *Stockett v. Holliday*, 9 Md. 480, 498; *Partridge v. Havens*, 10 Paige (N. Y.) 618, 624, 625; *Walden v. Walden*, 33 Gratt. (Va.) 88, 95, 96; *Poindexter v. Jeffries*, 15 Gratt. (Va.) 363, 373.

5. *Butterfield v. Stanton*, 44 Miss. 15, 35.

6. *Teller v. Bishop*, 8 Minn. 226, 228.

7. *Barker v. Morrill*, 55 Ga. 332, 334.

8. *Stockett v. Holliday*, 9 Md. 480, 498.

9. *Wickes v. Clarke*, 8 Paige (N. Y.) 161, 172; *Buchanan v. Lee*, 69 Ind. 117; *Bayne v. State*, Md. Law Rec., Aug. 23, 1884; *Oswald v. Hoover*, 43 Md. 360, 368; *Plummer v. Jarman*, 44 Md. 632; *Peirce v. Thompson*, 17 Pick. (Mass.) 391, 393; *Gicker v. Martin*, 50 Pa. St. 138, 141.

In the case of *Oswald v. Hoover*, 43 Md. 360, a husband received his wife's share of the proceeds of the sale of her father's real estate, sold under a decree of partition passed on the 2nd of December, 1856, and applied the same to the purchase of land in his own name, under a promise to her before the purchase that the money should be so applied and treated as a loan to him. A portion of the money was received in April, 1857, and the balance in June, 1860. The husband subsequently conveyed all of his property to a trustee to

of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, it is a bargain and a transaction on valuable consideration.¹

Each of the following is a mere *nominal consideration*, really no consideration at all: The wife's property which by law is the husband's;² dower previously voluntarily released;³ property previously voluntarily given up;⁴ cohabitation, when this is a duty;⁵ the wife's services, when these belong to her husband.⁶

Adequacy.—As a general rule, if a consideration is real (valuable), its adequacy is not enquired into.⁷ But inadequacy of consideration is evidence of fraud.⁸ And, as against creditors, the consideration for a settlement must be fair and reasonable, the payment of a trivial sum,⁹ or such a disproportionate considera-

be sold and the proceeds thereof distributed among his creditors. The property was sold and a report of the sales made to the circuit court of Washington county, in equity, by which the same were ratified and confirmed. The wife, under the usual notice by the auditor of the court to all persons having claims against her husband to file the same, filed her claim for the amount of her loan to him. Upon exceptions to this claim by the creditors of the husband, it was held that the wife's claim was an equitable one and should be allowed. See also *Metsker v. Bonebrake*, 108 U. S. 66.

1. *Teasdale v. Braithwaite*, L. R., 4 Ch. Div. 85, 90; 46 L. J., Ch. 306.

2. *Ream v. Karnes*, 90 Ind. 167, 172; *Buchanan v. Lee*, 69 Ind. 117; *Bayne v. State*, Md. Law Rec., Aug. 23, 1884; *Oswald v. Hoover*, 43 Md. 360, 368; *Plummer v. Jarman*, 44 Md. 632, 637; *Peirce v. Thompson*, 17 Pick. (Mass.) 391, 393; *Gicker v. Martin*, 50 Pa. St. 138, 141.

3. *Woodson v. Pool*, 19 Mo. 340, 341.

4. *Whittlesey v. McMahon*, 10 Conn. 137; 26 Am. Dec. 382; *Lyne v. Bank of Ky.*, 5 J. J. Marsh. (Ky.) 545, 552; *Sabel v. Slingluff*, 52 Md. 132, 134; *Kuhn v. Stansfield*, 28 Md. 210, 216; *Terry v. Wilson*, 63 Mo. 493, 499; *Woodson v. Pool*, 19 Mo. 340, 341; *Clark v. Rosekrans*, 31 N. J. Eq. 665, 667; *Johnston v. Johnston*, 31 Pa. St. 450, 454; *Perkins v. Perkins*, 1 Tenn. Ch. 537; *Cheatham v. Hess*, 2 Tenn. Ch. 763.

In the case of *Sabel v. Slingluff*, 52 Md. 132, 134, it is held that money received by a husband from the sale of his wife's real estate, made before the adoption of the code, belongs to the

husband absolutely, unless at the time he received it he promised the wife to repay it and obtained possession of it upon the faith of such promise.

5. See *Stewart on H. & W.*, § 59, where the subject is treated very fully.

6. *Belford v. Crane*, 16 N. J. Eq. 268, 271; *Stewart on H. & W.*, § 65.

7. *Hoot v. Sorrell*, 11 Ala. 386, 400; *Drury v. Briscoe*, 42 Md. 154, 163; *Duffy v. Mechanics' etc. Ins. Co.*, 8 W. & S. (Pa.) 413, 435; *Banks v. Brown*, Riley (S. Car.) Ch. 131, 138; 30 Am. Dec. 380; *Taylor v. Heriot*, 4 Desaus. (S. Car.) Eq. 227, 231. See Anson on Contracts, p. 63; *Parsons on Contracts*, 429; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Follett v. Rose*, 3 McLean (U. S.) 332; *Stewart v. State*, 2 Har. & G. (Md.) 114; *Hubbard v. Coolidge*, 1 Met. (Mass.) 84; *Knobb v. Lindsey*, 5 Ohio 468, 471; *Gorce v. Wilson*, 1 Bail. (S. Car.) 597; *Bracham v. Griffin*, 3 Call. (Va.) 433; *Kidder v. Chamberlain*, 41 Vt. 62. But see *Schnell v. Neel*, 17 Ind. 29; *Bailey v. Day*, 26 Me. 88.

8. *Goff v. Rogers*, 71 Ind. 459, 461; *Stewart on H. & W.*, § 112.

9. *Metsker v. Bonebrake*, 108 U. S. 66. A loan by a wife to her husband, of money which is her separate property, upon his promise to repay it, creates an equity in her favor which a court of equity will enforce. *Seitz v. Mitchell*, 94 U. S. 580.

A married woman claiming, in opposition to her husband's creditors, property purchased after the marriage, must show that the consideration was paid out of her separate estate.

In *Davis v. Fredericks*, 104 U. S. 618, where a wife paid for property in cash from her own separate funds, it is not

tion as two hundred and seventy dollars, for property worth two thousand dollars,¹ or four hundred dollars for property worth eighteen hundred dollars,² will not defeat creditors' rights; as to them the settlement is voluntary to the extent of the excess;³ and though, if the settlee has acted in good faith, he or she will be protected as a creditor, and the settlement treated as a security for the actual consideration.⁴

liable for her husband's debts on the ground that the deed to her was made in fraud of his creditors. See also *Hitz v. Nat. Metropolitan Bank*, 111 U. S. 722; *Kehr v. Smith*, 20 Wall. (U. S.) 31; *Hollowell v. Simonson*, 21 Ind. 398, 400; *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 538; 19 Am. Dec. 291; *Worthington v. Bullitt*, 6 Md. 172, 198; *Den v. York*, 13 Ired. 206, 211.

1. *Peigne v. Snowden*, 1 Dessaus. (S. Car.) Eq. 591, 592. A married man cannot convey property of which he was the absolute owner, in trust for his wife (to whom he owed £280), to the prejudice of a creditor to whom he was indebted before he executed the deed, where the property was worth £2,000, for that circumstance is strong proof of a fraudulent intent.

2. *Worthington v. Bullitt*, 6 Md. 172, 198.

A father being indebted and in embarrassed circumstances conveyed to his son land worth upwards of \$20,000, for the money consideration expressed in the deed of \$12,000, of which but \$5,000 was in fact paid in money by the son. Held, that this was a voluntary conveyance to the extent of the excess of the value of the land over the \$5,000, and was therefore void as to creditors who were such prior to and at its date. A deed founded upon a moneyed consideration, which bears no adequate relation to the real value of the property, though valid as between the parties, may be assailed in chancery by creditors solely upon the ground of inadequacy of consideration. See also *Herschfeldt v. George*, 6 Mich. 456, 468.

3. *Worthington v. Bullitt*, 6 Md. 174, 198; *Hinkle v. Wilson*, 53 Md. 287, 294; *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 538; *Bowie v. Stonestreet*, 6 Md. 418, 433; *Hill v. Brigg*, 52 Miss. 397, 402; *Kelley v. Case*, 18 Hun (N. Y.) 472, 474; *Den v. York*, 13 Ired. (N. Car.) 206, 210; *Peigne v. Snowden*, 1 Dessaus. (S. Car.) Eq. 591, 592; *Johnston v. Gill*, 27 Gratt. (Va.) 587, 591; *Davis v. Davis*, 25 Gratt. (Va.) 587, 596; *Warren v. Ranney*, 50 Vt. 653, 656.

4. In *Hinkle v. Wilson*, 53 Md. 287, at a trustee's sale of an intestate's real estate for the purpose of partition among his heirs at law, the husband of one of the heirs at law purchased a part for \$2,255; terms, one-third cash, balance in equal instalments at one and two years from day of sale, with interest. The husband signed the contract of sale and his note, with surety for the deferred payments. The sale was reported and ratified, and the husband entered into possession of the land as his own; and during 1872 to 1874 borrowed various sums of money in his own name and on his own credit to pay on the purchase, on which account was also paid an amount lent by a person to whom, in 1874, he executed a mortgage on the land for the security of part of what he received, without joinder of his wife, reciting his own indebtedness for the amount. After a petition by the trustee for a resale of the property at the risk of the husband for the balance of purchase money unpaid, the trustee reported the amount due by the husband to be \$956.52, including interest. A distribution of this amount was made, and the share distributed to the husband's wife was \$328.80. The aggregate of all distributions to her from the whole estate was \$1,241, which amount was credited to the purchase money. The husband's wife, on his petition, in which he stated that he had sold his interest to her for a valuable consideration, was substituted, by order of court, in his stead as purchaser; and a deed was made to her by the trustee and recorded the 19th of February, 1878. The husband became indebted to the appellants in 1872 to 1874, and on some of their claims they had recovered judgments before a justice of the peace. On a bill filed by the appellants to have the deed to the husband's wife set aside, as being in prejudice of their rights as creditors, it was held that while the deed from the trustee to the husband's wife should be set aside as an absolute conveyance of the property, it would be allowed to

In the case of bad faith he or she will not be protected at all.¹

6. Fraud Between the Parties.—Formerly a married woman was deemed entirely under her husband's control, and incapable of voluntary acts in his presence,² and even now her torts and crimes committed in his presence are presumed committed under his coercion.³ So in the case of contracts. These at common law were void, and good in equity only if proved to have been fairly and freely made.⁴ But now, although the greatest good faith is required in dealings between husband and wife,⁵ which are treated much as dealings between trustee and *cestui que trust* are,⁶ and in case of a gift by her to him,⁷ or an inadequate consideration,⁸ or an advantage secured by him,⁹ the burden of proof is on him to show that the transaction was freely and deliberately concluded,¹⁰ the mere fact that he is her husband does not render it a fraud for him to take property from her;¹¹ but she must prove fraud or undue influence, and allowance will be made for their intimate relation.¹² The husband's fraud or duress will not affect the validity of a wife's transfer in the hands of a *bona fide* pur-

stand as security to the grantee for the principal sum of \$1,241; subject, however, to the mortgage executed by the husband; and that executions and levies on the land, under the appellants' judgments duly recorded, as required by the Act of 1868, ch. 443, constituted liens, according to their priority, upon the husband's equitable interest in the land; and that if such liens or judgments were not otherwise discharged, equitable interest might be void. See also *Herschfeldt v. George*, 6 Mich. 456, 468; *Davis v. Davis*, 25 Gratt. (Va.) 587, 596.

1. *Warren v. Ranney*, 50 Vt. 653, 656; *Stewart on H. & W.*, § 107.

2. *Stewart on H. & W.*, §§ 38, 121; *Hepburn v. Dubois*, 12 Pet. (U. S.) 345.

3. *Stewart on H. & W.*, § 66, ch. 24; § 68, ch. 25.

4. *Stewart on H. & W.*, §§ 41, 42, 359.

5. *Willetts v. Willetts*, 104 Ill. 122; *Campbell's Appeal*, 80 Pa. St. 298, 309.

6. *Darlington's Appeal*, 86 Pa. St. 512, 519; 27 Am. Rep. 726.

7. *Boyd v. De La Montagnie*, 73 N. Y. 493, 502; 29 Am. Rep. 197; *McRae v. Battle*, 69 N. Car. 98, 107; *Darlington's Appeal*, 86 Pa. St. 512, 520; 27 Am. Rep. 726. In *Boyd v. De La Montagnie*, 73 N. Y. 498, a gratuitous transfer of property from a wife to a husband, induced in part by representations on his part that she was liable for a debt, for which in fact she was not liable, and made in the belief

that the effect of the transfer would be to delay the creditors, or in some way to save the property, will be set aside by a court of equity. To sustain an action for that purpose it is not necessary to show a fraudulent intent upon the part of the husband in making the representations; a mutual misapprehension or mistake is sufficient. From the confidential relation of the parties the burden is thrown upon the husband, in order to sustain such a transfer, to show that the gift was freely and deliberately made, and that the transaction was fair and proper. The fact that the wife consented to the transfer to defraud creditors does not constitute a defence.

8. *Birdsong v. Birdsong*, 2 Head (Tenn.) 289, 296; *Stewart on H. & W.*, § 106.

9. *Jenne v. Marble*, 37 Mich. 319, 322.

10. *Smiley v. Reese*, 53 Ala. 89, 101; *Campbell's Appeal*, 80 Pa. St. 298, 309.

11. *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 547, 548; 50 Am. Dec. 528; *Meriam v. Harsen*, 4 Edw. (N. Y.) Ch. 70, 82.

12. *Boyd v. De la Montagnie*, 73 N. Y. 498, 502, just cited is direct in point; see also *Witbeck v. Witbeck*, 25 Mich. 439, 442; *Freeman v. Wilson*, 51 Miss. 329, 333; *Smyley v. Reese*, 53 Ala. 89, 101; *Stone v. Wood*, 85 Ill. 603, 609; *Lin v. Blizzard*, 70 Ind. 23; *Senger v. Rawson*, 50 Iowa 634; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 547; 50 Am. Dec. 518; *Battle v.*

chaser for value;¹ she cannot have her deed to a third party set aside on account of her husband's conduct,² unless they were confederates,³ or the husband acted as such third party's agent in obtaining the deed.⁴ In spite of fraud, equity will sustain a settlement between husband and wife if for the benefit of them both.⁵ Generally, courts of equity alone will afford them relief.⁶

7. Fraud as Against Creditors.—Husband and wife are one, and it is a great temptation for a husband to place property in his wife's name in order to secure himself. Innumerable cases have therefore arisen where the creditors of a husband have attached transfers to his wife and sought to have them declared void, and the principles applicable to such cases are quite well defined. A transfer by which the grantor hinders, delays or defrauds his cred-

Kasa, 30 La. An. 940; *Whitridge v. Barry*, 42 Md. 140, 153; *Eccleston v. Furst*, 48 Md. 145, 160; *Smith v. Osborn*, 33 Mich. 410; *Jenne v. Marble*, 37 Mich. 319, 322; *Ferdon v. Miller*, 34 N. J. Eq. 10, 13; *Remington v. Wright*, 43 N. J. L. 45; *Rexford v. Rexford*, 7 Lans. (N. Y.) 6, 7; *Meriam v. Harslem*, 4 Edw. (N. Y.) Ch. 70, 82; *McRae v. Battle*, 69 N. Car. 98, 107; *Levi v. Earl*, 3 Ohio St. 147; *Campbell's Appeal*, 80 Pa. St. 298, 309; *Darlington's Appeal*, 86 Pa. St. 512, 519; 27 Am. Rep. 726; *Hammit v. Bull*, 8 Phila. (Pa.) 29, 30; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289, 296.

1. *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580; *Spurgin v. Traub*, 65 Ill. 170, 175; *Finnegar v. Finnegar*, 3 Tenn. Ch. 510.

2. *Rogers v. Adams*, 66 Ala. 600, 602. Duress of the wife, practiced by the husband to obtain her signature to a mortgage, does not affect the validity of the mortgage, when the mortgagee was not privy to such duress, and did not connive at it, or in any way participate in it. See also *Collins v. Wassell*, 34 Ark. 17, 33; *Green v. Scrange*, 19 Iowa 461, 465; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *Hammit v. Bull*, 8 Phila. (Pa.) 29, 50.

3. *Fargo v. Goodspeed*, 87 Ill. 290, 296.

4. *Comegys v. Clarke*, 44 Md. 108, 110. But see the case of *Central Bank v. Copeland*, 18 Md. 305 and 320, where a wife appears to have been induced to execute and acknowledge a mortgage of her property for her husband's debts by harshness and threats and the exercise of unwarrantable authority so excessive as to subjugate and control the freedom of her will. A court of equity will refuse to enforce it against her.

The fact that the mortgagee took no part in procuring the execution of the mortgage by the wife does not strengthen his right to set it up as valid, nor impair hers to avoid it; the acceptance of a mortgage implies adoption by the mortgagee of the husband's agency in procuring it.

5. *Birdsong v. Birdsong*, 2 Head (Tenn.) 289, 296.

6. In *Stone v. Wood*, 85 Ill. 603, where a wife fraudulently and deceitfully represented to her husband, then residing in a different locality from her, that if he would put the title to his house and lot in her name, she could sell it for a certain price, and would pay his debts and join him, giving him the surplus, and afterwards wrote him that she had made a sale, and thereby procured him to unite in a deed of the property to one she represented as a purchaser, but who, in fact, took the conveyance in trust for the wife, when she should reimburse him for some moneys loaned her and liabilities incurred, and the proof showed that the wife was untrue to her husband, and the grantee was a party to the fraud to deprive the husband of the property, it was *held* that the conveyance of the husband was properly set aside, and also a purchase by such grantee of the property under a judgment brought by him against the husband, the proofs showing that the rents of the property exceeded the sum paid by such grantee.

Where either husband or wife becomes untrue to the other, and by fraud obtains an unjust advantage over the other, a court of equity will as readily afford relief as it will between other persons not occupying that relation. See also *Stewart H. & W.*, §§ 53, 121-124.

itors is called a "fraudulent conveyance." Such conveyances are of two kinds, those which are made with the intent to evade creditors, where there is *fraud in fact*,¹ and those where there is no such intent, but which being voluntary prejudice creditors' rights, where there is fraud in law.² The usual rules as to fraudulent conveyances apply generally to conveyances between husband and wife.³ But the subject is too vast to be minutely treated herein.

Statutes Protecting Creditors.—The statutes relating to this subject which are constantly referred to, which are merely declaratory of the common law,⁴ which, as a part of the common law, are in force in many States,⁵ and which form the basis of most modern statutes against fraudulent conveyances,⁶ are: 13 Eliz., ch. 5, and 27 Eliz., ch. 4. Statute 13 Eliz., ch. 5, provides that all transfers made to the end, purpose, and intent to delay, hinder or defraud creditors and others of their lawful rights are "utterly void" as against such creditors and others; but does not affect *bona fide* transfers for value. Statute 27 Eliz., ch. 4, provides that all transfers made for the intent and purpose of defrauding

1. In *Williams v. Avery*, 38 Ala. 115, a voluntary conveyance by a husband to his wife, if free from fraud, actual or constructive, will sometimes be upheld in equity as against subsequent creditors of the husband; but proof of an intent to hinder and defraud his creditors, will avoid the deed and render the property subject to subsequent debts.

In *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, a postnuptial voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors, under provisions of a statute that every voluntary conveyance of a person for his own benefit is fraudulent against creditors.

A conveyance from husband to wife, or a settlement of property upon her, which does not hinder or defraud then existing creditors, is not fraudulent as to subsequent creditors, without proof of actual or intentional fraud. *Moore v. Page*, 111 U. S. 117; *Mattingly v. Nye*, 8 Wall. (U. S.) 370; *Kehr v. Smith*, 20 Wall. (U. S.) 31; *Smith v. Vodges*, 92 U. S. 183; *Jones v. Clifton*, 101 U. S. 225; *Clark v. Kilrain*, 103 U. S. 766; *Wallace v. Penfield*, 106 U. S. 260.

2. In *Metsker v. Bonebrake*, 108 U. S. 66, conveyance of land by a husband to his wife, through a third person, in repayment of a loan, not made to defraud creditors, but to satisfy his equitable obligation to his wife, is not a voluntary conveyance, and is valid against

his creditors. The conveyance by him, first to a third person who paid nothing, but took the title in trust for his wife, and from him to her to satisfy the common law inability to make a direct conveyance from husband to wife, is no evidence of fraud. *Lloyd v. Fulton*, 91 U. S. 479.

In a voluntary settlement upon a grantor's wife, prior indebtedness is only presumptive and not conclusive proof of fraud. See also *Bean v. Patterson*, 122 U. S. 496; *Banks v. Patton*, 1 Rob. (Va.) 400, 527.

3. *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; 1 Am. Lead. Cas. 17; *Shepard v. Shepard*, 7 Johns. (N. Y.) Ch. 57; *Ewell's Lead. Cas.* 280.

4. *Cadogan v. Kennet*, Cowp. 434; *Hamilton v. Russell*, 1 Cranch (U. S.) 309, 316; *Adams v. Broughton*, 13 Ala. 731, 739; *Whittlesey v. McMahon*, 10 Conn. 137, 141; 26 Am. Dec. 382; *Fleming v. Townsend*, 6 Ga. 103, 108; 50 Am. Dec. 318; *Sparrow v. Chesley*, 19 Me. 79; *Hudnal v. Wilder*, 4 McCord (S. Car.) 294; *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 514, 523; *Footman v. Pendergrass*, 3 Rich. (S. Car.) Eq. 33; *Howard v. Williams*, 1 Bail. (S. Car.) 575, 580.

5. *Gardner v. Cole*, 21 Iowa 205; *Bohn v. Headley*, 7 Har. & J. (Md.) 257, 271.

6. *Anderson v. Hooks*, 9 Ala. 704; *Blackman v. Wheaton*, 13 Minn. 326.

subsequent purchasers are "utterly void" as against such subsequent purchasers; but does not affect *bona fide* transfers for value. These statutes are construed liberally,¹ and alike at law and in equity;² but while at common law fraudulent intent was a mere question of fact,³ under these statutes it became in part a question of law.⁴ The general statutes on the subject in the several States are given the same effect as these statutes in spite of somewhat different wording;⁵ but the modern system of public records has greatly diminished the importance of Statute 27 Eliz., ch. 4.⁶ There are, moreover, such statutes as that in Maryland, which provide that no acquisition of property by wife from husband shall be valid if made in prejudice of the rights of his creditors, and these seem to add nothing to the common law.⁷ Bankruptcy acts may also affect such conveyances, for a conveyance by a husband to his wife of all his property is an act of bankruptcy;⁸ and other collateral statutes may protect creditors.⁹

Existing Creditors.—If a debtor transfers his property for ade-

1. See 1 Bish. M. W., § 739. These statutes, as already intimated, have generally been understood by the courts as in some sense declaratory of the common law, rather than as introducing a new rule; though it is plain that they have a certain effect beyond what the common law would have without them. Still in their main provisions they are doubtless so far in affirmation of the common law as to bring them within the rule of interpretation, "that an enactment in its nature declaratory of the common law will be construed as far as may be according to the common law." In any view, these statutes are within another rule of interpretation, that enactments made to suppress frauds between individuals should be liberally interpreted.

2. *Hopkirk v. Randolph*, 2 Brock Marsh. (U. S.) 132, 139; *Stewart H. & W.*, § 16.

3. *Avery v. Street*, 6 Watts (Pa.) 247, 248; *Stewart H. & W.*, §§ 109, 112.

4. *Myers v. King*, 42 Md. 65, 71. Where articles of household furniture were purchased by a husband in pursuance of an antecedent agreement with his wife that he should advance the money and she would reimburse him, which she afterwards did, it was held, what is "a legal transfer" of property is a question of law, which a jury is incompetent to decide. See also *Jones v. Spear*, 21 Vt. 426, 431; *Beers v. Botsford*, 13 Conn. 146, 154; *Gardiner Bank v. Wheaton*, 8 Me. 373, 581. The accepted rule now is that the presump-

tions of law are rebuttable. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 280; *Kehr v. Smith*, 20 Wall. (U. S.) 31, 35; *Stewart H. & W.*, §§ 116, 112.

5. *Butterfield v. Stanton*, 44 Miss. 15, 30; *Johnston v. Gill*, 27 Gratt. (Va.) 587, 592.

6. *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; 1 Am. Lead. Cas. 17, 48.

7. See *Scheffer v. Seltz*, Md. L. Rec., March 22nd, 1884; *Erdman v. Rosenthal*, 60 Md. 312, 316; *Crane v. Barkdoll*, 59 Md. 534, 535; *Hinkle v. Wilson*, 53 Md. 287, 292; *Trader v. Lane*, 45 Md. 1, 14; *Keller v. Keller*, 45 Md. 259; *Plummer v. Jarman*, 44 Md. 634, 637; *Myers v. King*, 42 Md. 65; *Drury v. Briscoe*, 42 Md. 154; *Sanborn v. Lang*, 41 Md. 106; *Farmers' Bank v. Brook*, 40 Md. 249, 257; *Green v. Early*, 39 Md. 223; *Warner v. Dove*, 33 Md. 579, 586; *Mayfield v. Kilgour*, 31 Md. 240; *Kuhn v. Stamford*, 28 Md. 210. *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; *Jones v. Jones*, 18 Md. 464; *Stockett v. Holliday*, 9 Md. 480; *Worthington v. Bullett*, 6 Md. 172.

8. In *Humes v. Scruggs*, 94 U. S. 22. If a husband, when bankrupt, conveys to his wife property worth from \$15,000 to \$20,000, with no present consideration, but with a recital of part indebtedness to less than a fifth of its value, the transaction is fraudulent and void as to creditors. See also *Parish v. Murphree*, 13 How. (U. S.) 92; *Re Alexander*, 1 Low. (U. S.) 470, 474.

9. *Reich v. Reich*, 26 Minn. 97, 98.

quate valuable consideration, his creditors cannot complain unless his actual intention in making the transfer was to defeat or prejudice their rights, and was shared in by his grantee.¹ Still, in the absence of statute,² a mere preference of a *bona fide* creditor is lawful, irrespective of intent, and even though the debtor divests himself of all his property.³ But where the transfer is voluntary, the law raises in favor of existing creditors a presumption of fraudulent intent,⁴ which, in some old cases, and even now in some States, is, irrespective of the amounts of indebtedness,⁵ of the debtor's means,⁶ and of the property transferred,⁷ conclusive; but which, by the great weight of authority, may be rebutted by showing the purity of the grantor's intent and the reasonableness of the provision.⁸ The rule as stated by the Supreme Court of the United States reads: "The ancient rule that a voluntary postnuptial settlement can be avoided if there was some indebtedness existing has been relaxed, and the rule generally adopted in this country at the present time (1873) will uphold it if it be reasonable, not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors";⁹

1. *Préwit v. Wilson*, 103 U. S. 22, 23.
24. A conveyance executed for a valuable and adequate consideration will be upheld against the creditors of the grantor, however fraudulent his purpose may have been, if the grantee had no knowledge thereof.

2. Statutes often provide against preferences.

3. *Carson v. Murray*, 15 Mo. 378, 381. A debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others, and such disposition of his effect is not impeachable on the ground of fraud, even though it embraces all his property.

4. *Kehr v. Smith*, 20 Wall. (U. S.) 31. A voluntary postnuptial settlement, if it be reasonable, and not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors, will be upheld; it will be held to be in bad faith toward existing creditors, if it is out of all proportion to the means of the husband, considering his state and condition, and seriously impair his ability to respond to the demands of his creditors. See also *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Clarke v. McGeiham*, 25 N. J. Eq. 423, 424; *Leavitt v. Leavitt*, 47 N. H. 329, 333; *Woolston's Appeal*, 51 Pa. St. 452, 456; *Reynolds v. Stansford*, 16 Tex. 386, 291; *Bank v. Batton*, 1 Rob. (Va.) 500, 527; *Wilson v. Buchanan*, 7 Gratt. (Va.) 334, 340.

5. In *Reade v. Livingston*, 3 Johns. (N. Y.) Ch. 481. A voluntary settlement, after marriage, by a person indebted at the time, is fraudulent and void against all such antecedent creditors; and that without regard to the amount of the existing debts, or the extent of the property settled, or the circumstances of the party.

6. *Reade v. Livingston*, 3 Johns. (N. Y.) Ch. 500; the conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up, or traced in any of the cases.

7. *Annin v. Annin*, 24 N. J. Eq. 184, 191, 194. See notes to *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; 1 Am. Lead. Cas. 17; *Costillo v. Thompson*, 9 Ala. 937, 945; *Bogard v. Gardley*, 4 Smeeds & M. (Miss.) 302, 310; *Davidson v. Graves*, Riley (S. Car.) Ch. 219, 224; *Cordery v. Zealy*, 2 Bail. (S. Car.) 205, 208.

8. *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663.

9. *Kehr v. Smith*, 20 Wall. (U. S.) 31, 35.

and this rule is generally adopted,¹ even where a statute expressly provides that a transfer from husband to wife "in prejudice of the rights of subsisting creditors" shall be invalid.² A husband's love and affection for his wife, and a desire to secure her support, is ample reason for a gift to her;³ still his actual intention is a mere question of fact;⁴ but whether the gift is a reasonable one considering his circumstances seems to be a question of law.⁵ It is reasonable if his debts are trifling,⁶ or if he retains enough to readily pay them all;⁷ but unreasonable if his debts are so great as to embarrass him,⁸ or if he is insolvent,⁹ or if the gift leaves him insolvent,¹⁰ or if he denudes himself of all his property,¹¹ or if the property he conveys is easily accessible to creditors, while that which he retains, though ample in amount, is inaccessible to them.¹²

Subsequent Creditors.—A settlement is valid as against those who become creditors after it is made, unless there is an actual intent to defraud them;¹³ and if the settlement is on valuable consideration, unless the intent is shared in by the grantee.¹⁴ Transferring property with the intention of thus withdrawing it from the operation of debts about to be assumed is fraud in fact,¹⁵ and the transfer of all one's property is strong evidence of such fraud.¹⁶ A subsequent creditor cannot attack a settlement on the ground that it defrauds existing creditors;¹⁷ but if a settlement is set aside by existing creditors, subsequent creditors may come in *pari passu* with them.¹⁸

1. *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; 1 Am. Lead. Cas. 17, cases collected. See *Stewart H. & W.*, § 116, and cases there cited in note 13.

2. *Warner v. Dove*, 33 Md. 579, 586, 587.

3. *Enders v. Williams*, 1 Metc. (Ky.) 346, 351.

4. *Hapgood v. Fisher*, 34 Me. 407; 56 Am. Dec. 663; *Carson v. Murray*, 15 Mo. 378, 383; *Pomeroy v. Bailey*, 43 N. H. 118, 122; *Stewart H. & W.*, § 109.

5. *Warner v. Dove*, 33 Md. 579; *Stewart H. & W.*, §§ 109, 114.

6. *Smith v. Reavis*, 7 Ired. (N. Car.) 341, 343.

7. *Secor v. Souder*, 95 Ind. 95, 100.

8. *Wilson v. Buchanan*, 7 Gratt. (Va.) 334, 340.

9. *Bank v. Patton*, 1 Rob. (Va.) 500.

10. *Izard v. Middleton*, Bail. (S. Car.) Ch. 228, 237.

11. *Coates v. Gerlach*, 44 Pa. St. 43, 46; *Re Alexander*, 1 Low. (U. S.) 470, 474; *Ware v. Gardner*, Law R., 7 Eq. 317, 321; *Horn v. Ross*, 20 Ga. 210, 223; *Clayton v. Brown*, 30 Ga. 490, 495; *Wilder v. Brooks*, 10 Minn. 50, 56; *Piegné v. Snowden*, 1 Dessaus. (S.

Car.) Eq. 591; *Crane v. Stickles*, 15 Vt. 252, 257.

12. *Bullett v. Worthington*, 3 Md. Ch. 99; *Annin v. Annin*, 24 N. J. Eq. 184, 194.

13. A conveyance from husband to wife, or a settlement of property upon her, which does not hinder or defraud then existing creditors, is not fraudulent as to subsequent creditors, without proof of actual or intentional fraud. *Moore v. Page*, 11 U. S. 117; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; *Mattlingly v. Nye*, 8 Wall. (U. S.) 375; *Kehr v. Smith*, 20 Wall. (U. S.) 31; *Smith v. Vodges*, 92 U. S. 183; *Jones v. Clifton*, 101 U. S. 225; *Clark v. Killian*, 103 U. S. 766; *Wallace v. Penfield*, 106 U. S. 260. See also *Stewart H. & W.*, § 117, and cases in notes 1 and 2.

14. *Magniac v. Thompson*, 7 Pet. (U. S.) 348, 393.

15. *Pawley v. Vogel*, 42 Mo. 291, 303.

16. *Martin v. Oliver*, 9 Humph. (Tenn.) 561, 565, 566; 49 Am. Dec. 717; *Stewart H. & W.*, § 112.

17. *Lynch v. Raleigh*, 3 Ind. 273, 275.

18. *Elliott v. Horn*, 10 Ala. 348, 352;

Property Exempt.—Any property of a husband, personal¹ or real,² which his creditors could not proceed against,³ he may, as against them, settle upon his wife.⁴ Thus, there is no fraud, in law or in fact, in a conveyance by him to her of the homestead;⁵ or of her earnings,⁶ or cattle if they are exempt;⁷ or of her choses in action, which are not his till reduced to possession, and which his creditors cannot compel him to so reduce.⁸

Fraudulent possession is discussed under the title HUSBAND AND WIFE.

8. Enforcement of and Suits Upon.—The remedies for enforcing a postnuptial settlement depend largely upon the modes of procedure in the different States. As between husband and wife there are some special disabilities which have been discussed under title HUSBAND AND WIFE. Usually such settlements are enforced in equity.⁹ There the wife may have it specifically

Lewis v. Love, 2 B. Mon. (Ky.) 345, 347; 38 Am. Dec. 161; Edwards v. Coleman, 2 Bibb (Ky.) 204, 205; Parkman v. Welch, 19 Pick. (Mass.) 231, 237; McConihe v. Sawyer, 12 N. H. 396; Hope v. Henderson, 2 Dev. (N. Car.) 12, 14; 4 Dev. (N. Car.) 12, 14; 28 Am. Dec. 677; Hester v. Wilkinson, 6 Humph. (Tenn.) 215, 218; Stewart H. & W., § 124.

1. Robb v. Brewer, 60 Iowa 539, 542.

2. Premo v. Hewitt, 55 Vt. 362, 366.

3. Stewart H. & W., §§ 122-124.

4. Jones v. Brandt, 59 Iowa 332, 344; Delashmut v. Tran, 44 Iowa 613, 616; Peterson v. Mulford, 36 N. J. L. 481, 489; Woodworth v. Sweet, 51 N. Y. 8, 10; Smethurst v. Thurston, Brightly (Pa.) 127, 129; Robinett's Appeal, 36 Pa. St. 174, 178, 187; Leavitt v. Jones, 54 Vt. 423, 427; 41 Am. Rep. 840; Dreuzter v. Bell, 11 Wis. 114, 118; Hike v. Miles, 23 Wis. 164, 168.

5. Jones v. Brandt, 59 Iowa 332, 344.

6. Robb v. Brewer, 60 Iowa 539, 542; Premo v. Hewitt, 58 Vt. 362, 366. See Peterson v. Mulford, 36 N. J. L. 481, 489.

7. Leavitt v. Jones, 54 Vt. 423, 427; 41 Am. Rep. 849.

In the case of Leavitt v. Jones, 54 Vt. 423, a man sold nine lambs for a valuable consideration to his wife; and his creditor afterwards attached seven of these and eleven others, the increase of the nine. *Held*:

1. That the sale was valid; that it vested a perfect title in the wife.

2. No change of possession was required, because the nine sheep were exempt, and the ownership of the

young followed their dams.

3. If they were not exempt at the time of the sale, because the husband owned thirty others, they were when attached, and this would enure to the benefit of the wife.

4. As between the vendor and the vendee the sale of the nine lambs was valid; hence the vendor never was the owner of the increase of these nine, which was necessary in order to require a change of possession.

8. Peterson v. Mulford, 36 N. J. L. 481, 489; Woodworth v. Sweet, 51 N. Y. 8, 10; Robinett's Appeal, 36 Pa. St. 174, 178; Smethurst v. Thurston, Brightly (Pa.) 127, 129. See Stewart H. & W., §§ 176, 177.

In Robinett's Appeal, 36 Pa. St. 178, ALLISON, J., in delivering the opinion of the court, said: "The law does not compel a husband to make his wife's choses in action his property; he may say that it was not his, and he may refuse to do any act that will make it his, and such refusal is consistent with his duty to those whom he is indebted; for it is the property of the debtor alone that can be taken by his creditors and applied to the payment of their just demands."

9. In Jones v. Jones, 18 Md. 464, a wife united with her husband in the sale of a farm, of which she was seised in her own right, upon the express agreement and understanding that he would invest a like sum for her use in other land; and in pursuance of this agreement, and in part performance of his contract, the husband purchased a farm and conveyed it by deed to his wife. *Held*, that a court of

performed,¹ or rectified;² and where she and her husband have conveyed her property in trust for her sole separate use, she may after his death have it conveyed back to her;³ so when he has bought property in his name with her money, she may compel him to convey to her.⁴ But the grantor cannot revoke a settlement or have it set aside,⁵ except for fraud.⁶ No one not a party or creditor has any remedies at all.⁷

As to Creditors.—Courts of law and equity have concurrent jurisdiction over fraudulent conveyances;⁸ a creditor may treat the settlement as voidable, and apply to equity to have it set aside,⁹ or as void and attach personalty,¹⁰ or having bought the reality sue in ejectment.¹¹ But if the grantor has never held the legal title,¹² as where a husband has made a purchase and taken

equity will not disturb the title of the wife under this deed in favor of the heirs at law of her husband. A contract may be entered into between husband and wife for the transfer of property from the husband to the wife for a valuable consideration, and such contract, if clearly established by proof, will be enforced in a court of equity. See also *Stewart H. & W.*, §§ 42, 53.

1. *Grain v. Shipman*, 45 Conn. 572, 581.

2. *Hanley v. Pearson*, L. R., 13 Ch. D. 545; 549.

3. *Tucker's Appeal*, 75 Pa. St. 354, 356. Husband and wife conveyed her property in trust for her separate use for life so that it should not be liable for her present or any future husband's engagements, and after her death for such persons and uses as she by her will should appoint, and in default of appointment for the persons who would be entitled to her "real and personal estate under the intestate laws of the place where she may be domiciled" at her death. The husband having died, held that the wife was entitled to a conveyance from the trustee of the trust estate. Equity will relieve from a voluntary and self-imposed trust without consideration when its purpose has been fulfilled and there is no other reason to preserve it.

4. *Cade v. Davis*, 96 N. Car. 139, where a husband contracts with his wife to invest money received from a sale of her land in other land, the title to which is to be taken to the wife, but, instead, he takes the title to himself, he must either execute his contract by conveying the land to her or restore to her the money which he received from her estate.

Bigley v. Jones (Pa.) 5 Cent. Rep. 670. A purchase by a husband of real estate in which his wife had an inter-

est as heir, with an agreement—which is carried out—that the wife's share is to remain in the land, and be applied as part of the purchase money, will establish a resulting trust in the wife. See also *Kline v. Ragland*, 47 Ark. 111, where the purchase money for land conveyed to the husband is paid for in whole or in part by the wife, she has an equity to have a trust declared and enforced against him to the extent of her payment. See also *Keller v. Keller*, 45 Md. 269; *Stewart H. & W.*, § 132.

5. *Garner v. Graves*, 54 Ind. 188, 192; *Hildreth v. Eliot*, 8 Pick. (Mass.) 293, 296; *Bowser v. Bowser*, 82 Pa. St. 57, 59; *Cushwa v. Cushwa*, 5 Md. 44, 50.

In *Cushwa v. Cushwa*, 5 Md. 44, a deed fraudulent as to creditors may be impeached by them, but it is good against all others; it cannot be impeached by the parties to the fraud or by their representatives or heirs at law. The grantor in a fraudulent deed cannot rely upon the fraud either as plaintiff claiming relief against the effect of the deed, or as defendant, resisting the claim of the grantee.

6. *Stone v. Wood*, 85 Ill. 603, 609; *Stewart H. & W.*, § 110.

7. *Currier v. Ford*, 26 Ill. 488; *Thompson v. Moore*, 36 L. e. 47; *Cushwa v. Cushwa*, 5 Md. 44; *Semay v. Bibeau*, 2 Minn. 291; *Graser v. Stellwagen*, 25 N. Y. 315; *Byrod's Appeal*, 31 Pa. St. 341; *Norton v. Kearney*, 10 Wis. 443.

8. *Mulford v. Peterson*, 35 N. J. Eq. 127, 133; *Bump. Fraud. Convey.* 530, 531.

9. *Bump. Fraud. Convey.* 534.

10. *Cook v. Cook*, 43 Md. 522, 528; *Green v. Early*, 39 Md. 223, 229, 250.

11. *O'Hara v. Dilworth*, 72 Pa. St. 397.

12. *Low v. Marco*, 53 Me. 45, 49.

the deed in his wife's name,¹ the creditor must proceed in equity;² so in the case of *bona fide* valuable, but inadequate, consideration.³

9. Construction of.—As to this matter the same rules applicable to antenuptial settlements apply.

10. Conflict of Laws as to.—On this matter see same subject as to antenuptial settlements, and title CONFLICT OF LAWS.

11. Deeds of Settlement.—Deeds of settlement between husband and wife, especially in the case of separation,⁴ are common, and though it is usual to make them through the intervention of trustees, this is not necessary,⁵ but where a trustee is needed the husband is treated as such.⁶ Such deeds are always good in equity if equitable.⁷ To exclude the husband's marital rights in real estate the deed should contain express words,⁸ but every gift of personalty from husband to wife is presumed to be for her sole and separate use.⁹ In other respects such deeds are like deeds between strangers;¹⁰ for example, they may be delivered in escrow;¹¹ they are binding on the parties by estoppel.¹² All the property rights of the parties are often settled by deed.

12. Gifts of Personalty.—Gifts of personalty between husband and wife are usually good in equity if not at law;¹³ but as they are transfers of property without consideration, they are invalid as

1. Stewart H. & W., § 132.

2. Bump Fraud. Convey. 532; Stewart on H. & W., § 132.

3. Wright v. Stanard, 2 Brock. Marsh. (U. S.) 311, 314; Stewart H. & W., § 106.

4. See Stewart M. & D., §§ 182-191.

5. Banon v. Banon, 24 Vt. 375, 398; Jones v. Clifton, 101 U. S. 225, 229. See Stewart M. & D., § 186; Stewart H. & W., §§ 41-43.

In Walker v. Walker, 9 Wall. (U. S.) 743, deeds of separation through a trustee, for separate maintenance of the wife, are legal, and equity will enforce them as to a separation immediately to occur or that has taken place.

6. Crooks v. Crooks, 34 Ohio St. 610, 616; Duffy v. Mechanics' etc. Ins. Co., 8 W. & S. (Pa.) 413, 443.

7. Shepard v. Shepard, 7 Johns. (N. Y.) Ch. 57; 11 Am. Dec. 396; Ewell's Lead. Cas. Cor. 280; Sims v. Rickets, 35 Ind. 181; 9 Am. Dec. 679.

8. Plumb v. Ives, 39 Conn. 120; Hayt v. Parks, 39 Conn. 357; Bowen v. Lebrée, 2 Bush (Ky.) 112; Hutchinson v. Mitchell, 39 Tex. 487; Stewart H. & W., § 201.

9. Helmetag v. Frank, 61 Ala. 67; Deming v. Williams, 26 Conn. 226; Story v. Marshall, 24 Tex. 305.

10. Crooks v. Crooks, 34 Ohio St. 610.

11. See cases cited above.

12. Mulford v. Peterson, 36 N. J. L. 127; Stewart H. & W., § 412.

13. In Kitchen v. Bedford, 13 Wall. (U. S.) 413, the statute law of *Arkansas* has not changed the common law rule that a husband cannot legally make a gift to his wife during coverture. Where a husband has not parted with the legal title to bonds of which he may have made an equitable gift for his wife's benefit, he can call any person to account who unlawfully converts them. Perhaps he might have made an equitable gift for her benefit.

In Hutchins v. Dixon, 11 Md. 29, a *feme covert* may have a separate estate in personal property without a trustee; in such case equity will treat the husband as trustee for her benefit. See also Eddins v. Buck, 23 Ark. 507; Peck v. Brummagin, 31 Cal. 440; Deming v. Williams, 26 Conn. 226; Manny v. Rixford, 44 Ill. 129; Clawson v. Clawson, 25 Ind. 229; Thomas v. Harkness, 13 Bush (Ky.) 23; Dilts v. Stevenson, 17 N. J. Eq. 407; Seymour v. Fellows, 77 N. Y. 178; Paschall v. Hall, 5 Jones (N. Car.) Eq. 108; Coates v. Gerlach, 44 Pa. St. 43; Fox v. Jones, 1 W. Va. 205; Stewart H. & W., § 43. Her equitable title becomes legal after her husband's death. Underhill v. Morgan, 33 Conn. 105, 108; Thomas v. Harkness, 13 Bush (Ky.) 23.

against creditors, whose rights they prejudice.¹ Gifts *causa mortis* differ from gifts *inter vivos* only in that the former are revoked if the donor does not die as expected,² and are therefore not separately discussed.³ The two essentials of a gift are, (1) the donor's intent to vest the title in the donee;⁴ (2) the execution of such intent by actual or constructive delivery.⁵ If a gift is good only in equity, it must be fair,⁶ reasonable,⁷ not extravagant,⁸ in fine, equitable.⁹ But once executed a gift is irrevocable;¹⁰ except under the civil or Spanish law.¹¹

(a) *The donor's intention* to vest the title in the donee must be clearly proved,¹² and is a mere question of fact, as in the case of gifts between strangers.¹³ But special presumptions arise from

1. 1 Parsons Cont. 236; Stewart H. & W., §§ 104, 108, 109, 111, 115, 117.

2. Conser v. Snowden, 54 Md. 175. "In order to render perfect a *donatio mortis causa* three things must concur: 1st. That the gift be made with a view to the death. 2nd. That it be with a condition, either express or implied, that it shall take effect only on the death of the donor, by a disorder from which he is then suffering; and 3rd. That there be a delivery of the subject of the donation."

It is well settled in *Maryland*, that there is no difference in the legal requirement to make a good delivery in gifts *inter vivos* and *mortis causa*. Although a gift *causa mortis* depends for its absoluteness on the death of the giver from the disease threatening life when the gift was made, so that recovery would revoke it, still for the time being and until recovery the absolute dominion over the thing given must be parted with at the time of the gift. 1 Parsons Cont. 236, 237. See GIFTS.

3. They are valid. Marshall v. Jaquith, 134 Mass. 138. Lanson v. Lanson, 1 P. Wms. 441; Miller v. Miller, 3 P. Wms. 356; Walter v. Hodge, 2 Swanst. 92; Whitney v. Wheeler, 116 Mass. 490, 492; Whitaker v. Whitaker, 52 N. Y. 368.

4. Manny v. Rixford, 44 Ill. 129; Skillman v. Skillman, 13 N. J. Eq. 403; Paschall v. Hall, 5 Jones (N. Car.) Eq. 108.

5. See generally Connor v. Trawick, 37 Ala. 289; 1 Ala. Sel. Cas. 258; Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39; Minor v. Rogers, 40 Conn. 512; 16 Am. Rep. 69; Kerrigan v. Rantigan, 43 Conn. 17; Wheeler v. Wheeler, 43 Conn. 503; Evans v. Lipscomb, 28 Ga. 71; Cranz v. Kroger, 22 Ill. 74; Taylor v. Henry, 48 Md. 550;

3 Am. Rep. 486; Davis v. Ney, 125 Mass. 590; 28 Am. Rep. 272; Kimball v. Leland, 110 Mass. 325; Crittenden v. Phoenix Life Ins. Co., 41 Mich. 442; Curry v. Powers, 70 N. Y. 212; 26 Am. Rep. 577; Campbell's Appeal, 80 Pa. St. 298, 306; Tillinghast v. Wheaton, 8 R. I. 536; 5 Am. Rep. 621.

6. Clawson v. Clawson, 25 Ind. 229, 239; Hatch v. Gray, 21 Iowa 29, 32.

7. Coates v. Gerlach, 44 Pa. St. 43, 45.

8. Paschall v. Hall, 5 Jones (N. Car.) Eq. 108, 110.

9. Stewart H. & W., § 43.

10. Garner v. Graves, 54 Ind. 188, 192. See Rivers v. Carleton, 50 Ala. 40; Chew v. Chew, 38 Iowa 405, 406.

11. Fuller v. Ferguson, 26 Cal. 546, 547; Bradshaw v. Mayfield, 18 Tex. 21, 25; Ferris v. Parker, 13 Tex. 385.

12. Jennings v. Davis, 31 Conn. 134, 142; Manny v. Rixford, 44 Ill. 129, 133; Skillman v. Skillman, 13 N. J. Eq. 403, 407; Neufville v. Thomson, 3 Edw. (N. Y.) Ch. 92, 94; Paschall v. Hall, 5 Jones (N. Car.) Eq. 108, 109; Earl v. Champion, 65 Pa. St. 191, 194; Bradshaw v. Mayfield, 18 Tex. 21, 25.

13. In *Stickney v. Stickney*, 131 U. S. 227, there is no higher presumption that a married woman in the *District of Columbia* intends, by placing her separate money in the hands of her husband, thereby to make a gift of it to him, than there is that a third person has such intent when he in like manner deposits money with him. In the *District of Columbia*, whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. See also 2 Schoul. Pers. Prop. 88; 1 Parsons Cont. 234.

the relation of the parties.¹ Thus, if a husband buys property in his wife's name, a gift thereof to her is *prima facie* presumed;² so if he takes a promissory note for a debt due him payable to her,³ or puts stock in her name,⁴ or deposits money to her credit;⁵ so if a note is taken payable to him and her, though he may dispose of it during his life,⁶ and perhaps by will,⁷ she takes it as survivor.⁸ Still, these presumptions may always be rebutted and the real intent shown.⁹ On the other hand, when a wife consents to her husband's expending her money, a gift of it to him is presumed, unless she shows that their intent was different;¹⁰ for example, that he received it as her agent,¹¹ or as a loan.¹² So a gift is presumed if by her consent he changes her realty into personalty,¹³ where personalty is by law his;¹⁴ but the mere pos-

1. *Irvine v. Greeves*, 32 Gratt. (Va.) 411, 417; *Welch v. Welch*, 63 Mo. 57, 61. Where gifts from the husband to the wife will be upheld in equity the same result will attend a gift to her from a third person, which the husband assents to and treats as belonging exclusively to her.

2. *Jackson v. Jackson*, 91 U. S. 122. Although by the common law, the money which a wife has at the time of her marriage, not secured to her by a settlement or contract, and that which she subsequently earns, belongs to the husband, it is competent and lawful for him to allow its investment in the purchase and improvement of real property for her separate use, if the rights of existing creditors are not thereby impaired. The doctrine of resulting trusts has no application to an investment of this kind; it constitutes a voluntary settlement upon the wife, whether made through the husband or directly by the wife with his consent. See also *Stewart H. & W.*, § 132.

3. *Phelps v. Phelps*, 20 Pick. (Mass.) 556, 559. A married woman lent the interest accruing after her marriage upon a note held by her before her marriage, and the borrower gave her therefor a promissory note, which was made payable to her, in accordance with the wishes of her husband, in order that she might be the exclusive owner thereof, and the husband frequently declared that the money as well as the interest thereon was her separate property, and that he did not intend to claim or receive any part thereof to his own use; but he also stated to a third person that no agreement had been made with the wife in relation to the money either before or after the marriage. After the death of the husband,

the borrower paid to the wife the amount due on his note, she having retained it in her custody. It was held that she was entitled to retain the amount so paid for her own use as against the executor of the husband. *Love v. Francis* (Mich.), 5 West Rep. 758.

A note taken by the husband upon the sale of his property to his wife is *prima facie* evidence of a gift to her. See also *Rynders v. Crane*, 3 Daly (N. Y.) 339, 347; *Scott v. Simes*, 10 Bosw. (N. Y.) 314.

4. *Schick v. Grote*, 42 N. J. Eq. 352. A deposit by a husband in a savings bank, upon the account of himself and wife, is not evidence of a gift to the wife, he retaining the power to draw the money at will, and in fact drawing the interest upon it on several occasions. See also *Mason v. Fuller*, 36 Conn. 160, 163; *Jennings v. Davis*, 31 Conn. 134, 142, 143; *Neufville v. Thompson*, 3 Edw. (N. Y.) Ch. 92, 94.

5. *Howard v. Windham Co. Savings Bank*, 40 Vt. 597, 599; *Stewart H. & W.*, § 128.

6. *Towle v. Towle*, 114 Mass. 167, 168.

7. *Pile v. Pile*, 6 Lea (Tenn.) 508, 511; 40 Am. Rep. 50.

8. *Sanford v. Sanford*, 58 N. Y. 69, 72; 45 N. Y. 723; *Stewart H. & W.*, §§ 118, 132.

9. *Snider v. Ridgeway*, 49 Ill. 522, 524; cases cited in *Stewart H. & W.*, § 128.

10. *Tyson v. Tyson*, 54 Md. 35, 38; *Mellinger v. Bansman*, 45 Pa. St. 522, 529.

11. *Stewart H. & W.*, § 86.

12. *Stewart H. & W.*, § 42.

13. See change of realty into personalty in *Stewart H. & W.*, § 136.

14. *Latimer v. Glenn*, 2 Bush (Ky.) 535.

session and user of her chattels by him is of itself no evidence of a gift from her to him.¹

(b) *Delivery Must be Clearly Proved.*²—A mere declaration, as, "I give you this property," without delivery is merely an inchoate gift,³ and is treated as a promise to make a gift⁴—a promise which not even courts of equity enforce.⁵ The same is true though the declaration be in writing,⁶ but not if the writing be under seal, by virtue of the principle of estoppel.⁷ Declarations are usually evidence only of intent;⁸ delivery must be proved by facts showing actual, constructive, or symbolic change of possession.⁹ When, however, a husband purchases property for his wife as a gift, delivery to him is delivery to her, and subsequent possession by him is her possession.¹⁰ So that, when a husband bought a horse for his wife, the gift was upheld, though he kept the horse in his stable.¹¹ But it might have been otherwise had he first bought it for himself and then given it to her;¹² as when he gave her a wagon, but retained possession thereof and used it as before.¹³ Except in the case of personal ornaments and apparel,¹⁴ it is very difficult to prove actual delivery between husband and wife who are living together; as, for example, delivery of household furniture, and especially so when the question of fraud against creditors arises. And it may be said that the only safe delivery is by instrument under seal as between the parties,¹⁵ and

1. *White v. Zone*, 10 Mich. 333, 335; *Allen v. Mills*, 36 Miss. 640, 644; *Stewart H. & W.*, § 119.

2. *Dickeschild v. Exchange Bank*, 28 W. Va. 341. The mere possession of the subject of the alleged gift, unaccompanied by proof of its delivery by the donor to the donee, is insufficient to establish it as a gift either *inter vivos* or *causa mortis*.

Schick v. Grote, 42 N. J. Eq. 352. To constitute a perfect gift the donor must part with the possession of and dominion over the property. See also *Dilts v. Stevenson*, 17 N. J. Eq. 407, 413, 414. See *Cotteen v. Missing*, 1 Madd. 174, 183; *Woodruff v. Clark*, 42 N. J. L. 198, 202. See cases cited in note 5, p. 568.

3. *In re Pierce*, 7 Biss. (U. S.) 426, 427; *Machen v. Machen*, 38 Ala. 364, 368; *Woodson v. Pool*, 19 Mo. 340, 345; *Dilts v. Stevenson*, 17 N. J. Eq. 407, 414; *Wade v. Cantrell*, 1 Head 346, 347. See *Prater v. Frazier*, 11 Ark. 249; *Henderson v. Henderson*, 21 Mo. 379. Husbands' naked declarations are no evidence as against third parties of wife's title. *Hanson v. Millett*, 55 Me. 184, 190; *Parvin v. Capewell*, 45 Pa. St. 89, 93.

4. 2 Schoul. Pers. Prop. 71.

5. *Cotteen v. Missing*, 1 Madd. 176, 183; *Breton v. Woolven, L. R.*, 17 Ch.

Div. 416, 421; *Crooks v. Crooks*, 34 Ohio St. 610, 615.

6. *Breton v. Woolven, L. R.*, 17 Ch. Div. 416, 421.

7. *Fox v. Fox, L. R.*, 1 Ch. Div. 302, 306; *Enders v. Williams*, 1 Metc. (Ky.) 346, 350; *Mulford v. Peterson*, 35 N. J. L. 127, 136. See also *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; 2 Schoul. Per. Prop. 84; *Stewart H. & W.*, § 409.

8. See *Olds v. Powell*, 7 Ala. 653; *Burney v. Ball*, 24 Ga. 505; *Morisey v. Bunting*, 1 Dev. (N. Car.) 3; *Sims v. Saunders, Harp. (S. Car.)* 374; 2 Schoul. Per. Prop. 85.

9. In *Wogel v. Gast*, 20 Mo. App. 104, delivery in some cases may be symbolical. See 1 *Parsons Cont* 234; 2 Schoul. Per. Prop. 69 *et seq.*; *Stewart H. & W.*, § 120.

10. *Scott v. Simms*, 10 Bosw. (N. Y.) 314, 320. See *Wheeler v. Wheeler*, 43 Conn. 503, 509; *Stewart v. Ball*, 33 Mo. 154, 156.

11. *Wheeler v. Wheeler*, 43 Conn. 503.

12. *Wheeler v. Wheeler*, 43 Conn. 509.

13. *Dilts v. Stevenson*, 17 N. J. Eq. 407, 414.

14. *In re Pierce*, 7 Biss. (U. S.) 426, 427; *Rogers v. Fales*, 5 Pa. St. 154, 158.

15. In *Hutchins v. Dixon*, 11 Md.

by recorded instrument as against creditors.¹ Delivery by order is not perfected until the order is accepted or executed;² until such time it may be revoked and is revoked by the donor's death.³

30. The acknowledgment and recording of a deed import delivery, and are *prima facie* evidence of all circumstances necessary to give it validity. In *Warner v. Hardy*, 6 Md. 525, and *Stewart v. Redditt*, 3 Md. 67, it was decided that these formalities (the acknowledgment and recording) import delivery to the grantee. See also *Miller v. Andrus*, 1 La. An. 237; *Woodson v. McClelland*, 4 Mo. 495; *Brummet v. Barber*, 2 Hill (S. Car.) 543. See *Stewart H. & W.*, §§ 102, 129, 125.

1. *Hatch v. Gray*, 21 Iowa 29, 32; *Lyman v. Cessford*, 15 Iowa 229, 234; *Stewart H. & W.*, § 121.

2. See *Chalmers Bills and Notes*, 261, 262; *Bromley v. Brunton*, 37 Law J., Ch. 902; *Law R.*, 6 Eq. 278; *Hughes v. Stubbs*, 11 Jur., N. S. 913; *Harvard v. Pace*, 15 Ga. 486. It is a revocable agency.

3. In *Taylor v. Henry*, 48 Md. 550, I H, being in feeble health and contemplating a departure from home for the benefit of his health, made a deposit in a savings bank in Baltimore of \$1,850. In the depositor's bank book, furnished him at the time, the account was opened and the money credited to J H and M H, his mother, and the survivor of them, subject to the order of either. Corresponding entries were made upon the books of the bank. Some time after the deposit J H went again to the bank, accompanied by his sister, M T, and had the name of his mother erased and that of his sister substituted; so that the account was made to stand in the books thus: "14096—J H, M T, and the survivor of them, subject to the order of either. 1866, April 20th, received eighteen hundred and fifty dollars—\$1,850." Of this amount J H drew out \$50 on the 2nd of June, leaving a balance on deposit of \$1,800. After the death of J H, that is on the 28th of September, 1866, M T obtained the bank book from the trunk of the deceased, where it had been constantly kept, and drew from the bank the entire balance with interest thereon. The deceased left no property other than this money, and by his will made sundry pecuniary bequests. On a bill filed by his administrators against M T and her husband to recover back the money

drawn from the bank by her, it was held:

1st. That the right to the money depended upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank book, and all the circumstances surrounding the deceased at the time. 2nd. That if the words "and the survivor of them" had been omitted in making the entry in the bank book, the entry in the book would not be sufficient evidence of a complete and perfect gift. 3rd. That those words, when taken in connection with those which precede and those which follow them in the entry, do not import either a gift *inter vivos* or a gift *causa mortis*. 4th. That to make a gift *inter vivos* perfect and complete, there must be an actual transfer of all dominion over the thing given by the donor and an acceptance by the donee, or some competent person for him; and it is essential to the validity of such gift that it should go into effect, that is, transfer the property at once and completely. 5th. That having by the terms of the entry retained in himself the power to draw out the money, the deceased did not divest himself of dominion and control over the fund. 6th. That as the mother's name had been erased and that of the sister substituted, so the name of the sister could have been erased without the slightest question of the brother's right to do so. That the conclusion to be drawn from all the facts and circumstances of the case was, that the form of the entry in the bank book was nothing more than a device or an arrangement by the deceased to subserve a matter of convenience to himself, and that the sister was solely constituted an agent with power to draw money from the bank to meet some supposed or apprehended emergency that might possibly arise in his absence from home.

See also *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486; *Jones v. Sock*, L. R., 1 Ch. 25; *Black v. Black*, L. R., 13 Eq. 489; *Smith v. Smith*, 3 Stew. (N. J.) 564; *Wellboin v. Odd Fellows B. & E. Co.*, 56 Tex. 501, 505.

In *Wellboin v. Odd Fellows B. & E. Co.*, 56 Tex. 501, the mere deposit of money by a husband to the account of

Delivery is not perfect unless accepted by the donee.¹

13. Bank Deposits of Husband and Wife.—A deposit by a husband of his own money in the names of himself and wife is not in itself a gift to her,² and if it is simply payable to her she is a mere

his wife, a receipt of the same being taken in her name, does not of itself show that it was intended as a gift to the wife as her separate property. The husband having died, leaving a widow and two children, and no other property except a homestead and that deposit, *held*, that a party to whom the widow had assigned the receipt should have no right to recover any part of the deposit as against the claims of creditors.

1. If the agent of the donee residing with the donor be authorized to accept and receive the gift, so that actual delivery thereof to him is a delivery to such donee, and the gift is in fact so delivered to and accepted by him at the place of the donor's residence, his possession thereof at such place of residence will be insufficient to make it a valid gift. *Dickeschied v. Exchange Bank*, 28 W. Va. 341; 2 Schoul. Pers. Prop. 88.

2. In *Schick v. Grote*, 42 N. J. Eq. 352, a husband deposited in the name of himself and wife \$1,000 in a savings bank, he did this because he could not deposit any more than he already had in his own name; nothing was drawn from the account before his death except some interest, which he drew. *Held*, not a gift to the wife. To same effect. *People v. State Bank*, 36 Hun (N. Y.) 607.

The form of the account to which the deposit was made is not evidence of gift to the wife from the husband. *Brabrook v. Boston etc. Sav. Bank*, 104 Mass. 228; *Brown v. Brown*, 23 Barb. (N. Y.) 565; *Marshall v. Cantwell*, L. R., 20 Eq. 328; *Smith v. Speer*, 34 N. J. Eq. 336; *Dilts v. Stevenson*, 17 N. J. Eq. 407.

Where a wife deposited money of her husband, consisting mainly of her own earnings, in a savings bank, in her own name, without his knowledge, *held*, not a gift, but to belong to the husband. *McDermott's Appeal*, 106 Pa. St. 358, 51 Am. Rep. 526.

Where money belonging to the husband is deposited in the name of the wife, the drawing checks thereon by her in payment of his debts and household expenses is evidence to show that

the wife is a mere agent of the husband, and that the money so deposited and remaining in the bank belongs to his estate, and not to the wife's. *Lloyd v. Doghe*, L. R., 8 Ch. Ap. 88; 8 Moak, Eng. Rep. 775; 14 Eq. 241. See *Galliland v. Gilliland*, 66 Mo. 522.

Where a husband deposited in a savings bank money to his credit, so that it could be drawn either by himself or his wife, and the deposit book was given to him, it was *held* (1) that this was not a valid gift of the money to the wife—a delivery of the money, or at least of the evidence of the deposit, being indispensable to such a gift; and (2) that the wife was a mere agent of the husband, in respect to the sum deposited, without any beneficial interest therein. *Brown v. Brown*, 23 Barb. (N. Y.) 565, 568, 569. See *Green v. Green*, 11 Week. Dig. 374.

Where S deposited \$1,000 in a bank and took a certificate of deposit as follows: "S has deposited in this bank \$1,000, payable to the order of himself or his wife on return of this certificate," and after the death of S his wife presented the certificate and got the money, it was not only held not to be a gift from husband to wife, but that the wife had no authority to draw the money after her husband's death, and the bank had to pay the money over again to her husband's administrator. *Second National Bank v. Wrightson*, 63 Md. 81, 84. See also *Murray v. Cannon*, 41 Md. 466.

Putting deposit in name of both and the survivor of them might be evidence of a gift to the survivor, but if it appears that the husband merely made the deposit in this form as a matter of convenience, it was held not a gift to his wife who survived. *Taylor v. Henry*, 48 Md. 550.

Where a husband deposits his money in a bank and takes a receipt in his wife's name, this does not constitute a donation to his wife, but the money remains community property, and subject on his death to be administered as belonging to his estate. *Wellboin v. Odd fellows B. & E. Co.*, 56 Tex. 501.

A husband has no right except at common law to deposit in his wife's

agent to draw it,¹ and her agency ceases on his death.² If the deposit is made in her name alone, its effect depends on the circumstances of the case; *prima facie*, except where the community system prevails, it is a gift to her,³ good against his heirs,⁴ though not against his creditors;⁵ but it may be shown that it was not a gift to her,⁶ as where it was entrusted to her for the support of the family.⁷ Of course as between her and the bank she may draw it, if the deposit is in her sole name.⁸ So if she deposits his money with his consent in her name, the deposit is deemed a gift to her.⁹ But a gift by a husband to his wife of a deposit in his name, must be perfected by delivery.¹⁰ A check alone is not delivery, and if he dies before his wife draws the money or has the check accepted, the gift does not take effect.¹¹

14. Mingling of Husband's and Wife's Property.—Some difficult questions sometimes arise where the property of a husband and a wife has been so mingled as to be beyond identification, but these questions will be found soluble upon principles already discussed.¹² If an ascertainable sum of a wife's money is mingled

name made by her. *Ganley v. Troy etc. Bank*, 98 N. Y. 487.

1. See cases cited above.

2. *Second National Bank of Baltimore v. Wrightson*, 63 Md. 81, 84.

A being at the point of death and desiring to give B a sum of money gave him a check on his bank. *Held*, the delivery of the check was not sufficient delivery of the money to render the gift valid and effectual. *Re Mather*, 30 Hun (N. Y.) 632.

It was held in *Harris v. Clark*, 3 N. Y. 93, that a written order upon a third person made by the donor was not the subject of a valid gift, either *inter vivos* or *mortis causa*. *Hewitt v. Kage*, L. R., 6 Eq. 198; *Second Nat. Bank v. Williams*, 13 Mich. 282, 291; *Conser v. Snowden*, 54 Md. 175, 183. A check, or order to pay money, is not good as a gift. An endorsement is simply an order to pay money. A check does not amount to an assignment of the funds; until payment it is revocable by the drawer. *Lunt. Bank of N. A.*, 49 Barb. (N. Y.) 221; *Phelps v. Phelps*, 28 Barb. (N. Y.) 123; *Fulton v. Fulton*, 48 Barb. (N. Y.) 581, 592; *Beak v. Beak*, 2 Moak, Eng. Rep. 390, 393, note; L. R., 13 Eq. 489.

It is otherwise as to the delivery of a certificate of deposit, or choses in action which are evidence of indebtedness enforceable against the institution or individual by whom they are issued. *Westerlo v. De Witt*, 36 N. Y. 340; *Champney v. Blanchard*, 39 N. Y. 111. See GIFTS.

3. *Wellboin v. Oddfellows B. & E. Co.*, 56 Tex. 501, 504.

4. *Fisk v. Cushman*, 6 Cush. (Mass.) 20, 25; *Howard v. Windham Co. Savings Bank*, 40 Vt. 597, 599.

5. *Ames v. Chew*, 5 Metc. (Mass.) 320, 323; *Spelman v. Aldrich*, 126 Mass. 113, 117; *ante*, § 7.

6. *Way v. Peck*, 47 Conn. 23, 25; *McClusky v. Provident Instit. for Savings*, 103 Mass. 300, 306.

7. In *McCubbi v. Patterson*, 16 Md. 179, where a laborer was employed on condition that his notes should be payable to his wife to be used for the support of himself, wife and children, and part of these wages were deposited in bank in the name of his wife without his knowledge, it was held no gift. See *Bates v. Bank of Brockport*, 89 N. Y. 286.

8. *Sweeny v. Boston etc. Sav. Bank*, 116 Mass. 384, 386.

9. *Jennings v. Davis*, 31 Conn. 134, 142, 143.

10. See DELIVERY, *ante*, § 12.

11. *Chalmers Dig. Bills etc.*, art. 262; citations *supra*, n. 3.

12. See discussion of equivocal possession of husband and wife, under title HUSBAND AND WIFE, vol. 9. While modern statutes give married women practically the full rights of unmarried women over their property it is generally held that the marriage relation, its intimacy, etc., is not to be unnecessarily affected, and that wives can waive their rights. So that many cases hold strongly that where a wife

by her husband with his own without her consent,¹ or upon no understanding that it shall be returned,² she is to the extent of such sum her husband's *cestui que trust* or creditor; but her consent alone to such a course is merely evidence of a waiver of her rights and of a gift to him.³ If, however, the amount of money so mingled is not ascertainable, she cannot recover from him or his estate.⁴ In many cases a married woman must keep her separate property separate.⁵

15. Settlements of Earnings, Labor, etc.—When a wife's services belong to her husband he may abandon all rights to her future earnings.⁶ If by statute a wife's "separate" earnings are hers,

places money in her husband's hands and nothing is said, there is a presumption of a gift. Thus, in *Tyson v. Tyson*, 54 Md. 35, 38, it is said: "If the husband received and applied the fund, whether money, goods or chattels, or collected choses in action, with the wife's privity and consent, and without an agreement or promise to repay or restore it, no legal obligation rests on the husband to restore it; no right of action enures to her, and to that extent her rights are extinct. *Edelen v. Edelen*, 11 Md. 415, 420; *Kuhn v. Stansfield*, 28 Md. 210; *Oswald v. Hoover*, 43 Md. 360." See *Harden v. Darwin*, 66 Ala. 55, 63; *Adlard v. Adlard*, 65 Ill. 212, 216, 217; *Jacobs v. Miller*, 50 Mich. 119, 124. See *ante*, § 12.

But a different view seems to be taken in *Stickney v. Stickney*, 131 U. S. 227, where it is said: "But we are of opinion that, in the absence of her testimony, there would be no presumption since the passage of the Married Woman's act, that she intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person, who in like manner deposited money with him.

We think that wherever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him."

In a similar case where a husband received his wife's money in her presence and appropriated it without either saying a word, the court said: "She was not bound to attempt a rescue of it from him, or proclaim that it was not a gift. She might rest on the idea that his receipt in her presence was with the intent to take care of it for her. . . .

If it was not a gift the husband was a trustee for his wife, and whether he kept the money in his pocket or put it into real estate which he had purchased, honesty required that he should account to her for it. He could be compelled to do so in equity." *Bergey's Appeal*, 60 Pa. 408. See *post*, § 17.

1. *Gover v. Owings*, 16 Md. 91, 99.

2. *Hill v. Hill*, 38 Md. 183, 185; *supra* cases, *Dent v. Slough*, 40 Ala. 518, 523; *Chambers v. Richardson*, 57 Ala. 85, 90.

3. *Hawkins v. Providence etc. R. Co.*, 119 Mass. 596, 598; 20 Am. Rep. 353. But see *Stickney v. Stickney*, 131 U. S. 227, *supra*.

If a husband invests a mixed fund in his wife's name, his creditors can attach the investment only to the extent of his interest. *Bridges v. Phillips*, 25 Ala. 136, 138.

4. *McClusky v. Provident Instit. for Savings*, 103 Mass. 300, 306; *Glover v. Alcott*, 11 Mich. 470, 479.

5. *Birkback v. Ackroyd*, 11 Hun (N. Y.) 365, 366. Nor can she claim that her earnings have been given her by her husband if they are mingled with his, as there is no gift without delivery. *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Pawley v. Vogel*, 42 Mo. 291, 302.

A wife does not, however, waive her rights to her chattels by allowing her husband to use them, as in the case of furniture. *Fitch v. Rathbun*, 61 N. Y. 579, 581. Unless she gives them to him, *Shirley v. Shirley*, 9 Paige (N. Y.) 363, 365.

In a case where a husband and wife died about the same time, each leaving a separate estate, they were held equally entitled to a fund found in her trunk. *Bergen v. Van Liew*, 36 N. J. Eq. 637, reversing same case at p. 251.

6. *Peterson v. Mulford*, 36 N. J. L. 481, 487, 489; *Quidort v. Pergeaux*, 18

she has thereby no interest in money earned jointly with her husband;¹ and usually when husband and wife are in business together without any special understanding, it is presumed that the wife intended to give her services to her husband.² A husband may give his wife his own services, whether he does so or not raising many questions.

(a) *General Rule*.—A husband may, as his wife's agent, manage her separate property or separate business with or without compensation;³ but neither he nor any creditor of his has, in the absence of special agreement, any right in the property managed, earned or accumulated through his agency.⁴ Partnerships between husband and wife are not included within this discussion.⁵

(b) *Express Contract*.—Contracts between husband and wife are in most States void,⁶ and therefore there is usually no express contract by a wife to pay her husband for his services. In cases when such contract can and does exist, she may even be made his garnishee;⁷ but in the absence of such contract neither he nor any creditor of his has any right against her or her property.⁸

(c) *Implied Contract*.—There is no implied contract that a wife will pay her husband for his services.⁹ His first duty is to support her and his family,¹⁰ and in helping her to make her property productive he is but discharging this duty, and is presumed amply compensated with the home and support she allows him.¹¹ Moreover, as one's talents and capacity to labor are not property, and as therefore no debtor can be made to work for his creditors,¹² a husband who is entitled to his wife's services may give them to her even against his creditors,¹³ and may likewise give her his own labor,¹⁴ but not his accumulations.¹⁵

N. J. Eq. 472, 479. Not if actual fraud. *Hozelbaker v. Goodfellow*, 64 Ill. 238.

The decisions are inharmonious. Such a gift has been held void against creditors. *Basham v. Chamberlain*, 7 B. Mon. (Ky.) 443, 444. Void against existing creditors. *Glaze v. Blake*, 56 Ala. 379, 385. Void against subsequent creditors. *Keith v. Woombell*, 8 Pick. (Mass.) 211, 213. Not void against subsequent creditors unless actual fraud. *Glaze v. Blake*, 56 Ala. 379, 385. Good against devisees. *Jones v. Reid*, 12 W. Va. 350, 364. Her earnings not liable to be attached for his debts if his earnings are exempt. *Hoyt v. White*, 46 N. H. 45, 47.

1 See *Wife's Earnings*, title *HUSBAND AND WIFE*, vol. 9.

2. *McClusty v. Provident Instit. for Savings*, 103 Mass. 300, 304; *Hollowell v. Horter*, 35 Pa. St. 375, 380.

3. See *Agency of Husband for wife*, title *HUSBAND AND WIFE*, vol. 9.

4. Full discussion in *Miller v. Peck*, 18 W. Va. 76, 85, 96. See note 1, p. 576.

5. See title *MARRIED WOMEN*.

6. See title *HUSBAND AND WIFE*, vol. 9.

7. *Lewis v. Johns*, 24 Cal. 78, 103; *Keller v. Moyer*, 55 Ga. 406, 410; *Miller v. Peck*, 18 W. Va. 75, 100.

8. *McIntyre v. Knowlton*, 6 Allen (Mass.) 565, 567; *Webster v. Hildreth*, 33 Vt. 457, 458. See note 1, p. 576.

9. *Lewis v. Johns*, 24 Cal. 98, 103.

10. See title *HUSBAND AND WIFE*, vol. 9.

11. *Cooper v. Ham*, 49 Ind. 393, 416; *McIntyre v. Knowlton*, 6 Allen (Mass.) 565, 566.

12. *Abbey v. Deyo*, 44 N. Y. 343, 347; *Rush v. Vought*, 55 Pa. St. 437, 445; *Hodges v. Cobb*, 8 Rich. (S. Car.) 50, 56.

13. *Peterson v. Mulford*, 36 N. J. L. 481, 487; *Hoyt v. White*, 46 N. H. 45, 47.

14. *Miller v. Peck*, 18 W. Va. 75, 99.

15. In *Isham v. Shafer*, 60 Barb. 317;

(d). *Apparent or Pretended Agency*.—A husband may thus, as his wife's agent, manage her property or business without acquiring any rights in said property or business, or subjecting it to the claims of his creditors.¹ But while apparently her agent and

Rush v. Vought, 55 Pa. St. 437, 445; Holdship v. Patterson, 7 Watts (Pa.) 547.

1. In *Baxter v. Maxwell* (Pa.), 6 Cent. Rep. 743, a married woman who, by judicial decree, has secured the benefits of the act of April 3rd, 1872, may employ her husband to manage and superintend the business in which she is engaged; and his creditors cannot seize in execution her property produced by his superintendence and labor over and upon her separate property, although the business was such as the husband alone had skill and knowledge to conduct.

In *Spering v. Laughlin*, 113 Pa. St. 209, held that the husband assists in managing the wife's business is evidence for the jury in determining the good faith of her claim of property. A husband may act as agent for his wife and give his wife his labor and skill without injuring her title to her own property; and his creditors cannot sell her property produced by his labor and skill with her original property.

In *Leeds v. Kahler*, 76 Pa. St. 262, a married woman owned land which she farmed, her husband managing for her; he had long been insolvent and without credit; her credit was good. He purchased a horse for her and signed a note for the price, "John E. Seeds for Josephine Seeds." She received the horse and used it on the farm and acknowledged her liability for its payment. The horse was seized for the husband's debt before it was paid for. In an issue on a sheriff's interpleader, *held*, where a wife has separate estate and buys goods on its credit, she may hold them against the creditors of the husband. To protect goods from the husband's creditors, it is incumbent on the wife to establish that their purchase was on the credit of her separate estate.

In *Lewis v. Johns*, 24 Cal. 98, it was held that in the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his supervision of and labor bestowed upon her separate property.

In *Keller v. Mayer*, 55 Ga. 406, the husband may be his wife's agent or employé in the management of her

separate estate; and if she becomes indebted to him for services by contract, express or implied, she is subject to garnishment at the instance of his creditors.

In *Bongard v. Core*, 82 Ill. 19, a married woman may own real and personal property under the statute, and have her husband act as her agent in transacting the business growing out of such property, such as preserving and transferring the same, without subjecting it to the payment of his debts. If a married woman buys land and pays for the same from the products when sold, even though her husband acts as her agent in its control and management, bestowing a portion of his time, the land will not become his, and the products thereof will not be liable for his debts. The fact that a crop is raised on the land of the wife under the supervision of her husband, he contributing some personal labor in controlling and managing the business, will not make the crop his and subject it to the payment of his debts. Where a crop raised upon the land of a married woman is taken in execution as the property of the husband, and the proof tends to show that she employed and paid for the labor that produced the same, through her husband, the fact whether he was her agent in the matter should be submitted to the jury, and it is error to refuse an instruction upon the hypothesis of his agency.

In *Cooper v. Ham*, 49 Ind. 393, a wife may employ her husband to act as her agent in operating a mill owned by her, and such employment is not proof of an attempt on her part to defraud his creditors. The husband in such case has the right to give his personal services and skill to the management of his wife's property without any other compensation than the support and maintenance of himself and family.

In *Carn v. Royer*, 55 Iowa 650, facts considered under which it was held that the leasing of a farm by a wife, and its cultivation by minor sons and hired labor, with some assistance from her husband, was not in fraud of her husband's creditors, and did not render the products of the farm subject to his debts.

pretending to act in that capacity he may be conducting a business of his own under her name simply for the purpose of evading

In *Abbey v. Deyo*, 44 N. Y. 343, by the existing statute law of New York a married woman may acquire the title to personal property by grant or purchase; and this purchase may be made in any of the ordinary modes known to the law, or to the course of business. It may be made by the payment of cash for the property purchased, or she may buy it on her own credit. And if a purchase be made by her, and the credit given to her with the object of vesting the title in her, she will acquire thereby a title to the property in her own name and as her sole and separate property. So the purchase may be made by herself in person, or by her authorized agent; and her husband may be that agent. She may carry on the trade or business of a merchant. She may conduct it with the property and means which she has fairly acquired by purchase; and she may carry it on herself by her personal labor and services exclusively, or exclusively through the medium of agents, or partly in each mode. She may make her husband her agent to conduct such business; and if she does so *bona fide*, without permitting her name to be used as a cover for fraud, intending to compensate him (or through him his creditors), and not to absorb the proceeds of his labor and earnings in the business for her own benefit, excluding his creditors therefrom, the transaction is lawful, and will be upheld by the law.

In *Webster v. Hildreth*, 33 Vt. 457, if a husband improves his wife's land without any agreement with her through trustees or otherwise that his labor and money expended thereon shall vest in him any interest therein or entitle him to any claim against or compensation from her property, he gains no right or title thereto which his creditors can reach by attachment or by the aid of a court of equity.

In *Miller v. Peck*, 18 W. Va. 75, a married woman having personal property, which she is allowed by statute to hold as her separate property, may barter and trade with reference thereto through her husband as her agent, and will be entitled to the increase thereof, though living with her husband. Although the husband may have given his own labor in such barter and trade,

or may have used the labor of his horses therein, in the absence of the fraud of the wife, this does not change the character of the property, and the property is not liable for the debts of the husband.

In *Penn v. Whiteheads*, 12 Gratt. (Va.) 74, a husband carries on the mercantile business as agent for his wife, and he is aided by his sons who are minors. The business is profitable and property is accumulated from its profits. The husband has an interest in this property which may be subjected by his creditors to the payment of his debts.

In *Wilson v. Loomis*, 55 Ill. 352, 354, notwithstanding the act of 1861, if a married woman advance her own separate money and place the same in the hands of her husband for the purpose of carrying on any general trade, although in the wife's name, and the husband by his labor and skill in that undertaking increase the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband. Though as between the husband and wife, if the rights of no creditors intervene, the rule might be different. See also *Aldridge v. Muirhead*, 101 U.S. 397, 399; *Voorhees v. Bonesteel*, 16 Wall. (U.S.) 16, 31; *Coon v. Rigden*, 4 Col. 275, 287, 288; *Martinez v. Ward*, 19 Ala. 175, 188, 189; *Wells v. Smith*, 54 Ga. 262, 264; *Olsen v. Kern*, 10 Ill. App. 578, 582; *Langford v. Greirson*, 5 Ill. App. 362; *Cubberly v. Scott*, 98 Ill. 38, 40; *Bellows v. Rosenthal*, 31 Ind. 116, 118; *Parker v. Bates*, 29 Kan. 597; *Commonwealth v. Fletcher*, 6 Bush (Ky.) 171, 172; *McIntyre v. Knowlton*, 6 Allen (Mass.) 565, 567; *Merrick v. Plumley*, 29 Mass. 566; *Rankin v. West*, 25 Mich. 195, 200; *Hossfeldt v. Dill*, 28 Minn. 469; *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500; *Glass v. Thomas*, 6 Mo. App. 157; *Owen v. Cawley*, 36 N. Y. 600, 604, 605; *Smith v. Sweeney*, 55 N. Y. 234, 235; *Gage v. Dauchy*, 34 N. Y. 293, 297; *Buckley v. Wells*, 33 N. Y. 518, 521; *Knapp v. Smith*, 27 N. Y. 233; *Holdstrop v. Patterson*, 7 Watts (Pa.) 547; *Hodges v. Cobb*, 8 Rich. (S. Car.) 50, 56; *Feller v. Alden*, 23 Wis. 301, 304; *Boos v. Gomber*, 23 Wis. 284, 286; *Dayton v.*

his creditors,¹ or he may be using her property as a gift to him,² or as a loan;³ in such cases the business is his and the remedies of his creditors against the assets thereof are full.⁴ So when she has no power by statute to trade, but with his consent is in a business which he conducts, it is his business;⁵ the right of his creditors against a business which he conducts can be questioned only when by statute she can trade alone.⁶ When he has been using her property in his business, her rights are at best those of a creditor.⁷ In some cases where a wife has amassed a fortune through the efforts of her husband, it has been held that a court of equity would in favor of his creditors make some apportionment⁸—treat the husband and wife as it were as partners.⁹

Walsh, 47 Wis. 113; 32 Am. Rep. 757. Compare cases *infra*, n. 1, below; Stewart H. & W. 187.

1. See *Hurlburt v. Jones*, 25 Cal. 225; *Wortman v. Price*, 47 Ill. 22; *Brownell v. Dixon*, 37 Ill. 198, 208; *Cooper v. Harn*, 49 Ind. 393, 416; *Laing v. Cunningham*, 17 Iowa 510; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13, 25; *Knapp v. Smith*, 27 N. Y. 277, 280; *Woodsworth v. Sweet*, 51 N. Y. 8; *Gage v. Dauchy*, 34 N. Y. 293, 298.

2. See *Dent v. Slough*, 40 Ala. 518; *Freeman v. Orser*, 5 Duer (N. Y.) 476.

3. *Glidden v. Taylor*, 16 Ohio St. 509.

4. In *Brownell v. Dixon*, 37 Ill. 198, a husband may act as the agent of his wife in the control and management of her personal property, either generally or under special instructions but she should be careful to see that her husband is acting in truth and in fact in that character, as very slight circumstances may, in certain cases, be sufficient for a jury to infer that the property he is managing is really his own and not that of his wife. See also *Gage v. Dauchy*, 34 N. Y. 293, 298.

5. In *Erdman v. Rosenthal*, 16 Md. 312, on a bill filed by a married woman for an injunction to restrain an execution issued against her husband and levied upon personal property which she claimed to be hers, it was held: 1st. That the husband being in apparent possession and active control of the property, dealing with it as his own, it was incumbent upon the wife, in order to defeat the rights of the creditors of the husband, to establish by clear and undoubted proof a *bona fide* right and title to the property. 2nd. That the simple assertion of title as against the husband or his creditors would not do; there must be clear affirmative proof to show how the property was acquired, and, if purchased, that it was paid for

with the money or purchased upon the credit of the wife exclusively. 3rd. That her claim to the property on the ground that it was paid for out of the profits of a business conducted upon a place leased by her, could not be maintained unless the business was in fact conducted at her expense and for her benefit. See also *Wortman v. Price*, 47 Ill. 22, 24; *Albey v. Deyo*, 44 N. Y. 343, 347; *Bucher v. Ream*, 68 Pa. St. 421, 426; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13, 25.

6. *Shackleford v. Collier*, 6 Bush (Ky.) 149, 159; *Alt v. Laforette*, 9 Mo. App. 91; *Pawley v. Vogel*, 42 Mo. 291; *Lyman v. Place*, 16 N. J. Eq. 30; *Quidort v. Pergieaux*, 18 N. J. Eq. 472, 480.

In *Wortman v. Price*, 47 Ill. 22, under the act of 1861, for the protection of married women in their separate property, the husband may act as agent for his wife in a particular transaction, or generally for the control of her property or the investment of her funds. He may lease her property and collect the rents, or invest her money, or change the character of the investment if authorized by her, and he may do this without subjecting her property to his debts. But she cannot make him her agent to engage in trade to be managed by him, to which all his time and energies must be devoted, without subjecting the property embarked in such trade and its profits to the payment of his debts.

7. See *Wortman v. Price*, 47 Ill. St., cited above. Also *Glidden v. Taylor*, 16 Ohio St. 509, 521; *infra*, note 2.

8. *Cooper v. Ham*, 49 Ind. 393, 416; *Com. v. Fletcher*, 6 Bush (Ky.) 171; *Glidden v. Taylor*, 16 Ohio St. 509, 520; *Filler v. Allen*, 23 Wis. 301, 305.

9. In *Glidden v. Taylor*, 16 Ohio

Whether the business is the husband's or the wife's is simply a question of fact, the burden of proof being generally on the wife to show that the business was hers.¹ So whether there is fraud is a question of fact.²

(e) *Illustrations*.—Thus, where a husband with his team did a great deal of work on his wife's property, and his creditors attempted to sell the crop for his debts, the court held that he could give to her the labor of himself and his beasts, and that the accretions to her property continued hers and could not be touched by his creditors.³ Where a manufacturer of large experience failed, and then started up again with his wife's money and in her name, and made a fortune, the court allowed her her money and interest, but held the remaining profits for his debts.⁴ Where, while the wife's earnings belonged to her husband, he consented that she should trade in her own name, but took part himself in the business, the business was held his, and therefore liable for his debts.⁵

(f) *Statutes*.—In some States there are statutes expressly referring to this subject.⁶

16. Improvements by One Spouse of the Other's Real Estate.—The land of one spouse is not liable for improvements placed upon it by the other, either to such other⁷ or to such other's creditors,⁸

St. 509, the wife was allowed only her money and legal interest.

In *The National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13, the whole was held liable for the husband's debts. To treat them as partners would be fairer when there is really a mingling of goods, etc. See *Stewart H. & W.* § 129.

1. *Keller v. Mayer*, 55 Ga. 406, 490; *Knapp v. Smith*, 27 N. Y. 277; *Abbey v. Deyo*, 44 N. Y. 343. Of course her capacity to trade is a question of law. Also discussed in *Stewart H. & W.*, §§ 118, 121, very fully.

2. *Myers v. King*, 42 Md. 65, 70; *Stewart H. & W.*, § 86.

3. *Miller v. Peck*, 18 W. Va. 95, 102.

4. *Glidden v. Taylor*, 16 Ohio St. 509.

5. *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13, 25.

6. See *Porter v. Gamba*, 43 Cal. 105; *Youngworth v. Jewell*, 15 Nev. 45.

7. In *Dick v. Hamilton*, 1 Deady (U. S.) 322, a subsequent creditor of the husband has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor. Where an insolvent husband lived with his family in the house of his wife, and during the time made repairs thereon, so as to keep it habitable,

held, that the property was not liable to the creditor of the husband for the value of such repairs.

In *Coleman v. Smith*, 52 Ala. 259, neither the use of moneys of the wife's statutory separate estate in permanent improvements on the husband's lands, nor his executing a trust deed on them to secure a debt due her, constitute them her statutory separate estate. On bill filed by the wife to subject the lands to her demands, a decree ordering a sale to pay the trust deed, but subordinating the claim for money used in improving the land to a mortgage given by the husband to a third person, is in no proper sense a "subjecting to sale the separate estate for a married woman," entitling her to an appeal and *supersedeas* without security under the act approved March 9th, 1871. See also *Hood v. Sorrell*, 11 Ala. 386; *Swain v. Duane*, 48 Cal. 358; *Bean v. Scroggin*, 12 Ill. App. 321; *Mather v. Dobschuetz*, 72 Ill. 438; *Capp v. Stewart*, 38 Ind. 479. But see *Stewart on H. & W.*, § 131, and particularly note 1, citing very many cases.

8. *Capp v. Stewart*, 38 Ind. 479; *Corning v. Fowler*, 24 Iowa 584; *Robinson v. Huffman*, 15 B. Mon. (Ky.) 80; *Pruno v. Hewitt*, 55 Vt. 362, 367; cases *supra*, note 5, p. 539.

except (1) in the case of a contract by the owner of the land which renders it liable,¹ or (2) as against creditors in the case of actual fraud.² As a general rule improvements placed upon real estate without any agreement of the owner to the contrary, become a part of the realty and are lost to the party who places them there and to his creditors.³ As between the parties in the absence of contract there seems to be no ground even for equitable interference,⁴ although when a husband improperly uses his wife's money to improve his lands equity will cause her to be reimbursed when the lands are sold.⁵ Nor ought a wife's land to be liable at all for improvements placed on them against her wishes or without her consent.⁶ But when a husband, who, within the knowledge of his wife, is indebted, with her consent improves her property, and becomes unable to pay his debts, there is good ground for equitable interference.⁷

17. Resulting Trusts Between Husband and Wife.—(a) *When a husband buys with his wife's money in his own name*, there arises a resulting trust in her favor,⁸ unless a different intention on her

1. In *Wilson v. Jones*, 46 Md. 349, it was held that in order to charge the debts contracted by a married woman upon her separate estate as a lien in equity, it is necessary that it should affirmatively appear that her contract was made with direct reference to her separate estate, and that it was her intention to charge the same.

A bill was filed against a *feme covert* and her trustee for the purpose of charging her separate estate with a lien for materials furnished by the complainants for the improvement of the same; the bill did not aver that there was any contract by her to bind her separate estate, or any intention on her part to create a charge or specific lien thereon for the payment of the complainant's claim. On demurrer to the bill it was held that the bill stated no case entitling the complainants to relief in equity, and that the demurrer should be sustained. See also *Crickmore v. Breckenridge*, 51 Ind. 294, 298. But see under community system *Succession of Roth*, 33 La. An. 540; *Stewart H. & W.*, § 314.

2. *Corning v. Fowler*, 24 Iowa 584, 586; *Hoot v. Sorrell*, 11 Ala. 388, 406; *Kirby v. Burns*, 45 Mo. 234, 235; *Caswell v. Hill*, 47 N. H. 407, 415; *Barto's Appeal*, 55 Pa. St. 386, 392; *Cater v. Eveleigh*, 4 Desaus. Eq. (S. Car.) 19, 20; 6 Am. Dec. 596. See cases *supra*, n. 3, *supra*.

3. See *Mather v. Fraser*, 2 Kay & J. 536; *Farrar v. Stackpole*, 6 Me. 154; 19

Am. Dec. 201; *Green v. Phillips*, 26 Gratt. (Va.) 752; 21 Am. Rep. 323; *Boone Real Prop.*, § 9.

4. As gifts are not discountenanced, see *Stewart H. & W.*, §§ 100, 105, 127.

5. *Colleman v. Smith*, 52 Ala. 259, 261.

6. *Barto's Appeal*, 55 Pa. St. 386, 392.

7. *Rose v. Brown*, 11 W. Va. 122, 137; *supra*, notes 3, 6.

8. In *Gebel v. Weiss* (N. J. 1887), 7 Cent. Rep. 126, where a woman paid her money for land and for the repairs and improvements put on it after the purchase, and accepted a conveyance thereof to herself and another, as her husband, in the belief that she was the lawful wife of such other, and that in case she should survive him the property would be wholly hers, those who claim under him have no better claim to the property than he had. Where she learns after his death that when he married her he had a wife living, she can maintain a suit against the latter and her children to obtain a decree assuring to complainant the title to the whole of the property, on the ground that his name was inserted in the deed through his fraud in marrying her and inducing her to believe that he was her lawful husband. See also *Heath v. Slocum*, 115 Pa. St. 549; *Bigley v. Jones* (Pa.), 5 Cent. Rep. 670; *Henderson v. Maclay* (Pa.), 5 Cent. Rep. 225; *Dilts v. Stewart* (Pa.), 1 Cent. Rep. 606; *Heberd v. Wines*, 105 Ind. 239; *Harris v. Brown*, 30 Ala. 401, 402;

part is shown,¹ and the burden of proof is on the husband to show she intended a gift to him,² which is, however, *prima facie* established by proof of her knowledge and consent.³ The wife, on her part, must clearly show that her money was paid.⁴ When such a resulting trust has arisen, the husband's creditors cannot complain if he conveys the legal title to her though he does so to defeat their remedies against the property.⁵ While this property is not liable for the husband's debts, his *bona fide* assignee for value without notice takes it clear of the trust.⁶

(b) *When a husband buys with his own money in his wife's name*, the transaction is deemed an advancement and gift to her,⁷ unless a different intention on his part is shown, as where she had agreed to hold it for him,⁸ or was invested with the title for his convenience, he being ill,⁹ or a foreigner.¹⁰ In such cases no resulting trust arises in favor of himself, or his heirs, but one does arise in favor of such creditors of his as could have set aside a direct conveyance of equal value from him to her, that is to say, existing creditors,¹¹ unless the settlement was fair and reason-

Plummer v. Jarman, 44 Md. 632, 638; Keller v. Keller, 45 Md. 269, 275; Wales v. Newbould, 9 Mich. 45, 64; Barnard v. Kuhn, 36 Pa. St. 383, 390; Ready v. Bragg, 1 Head (Tenn.) 511.

1. Wales v. Newbould, 9 Mich. 64; note 3, p. 541; § 132, Stewart H. & W.

2. See case cited *supra*, n. 4.

3. In Tyson v. Tyson, 54 Md. 35, a legacy amounting to \$2873.35, from the wife's father, was paid by his executor to the husband and wife jointly, and they executed a joint and several release therefor under seal, and acknowledged the same as their act before a justice of the peace. The money was appropriated by the husband. Years afterwards the wife filed a bill of complaint asking that she might be divorced *a mensa et thoro*, that proper alimony might be awarded to her, and that the said sum of \$2,873.35 might be paid to her by her husband. A decree was passed divorcing the complainants *a mensa et thoro* from her husband, and awarding her alimony to the extent of \$156 per annum during the joint lives of herself and husband, but omitting to award her the said sum of \$2,873.35. On appeal from the decree by the complainant the same was affirmed, it being held that the conversion of the money by the husband with the concurrence of the wife, and her conjoint act and deed, destroyed her right to recover it as her separate property after divorce, after a lapse of a series of years without any promise or agreement on the part of the husband to return it; that

the transaction amounted to an absolute gift. See also Russell v. Russell, 11 Ky. L. Rep. 54.

4. Plummer v. Jarman, 44 Md. 632, 638.

5. Harris v. Brown, 30 Ala. 401, 402; Stewart H. & W., § 105, n. 22; Wilson v. Sheppard, 28 Ala. 623, 629.

6. Ready v. Bragg, 1 Head (Tenn.) 511, 515; Gorman v. Wood, 68 Ga. 524; Darnaby v. Darnaby, 14 Bush (Ky.), 485, 488. Consult Stewart H. & W., § 100.

7. In Jones v. Bland, 116 Pa. St. 190, proof that land conveyed to a married woman was bought with her husband's money raises a presumption that the land was intended as a gift to her. Eykyn v. Eykyn, L. R., 6 Ch. Div. 115, 118; Jackson v. Jackson, 91 U. S. 122, 125; Ward v. Ward, 36 Ark. 586, 588; Andrews v. Oxley, 38 Iowa 578, 580; Ederly v. Ederly, 112 Mass. 175; Darrier v. Darrier, 58 Mo. 222, 227; Linker v. Linker, 32 N. J. Eq. 174, 177; Scott v. Simes, 10 Bosw. (N. Y.) 324, 329; Irvine v. Greever, 32 Gratt. (Va.) 411, 417; Bent v. Bent, 44 Vt. 555, 559.

8. Marshall v. Curtwell, L. R., 20 Eq. 328, 331; Higgins v. Higgins, 46 Cal. 259, 263; Wormley v. Wormley, 98 Ill. 544; Dun v. Hornbeck, 7 Hun (N. Y.) 629, 630; Bent v. Bent, 44 Vt. 555.

9. Marshall v. Curtwell, L. R., 20 Eq. 328, 331.

10. Dun v. Hornbeck, 7 Hun (N. Y.) 629.

11. In Jackson v. Jackson, 91 U. S.

able,¹ but not subsequent creditors, unless there was fraud in fact.² For a married woman may be trustee, even by implication and against her will.³ Still in these cases she is trustee only to the extent of the money paid by her husband.⁴

(c) *Every purchase by a married woman in her own name* is deemed to have been made with her husband's money,⁵ but she may show her funds were used.⁶ So if she paid only a part she is directly interested in the purchase to that extent, and holds the title as security when it is assailed by her husband's creditors.⁷

(d) *A purchase by a married woman with her husband's funds in her own name* is deemed a settlement by him on her, unless it appears that she did so wrongfully, or with a different purpose.⁸

(e) *A purchase with the money of both in the name of one* is deemed a gift to that one, unless the other shows a different intent, or a breach of trust.⁹ If the purchase is in the name of both, a tenancy by entireties is created.¹⁰

(f) *A resulting trust* can be enforced only in equity.¹¹

18. Insurance of Life for Benefit of Spouse.—A wife has a direct interest in the life of her husband, which may be insured by him

122, although by the common law the money which the wife has at the time of her marriage, not secured to her by a settlement or contract, and that which she subsequently earns, belongs to her husband, it is competent and lawful for him to allow its investment in the purchase and improvement of real property for her separate use, if the rights of existing creditors are not thereby impaired. The doctrine of resulting trusts has no application to an investment of this kind; it constitutes a voluntary settlement upon the wife, whether made through the husband or directly by the wife with his consent. See also *Peck v. Brummagin*, 31 Cal. 440, 447; *Ransdell v. Fuller*, 28 Cal. 37, 43; *Wing v. Goodman*, 75 Ill. 159, 163; *Indianapolis etc. R. Co. v. McLaughlin*, 77 Ill. 275, 278; *Garner v. Graves*, 54 Ind. 188, 192; *Snow v. Paine*, 114 Mass. 520, 526; *McCowan v. Donaldson*, 128 Mass. 169, 170; *Adams v. Brackett*, 5 Met. 280, 286; *Shepard v. Pratt*, 32 Iowa 296, 298, 301; *Baker v. Dobyns*, 4 Dana (Ky.) 220, 225; *Duhow v. Young*, 3 Bush (Ky.) 343; *Hearn v. Lander*, 11 Bush (Ky.) 669; *Low v. Marco*, 53 Me. 45, 49; *Warner v. Dove*, 33 Md. 579; *Matthews v. Torinus*, 22 Minn. 132; *Rogers v. McCauley*, 22 Minn. 384, 386; *Hill v. Bugg*, 52 Miss. 397; *Rose v. Brown*, 11 W. Va. 122, 136; *Stewart H. & W.*, §§ 113-117.

1. *Shepard v. Pratt*, 32 Iowa 296, 301; *Matthews v. Torinus*, 22 Minn. 343, 349; *Warner v. Dove*, 33 Md. 579, 584.

2. *Duhme v. Young*, 3 Bush (Ky.) 343, 349; *Matthews v. Torinus*, 22 Minn. 132, 135.

3. *Harden v. Darwin*, 66 Ala. 55, 61, 62; *Stewart H. & W.*, § 450.

4. *Hearn v. Lander*, 11 Bush (Ky.) 675, 676; *Hill v. Bugg*, 52 Miss. 397, 401. Consult *Stewart H. & W.*, § 106.

5. *Seitz v. Mitchell*, 94 U. S. 583, 582; *Rose v. Brown*, 11 W. Va. 122, 136.

6. *Higgins v. Higgins*, 46 Cal. 259; *Ramsdell v. Fuller*, 28 Cal. 37, 42; *McDonald v. Badger*, 23 Cal. 393, 398; *Huston v. Curl*, 8 Tex. 239, 242; 58 Am. Dec. 110.

7. *Hopkins v. Carey*, 23 Miss. 54, 58; *Grain v. Shipman*, 45 Conn. 472, 583; *Hill v. Bugg*, 52 Miss. 397, 401.

8. *Adlard v. Adlard*, 65 Ill. 212, 216, 217; *Darrier v. Darrier*, 58 Mo. 222, 227. Consult *supra*, notes 7, 8, 9, p. 581.

9. *Harden v. Darwin*, 66 Ala. 55, 65; *Marshall v. Cantwell*, L. R., 20 Eq. 328; *Hopkins v. Carey*, 23 Miss. 54, 58. Does husband have to prove gift, *supra* notes 1, 2, p. 581.

10. *Jacobs v. Miller*, 50 Mich. 119, 124, realty. *Eykyn v. Eykyn*, L. R., 6 Ch. Div. 115, 118, personality.

11. *Law v. Marco*, 53 Me. 45, 49.

(and by her under special statutes) for her benefit.¹ When such insurance has been made the policy is her separate property,² the proceeds belong not to the community but to her and her representatives;³ she may assign it,⁴ even for her husband's debt,⁵ but such assignment must be free from fraud and duress,⁶ but he cannot assign it or defeat her rights, as by a fraudulent surrender,⁷ nor can either of them so defeat the rights of children, who are also beneficiaries;⁸ still, if he survives her he may surrender a policy taken out for her benefit,⁹ or dispose of it by will,¹⁰ or have another person, as a second wife, made beneficiary.¹¹ Her separate estate is not, however, liable for the premiums.¹² If a husband assigns a policy for his benefit to his wife for hers, it may, just as any other assignment, be a fraud on his creditors;¹³ so if he surrenders a policy in his name and takes out one in hers, for this is really an assignment;¹⁴ so if he makes a large and un-

1. In *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44, 47, at common law and prior to the statute (Wagn. Stat. 936, § 15), the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid, and where the husband died during the life of his wife it would be enforced. But not so as to her legal representatives where the husband survived her. The only ground upon which the policy could be sustained when issued was the fact that the wife had a right to look to her husband for support. That object being lost by her death, the husband would not be bound to continue the policy for the benefit of her legal representatives, and he might change the policy for the benefit of a subsequent wife.

In *Central Bank of Wash. v. Hume*, 128 U. S. 195, a wife and children have an insurable interest in the life of the husband and father. See also *Thompson v. American etc. Ins. Co.*, 46 N. Y. 674, 675; *Stewart H. & W.*, § 393.

2. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 399, 402; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 618.

3. *Succession of Bofenschen*, 29 La. An. 711, 714.

4. In *Whitridge v. Barry*, 42 Md. 140, a policy of insurance taken on the life of a husband for the sole use of his wife, and payable to her or her assigns, is a chose in action of the wife's which she has the right to assign or otherwise dispose of with her husband's consent. *Ainsworth v. Backus*, 5 Hun (N. Y.) 414, 417; *Godfrey v. Wilson*, 70 Ind. 50, 56.

5. In *Emerich v. Coakley*, 35 Md. 188, 190, an assignment by a wife and her husband, for the benefit of his creditors, of a policy of insurance on his life obtained for her sole and separate use and made payable to her and her assigns is valid.

The forbearance of the creditors of the husband and the granting an extension of time for the payment of his debts, is a valid consideration for an assignment by the wife. *Stewart H. & W.*, § 134.

6. *Stewart H. & W.*, § 110. See cases cited *supra*, notes 2 and 3. Also *Fowler v. Butterly*, 78 N. Y. 68; 34 Am. Rep. 507.

7. See *Knickerbocker v. Weitz*, 99 Mass. 157, 159; *Barry v. Mutual Life Ins. Co.*, 49 How. (N. Y.) Pr. 504, 508; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 618, 619.

8. *Meller v. Meller*, L. R., 6 Ch. Div. 127, 128. Consult cases cited *supra*, n. 5.

9. See *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44, cited at length in n. 71. Also see *Kerman v. Howard*, 23 Wis. 108, 112.

10. In *Kerman v. Howard*, 23 Wis. 108, 112, where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise.

11. *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44.

12. *Ogden v. Guill*, 56 Miss. 330, 332.

13. *Elliott's Appeal*, 50 Pa. St. 75, 83; *Stewart H. & W.*, §§ 113-117. See *English Woman's Act 1882*, § 11.

14. *Stokes v. Coffey*, 8 Bush (Ky.)

reasonable insurance in her favor when he is indebted,¹ but even against creditors he may insure his life for her benefit for a reasonable amount.² Statutes often exempt insurance policies from the claims of creditors.³

19. Wife as Surety for Husband.—Contracts and conveyances by a wife for the benefit of her husband's creditors are in reality indirectly contracts and conveyances with him. But special considerations have arisen with reference to the wife's capacity to be surety for her husband, and to the incidents of her suretyship.

(a) *Capacity Under General Powers.*—In the absence of express prohibition in the settlement or statute whence she derives her capacity to contract, a wife can to the full extent of that capacity, equitable or statutory, contract as surety for her husband.⁴ Thus,

533, 538. That is to say, it is an indirect transfer. *Stewart H. & W.*, § 99.

1. *Stokes v. Coffey*, 8 Bush (Ky.) 533, 588.

2. In *Elliott's Appeal*, 50 Pa. St. 78, policies of insurance effected without fraud directly and on their face for the benefit of the wife, and payable to her, are not to be held fraudulent as to creditors. *Smedley v. Felt*, 43 Iowa 607, 608; *Stokes v. Coffey*, 8 Bush (Ky.) 533, 538; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 618.

3. *Md. R. C.* 1878, p. 483, § 26.

4. In *Perkins v. Elliott*, 23 N. J. Eq. 526, a married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or her estate. The rule is the same, whether such separate estate has been created by deed or will, or by force of the statute relating to the property of married women. A married woman executed a joint and several note with her husband, stating therein that the money was to be a charge on her separate estate, and it appeared that this money was to be applied to the payment of a mortgage given by the husband and wife on lands of the husband. *Held*, that the *feme* was bound, as she derived a benefit from the transaction, in relieving the lands in which she had a dower right from the encumbrance.

In *Muller v. Bayley*, 21 Gratt. (Va.) 521, real estate is conveyed to a trustee for a married woman, the whole equitable estate being vested in her, free from liability for her husband's debts; and with express power in her to mortgage, convey in trust or otherwise pledge the property or any part of it, and the trustee is, on her request, to

sell it and pay the proceeds to her or reinvest. The wife may subject the property to pay the debt of, or raise money for, her husband.

In *Wolff v. Van Metre*, 19 Iowa 134, the wife cannot bind herself as surety for her husband by a contract which does not relate to her separate property; but she may execute a mortgage conveying her separate property to secure either her own or her husband's debts.

In *Woolsey v. Brown*, 74 N. Y. 82, a married woman is not disqualified from executing as surety an undertaking upon appeal.

In *Hall v. Tay*, 131 Mass. 192, a mortgage was given by a husband and wife on her land to A, as security for sales of goods to be made by him to the husband. *Held*, that parol evidence was admissible to show that the liabilities which the mortgage was intended to secure were those to be incurred by the husband to a firm of which A was a member; and that it was immaterial that the wife did not know of the existence of the firm when she executed the mortgage, or when the subsequent purchases of goods were made.

In *Wilcox v. Todd*, 64 Mo. 388, where a deed of trust is given by the husband and wife jointly on the land of the latter to secure a debt of the husband, she occupies the position of a surety toward him, and, like any other surety, may compel a creditor of the husband holding a mortgage on other property of his to resort thereto in the first instance before subjecting her property to the payment of his debts; and *a fortiori* she has that right when the creditor has no such security; and her equity is unaffected by the fact that her land is not owned by her as a sepa-

mortgages by wife for husband's debts are common,¹ so are assignments of personalty;² and a married woman who can make a promissory note can endorse one for her husband.³

(b) *Capacity Limited by Statute.*—In some States statutes ex-

rate estate. See also *Greiner v. Greiner*, 58 Cal. 115, 122; *Collins v. Dawley*, 4 Colo. 138; *Ayres v. Husted*, 15 Conn. 504, 517; *Edwards v. Schoeneman*, 104 Ill. 278, 285; *Hubble v. Wright*, 23 Ind. 322, 324; *Low v. Anderson*, 41 Iowa 476, 478; *Latimer v. Glenn*, 2 Bush (Ky.) 535, 543; *Mayo v. Hutchinson*, 57 Me. 546; *Emerick v. Coakley*, 35 Md. 188, 190; *Watson v. Thurber*, 11 Mich. 457; *Stine v. Montgomery*, 35 Miss. 83, 104; *Re Harrall*, 13 N. J. Eq. 101; *Purvis v. Carstaphan*, 73 N. Car. 575, 581; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *Moore v. Fullen*, 6 Oreg. 272; 25 Am. Rep. 524; *Haffey v. Carey*, 73 Pa. St. 431, 432; *McFerrin v. White*, 6 Cold. (Tenn.) 449; *Rhodes v. Gibbs*, 39 Tex. 432. A married woman having no capacity to contract at common law can do so only in equity or by statute. *Stewart H. & W., Contracts of Married Women*, §§ 355-393.

1. *Short v. Battle*, 52 Ala. 456, 460; *Ward v. Spear*, 20 Cal. 660, 674; *Young v. Graff*, 28 Ill. 20; *Brockschmidt v. Hagenbusch*, 72 Ill. 562; *Washburn v. Roesch*, 13 Ill. App. 268, 272; *Hubble v. Wright*, 23 Ind. 322, 324; *Moffitt v. Roche*, 77 Ind. 48, 51; *Wolf v. Van Metre*, 23 Iowa 397; *Green v. Scranage*, 19 Iowa 461, 465; *Carregy v. Clarke*, 44 Md. 108; *Helburn v. Warner*, 112 Mass. 271, 275; *Smith v. Osborn*, 33 Mich. 410; *Armstrong v. Stovall*, 26 Miss. 275, 280; *Schneider v. Stahr*, 20 Mo. 269; *Wilcox v. Todd*, 64 Mo. 388, 389; *Robbins v. Abrahams*, 5 N. J. Eq. 465; *Bank of Albion v. Burns*, 46 N. Y. 170, 175; *McVey v. Cantrell*, 70 N. Y. 295, 297; 26 Am. Rep. 605; *Purvis v. Carstaphan*, 73 N. Car. 575; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. Rep. 524; *Bayler v. Com.*, 40 Pa. St. 37; *Jamison v. Jamison*, 3 Whart. (Pa.) 457; *Lytle's Appeal*, 36 Pa. St. 131, 133; *McFerrin v. White*, 6 Cold. (Tenn.) 449; *Rhodes v. Gibbs*, 39 Tex. 432; *Muller v. Bayly*, 21 Gratt. (Va.) 521.

In *Stafford Sav. Bank v. Underwood*, 54 Conn. 2, the only limitation upon the wife's power of alienation of her real estate is her husband's consent; and a conditional sale or mortgage evidenced by her husband joining in

the deed is valid when made to secure his debt.

In *McFillin v. Hoffman*, 42 N. J. Eq. 144, a wife joining with her husband in a mortgage of her own property to secure his debt is his surety merely, and entitled to all the rights and privileges of a surety. See cases cited in opinion of court.

2. In *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398, unless restrained by the deed or marriage settlement under which a married woman holds her separate personal property, she may pledge or dispose of it in equity, independent of the statute. And under the act of 1861, commonly called the "Married Woman's Act," she may dispose of her separate personal property, and cannot afterward repudiate the act by which it is done. See also *Collins v. Dawley*, 4 Colo. 138; 34 Am. Rep. 72; *Emerick v. Coakley*, 35 Md. 188, 190.

3. Consult *Stewart H. & W.*, ch. 21, § 385, where the subject is treated at length.

In *Mayor v. Holmes*, 124 Mass. 108, under the Stat. of 1874, ch. 184, a promissory note made by a married woman jointly with her husband, for no other consideration than a debt of his to the payee, binds her. (By section 1 of that act "a married woman may convey her shares in corporations, and lease and convey her real property and make contracts oral and written, sealed and unsealed, in the same manner as if she were sole;" but "nothing in this act shall authorize a married woman to convey property to, or make contracts with, her husband.")

GRAY, C. J., in construing this act, said: "Before the Stat. of 1874, ch. 184, the female defendant would not have been liable, but this statute has removed that restriction, and in the broadest terms enables a married woman to 'make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole,' and does not require that the consideration of her contracts should enure to her own benefit. See also *Parker v. Kane*, 4 Allen (Mass.) 346; *Kenworthy v. Sawyer*, 125 Mass. 28, 29; *Goodman v. Hill*, 125 Mass. 587, 589. Compare *De Vries v. Conklin*, 22 Mich. 255, 258,

pressly, or by necessary implication, prohibit a wife's contracts as surety for her husband.¹ But such is not the effect of statutes forbidding contracts between husband and wife,² or providing that a wife's property shall not be liable for her husband's debts.³ Nor does a statute which prohibits such contracts as to her statutory separate property affect her capacity as to her equitable separate property.⁴

(c) *Contract Otherwise Binding*.—The contract must, however, not only be one which, though a married woman, she has capacity to make, but also one which would bind her as surety if unmarried.⁵

(d) *Implied Suretyship*.—Whenever a wife conveys or mortgages her property, or binds herself for her husband's debt she does so *prima facie* simply as his surety;⁶ but whether she is so

260; *Sawyer v. Fernald*, 59 Me. 500, 502.

1. *Bibb v. Pope*, 43 Ala. 190, 200; *Bowman v. Kaufman*, 30 La. An. 1021, 1025; *Worthington v. Faber*, 52 Ala. 45, 47; *Dunbar v. Mize*, 53 Ga. 435, 437; *Foxworth v. Magee*, 44 Wis. 430; *Erwin v. Hill*, 47 Miss. 675; n. 7, p. 581, Ala., Ga. and Miss. cases.

2. *Major v. Holmes*, 124 Mass. 108, 109, cited n. 2, p. 585.

3. *Hubble v. Wright*, 23 Ind. 322, 324.

4. In *Short v. Battle*, 52 Ala. 456, the wife must be regarded in equity as a *feme sole* with respect to her equitable separate estate, having capacity to bind or charge it by her contracts, and to alienate or otherwise dispose of it. She may mortgage it as security for her own debt, or that of another.

In *Northington v. Faber*, 52 Ala. 45, a mortgage by the wife of her statutory separate estate, to secure payment of her husband's debt, was held void, conferring no title on the purchaser under it, and she, or her personal representatives, may maintain trover against the purchaser for conversion of property thus acquired.

5. In *Schmidt v. Postel*, 63 Ill. 59, 60, in an action against a husband and wife, upon a promissory note executed by both of them, the wife pleaded in bar that at the time of the making the promises, etc., mentioned, she was, and still is, the wife of her codefendant, and that the note was given for hogs bought by her husband; that the debt was his, and that she signed the note only as security for him, and such note was the only cause of action, the court below sustaining a demurrer to the plea. *Held*, that the court erred, the plea presenting a complete bar as to the wife.

MR. JUSTICE BREESE delivered the opinion of the court: "This is a plain case; the main question arising in it is settled by *Carpenter v. Mitchell*, 50 Ill. 470, where it was held that the note of a married woman, executed with her husband in payment for land purchased by the wife and conveyed to her, could not be the foundation of an action at law against her. If allowed, it would frustrate the object of the act of 1861, to protect married women in their separate property; for under the influence of her husband, which a married woman usually is, her separate property could be swept from her by his foolish undertaking and reckless contracts."

In *Doyle v. Kelly*, 75 Ill. 574. While, according to the laws in force in 1870, a married woman might lawfully bind herself in a contract in relation to her separate property, yet the laws then in force conferred no power upon her to become surety for her husband upon a promissory note given by her husband for a liability he had incurred, and the contract was held void as to the wife.

In *Hetherington v. Hixon*, 46 Ala. 297, the signing of her husband's note, previously made and delivered by him, by a wife, as his surety, does not impose on her any obligation which will sustain its subsequent recognition. See also *O'Daily v. Morris*, 31 Ind. 111; *Wolf v. Van Metre*, 19 Iowa 134; *West v. Laroway*, 28 Mich. 464; *Sawyer v. Fernald*, 59 Me. 500; *De Vries v. Conklin*, 22 Mich. 255; *Bayler v. Com.*, 40 Pa. St. 37, 44; *Hatz's Appeal*, 40 Pa. St. 209; *White's Appeal*, 36 Pa. St. 134; see *Baylie Sureties*, ch. 4.

6. *Huntingdon v. Huntingdon*, 2

or not depends upon her intent, and the debt may be shown to have really been hers.¹ Nor is she a surety so far as concerns creditors if she is one of the original contractors and nothing else appears.²

(c) *Incidents of her Suretyship*.—Whenever a wife is expressly or impliedly, as above, surety for her husband, she has the same rights as other sureties.³ Thus, she has her equity of exoneration.⁴ She may not only, if she has paid his debt, go against him for reimbursement *pari passu* with his other creditors, being subrogated to the rights of the creditor she has paid,⁵ but she may compel him or his representatives to redeem her goods which have been pledged for his debt,⁶ and after his death she or her representative or her creditor may have her property exonerated of its

White & T. Lead. Cas. 1010. Mortgage of wife's estate of inheritance for the benefit of her husband. Wife's estate considered only as surety. A wife joins with her husband in a mortgage of her own inheritance, in order to buy him a place, and the husband covenants to pay the money. He accordingly pays the money, and takes an assignment of the mortgage in trust for himself. The mortgage being for a term of years, the husband devises it for the benefit of his younger children. But it was held that the elder son, as heir of the wife, was entitled to have the term assigned as he should direct, discharged from all demands of the younger children. See cases collected in the notes to this case. Also, see *Hassey v. Wilke*, 38 Hun (N.Y.) 522, 523; *Ward v. Spear*, 20 Cal. 660, 674; *Ayres v. Husted*, 15 Conn. 504, 517; *Latimer v. Glenn*, 2 Bush (Ky.) 535; *Johns v. Reardon*, 11 Md. 465, 469; *Knight v. Whitehead*, 26 Miss. 245, 246; *Wilcox v. Todd*, 64 Mo. 388, 389; *Loomer v. Wheelwright*, 3 Saund. Ch. 135, 154; *Bank of Albion v. Burns*, 46 N. Y. 170, 175; *Purvis v. Carstaphan*, 73 N. Car. 575, 581; *Miner v. Graham*, 24 Pa. St. 491, 495; *Hammit v. Bull*, 8 Phila. (Pa.) 29, 30; *infra*, notes 3-12. This does not apply to her release of dower. *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 201.

1. *Duffy v. Mechanics' etc. Ins. Co.*, 8 Watts & S. (Pa.) 413, 433; *Clinton v. Hooper*, 3 Bro. C. C. 212, 213; 1 Ves. Jr. 173; *Kinnoul v. Monly*, 3 Swanst. 208 n; *Spear v. Ward*, 20 Cal. 660, 674.

2. *Alexander v. Bouton*, 55 Cal. 15, 19; *Spear v. Ward*, 20 Cal. 660, 677.

3. *Van Horne v. Everson*, 13 Barb. (N. Y.) 526, 530. When a wife becomes surety for her husband, by

making a valid lien upon her own property or estate, she is entitled to the same equitable rights as other sureties. See also *Wilcox v. Todd*, 64 Mo. 388; *Bank of Albion v. Burns*, 46 N. Y. 170, 175; *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 201; *Sheidle v. Weishlee*, 16 Pa. St. 134, 137.

4. In *Johns v. Reardon*, 11 Md. 465, husband and wife executed a mortgage of real estate belonging, one moiety to the wife in fee, and the other moiety to the husband in fee, but this mortgage was not properly acknowledged. Subsequently the same parties executed a mortgage of the same land to another party, which, being duly acknowledged, was decided to have priority over the former, and both were to secure debts due by the husband. *Held*, a wife who joins her husband in a mortgage of real estate, partly her own and partly her husband's, to secure a debt due by her husband, stands as surety of her husband to the mortgage and has the right to have the husband's interest first applied to pay the debt, in exoneration of her interest. See also *Butterfield v. Stanton*, 44 Miss. 15, 33; *Wilcox v. Todd*, 64 Mo. 388; *Shinn v. Smith*, 79 N. Car. 310; *Huntington v. Huntington*, 2 Bram. Parl. C. 1; 2 White & T. Lead. Cas. 1010.

5. *Gleaver v. Paine*, 1 De Gex J. & S. 87, 95, 96; *supra*, n. 4; *Greiner v. Greiner*, 58 Cal. 115, 122; 12 The Reporter 647, *supra*, n. 42.

6. In *Re Harrall*, 31 N. J. Eq. 101, 102, the wife of a lunatic who had an ample estate applied for an order requiring his guardian to redeem for her benefit certain separate property of hers (jewells, etc.) pawned, with her consent, by her husband while sane, to pay his personal expenses, and the proceeds of

liability out of his real and personal estate.¹ As in the case of other sureties she may compel the creditor to first exhaust the principal's means;² if any of his securities are released,³ or his time is extended,⁴—

the loan were so applied. *Held*, that she was entitled to relief, and that her husband, under the circumstances, is bound in equity to redeem the property.

1. In *Ayres v. Husted*, 15 Conn. 504, B, D and E, creditors of C, having successively, and in the present order of their names, attached C's personal property, it was, in pursuance of an agreement between them, placed in A's hands, to be by him sold, and the proceeds to be applied to the judgments, to be recovered by the attaching creditors, in the same manner as they would by law be applied in the ordinary course of proceeding. Where C and his wife conveyed to B the equity of redemption in her land, to be applied in payment of certain claims of B against C, which were previously secured in part by attachment of C's personal property, on which D and E, other creditors of C, had also liens by subsequent attachments, the residue of such equity of redemption to be applied in payment of a debt due from C to his daughter, and the balance, if any, to be paid to J, another creditor of C; on the claim of D and E that B should be compelled, for their benefit, to resort, for the satisfaction of his claims, to such equity of redemption, before he proceeded against the property attached; it was *held*, that such claim of D and E was inadmissible, as the property constituting the two funds did not wholly belong to C, but the land belonged to his wife, and was conveyed only as collateral security, and specifically for the benefit of other creditors, whose equity was equal to that of D and C. See also *Aguilar v. Aguilar*, 5 Madd. 414; *Stewart M. & D.*, § 460; *Huntington v. Huntington*, 2 White & T. Lead. Cas. 1010, 1015; *Lancaster v. Evans*, 10 Beav. 154, 266; *Johns v. Reardon*, 11 Med. 465, 468; *Knight v. Whitehead*, 26 Miss. 245, 246; *Fitch v. Cotheal*, 2 Sand. Ch. (N. Y.) 29, 30; *Miner v. Graham*, 24 Pa. St. 491, 495; *Weeks v. Haas*, 3 Watts & S. (Pa.) 520, 523; 39 Am. Dec. 39; note 4, p. 587.

2. In *Moffitt v. Roche*, 77 Ind. 48, where a woman and her husband, to give "a secondary security" for the payment of notes of the partnership of

which he was a member, already secured by a mortgage of partnership real estate, executed a mortgage on her separate real estate, they became sureties for the firm, and she is entitled to have the property mortgaged by the firm exhausted before her real estate can be subjected to the payments of such firm debts. See also *Sheidle v. Weishlee*, 16 Pa. St. 134, 137; *Wilcox v. Todd*, 64 Mo. 388.

3. In *Purvis v. Carstaphan*, 73 N. Car. 575, 592, where a wife joins her husband in a conveyance of her separate property to secure a debt of the husband, the relation which she sustains to the transaction is that of surety. And a surety is entitled to the benefit of all the securities which the creditor acquires from the principal debtor, and if the creditor perverts or misapplies such securities to the prejudice of the surety, he thereby discharges the surety *pro tanto*. Therefore where a *feme covert* joined her husband in a conveyance of her separate estate to secure the payment of advances which the defendant, a merchant, had agreed to make, to enable the husband to carry on a farm, and the mortgage also conveyed the crops to be made, and all the stock, tools, etc., to secure the sum of \$1,500, and the husband received the \$1,500, and the additional sum of \$1,110, and the crops were delivered to the defendant, who sold them, and by the direction of the husband, without the knowledge of the wife, applied the proceeds of the crop to the payment of the additional sum of \$1,100; it was held, that as against the husband the application was valid, but as against the wife, as surety, it was a perversion of the security, and operated as a discharge of the liability of the land.

4. In *Ward v. Spear*, 20 Cal. 660, W executed a bond to S, conditional for the payment by him of six thousand dollars in one year with interest, and at the same time, as security for its payment, W and wife executed a mortgage upon the separate property of the wife, wherein was recited as the consideration of its execution the receipt of six thousand dollars by the mortgagors, "and each of them." In an action by S to foreclose the mortgage, the wife defended

MARRIAGE SETTLEMENTS—MARRIED WOMEN.

or if he buys the debt,¹ she is discharged. If her mortgaged estate is sold for her husband's debt under decree, she may have a decree over against him.²

MARRIED WOMEN—(See also ADULTERY; ALIMONY; COMMUNITY PROPERTY; CRIMINAL LAW; DIVORCE; DOMICIL; DOWER; HOMESTEAD; HUSBAND AND WIFE; MARRIAGE; MARRIAGE SETTLEMENTS; WILLS).

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upon the ground that she was a mere surety for her husband, and that the liability of her property had been discharged by an extension of the time of payment given by S to her husband. By the pleadings, the extension of time was admitted, and the question of suretyship put in issue, and the cause was submitted without the introduction of other proof than the bond and mortgage. Held, that the property of the wife was bound by the mortgage; that she was not a surety for her husband, the recital as to the consideration meeting and counteracting the effect which would otherwise have arisen from the form of the transaction. See also *Fiscel v. Dorner*, 35 Mich. 151; *Smith v. Townsend*, 25 N. Y. 479, 483; *Bank of Albion v. Burns*, 46 N. Y. 170, 175; but see *Lytle's Appeal*, 36 Pa. St. 131, 133.

1. In *Fitch v. Cotheal*, 2 Sand. Ch. (N. Y.) 29, 30, the wife of J. W., being seised of lands, joined him in executing three several mortgages to secure his lands for money lent. Before his death, his attorney, with means furnished by him, paid the mortgages, and took an assignment of the lands and mortgages to S, who soon after gave J. W. a certificate that he held them in trust for J. W. and subjected to his order and control. Held,

that J. W. was the principal debtor, and his wife's lands stood in the relation of a surety for his debt, and that after the assignment and certificate, the securities belonged to him in equity, and the lands were thereby discharged from the lien of the mortgages.

2. In *Neimceinez v. Gahn*, 3 Paige (N. Y.) 614, where a wife unites with her husband in a mortgage of her real estate merely as a security for the payment of his debt, she is entitled to have his interest in the estate, as tenant by the curtesy, first sold and applied to the payment of the debt, in exoneration of her estate or interest in the mortgaged premises. This equity is paramount to the claim of a judgment creditor, who has only a general lien upon the husband's interest in the premises subsequent to the mortgage. Where a wife becomes a surety for her husband by the execution of a valid lien upon her own property or estate, she is entitled to the same equitable rights as other sureties. Where a surety is compelled to pay the debt of his principal, in order to save his property or to discharge his personal liability, he has an equitable right to be substituted in the place of the creditor as to all his remedies against the principal debtor and his estate.

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2. Exceptions at Common Law—1. Wife Abandoned.—When a husband has abjured the realm under the old common law, or has permanently abandoned his wife and the State by the present law, she has most of the capacities of a *feme sole*.⁶ Thus, she may contract,⁷ will,⁸ sue,⁹ and be sued¹⁰ as such.

2. Wife Divorced a Mensa et Thoro.—After a divorce *a mensa et thoro* the woman has still a husband, and is not, therefore, a *feme sole*;¹¹ and so in England she is held to remain under all the disabilities of coverture,¹² but in the United States a different rule has been adopted and she may generally contract, sue, be sued, etc., as if unmarried.¹³

3. Husband Civilly Dead.—When one is outlawed, banished, imprisoned for life, etc., he is civilly dead, and his wife has the

1. 1 Blackst. Com. 442; 2 Kent Com. 129; Litt., § 168; Coke Litt. 112 b; Story Eq., § 1367; 1 Bishop M. W., § 35; Wells v. Caywood, 3 Colo. 487, 491; Hoker v. Boggs, 63 Ill. 160; Long v. Kinney, 49 Ind. 235; O'Ferrall v. Simplot, 4 Iowa 381; Trader v. Love, 45 Md. 1, 14; Burdens v. Amperse, 14 Mich. 91; Frissell v. Rozier, 19 Mo. 448; Aultman v. Obermeyer, 6 Neb. 260; Patterson v. Patterson, 45 N. H. 164; White v. Wager, 25 N. Y. 328; Barron v. Barron, 24 Vt. 375, 398; Willock v. Noble, Law R., 7 H. L. 580, 589. See article on HUSBAND & WIFE, vol. 9.

2. White v. Wager, 25 N. Y. 325; Norris v. Lantz, 18 Md. 260; Martin v. Duelly, 6 Wend. (N. Y.) 9, 12; Patterson v. Lawrence, 90 Ill. 174; Waul v. Kirkman, 25 Miss. 609; Shroyer v. Nickell, 55 Mo. 264; Farrar v. Bessey, 24 Vt. 89.

3. See Baker v. Young, 44 Ill. 42, and other cases cited, vol. 9, note 8, p. 823 of this work.

4. See vol. 9, page 826, of this work.

5. Tucker v. Scott, 3 N. J. L. 955; Hawes Parties, §§ 63, 70.

6. Rhea v. Rhenner, 1 Pet. (U. S.) 105, 107; High v. Worley, 33 Ala. 196; Way v. Peck, 47 Conn. 23; Gallagher v. Delargy, 57 Mo. 29; Nash v. Mitchell, 71 N. Y. 199; Mason v. Jordan, 13 R. I. 193.

7. Bean v. Morgan, 4 McCord (S. Car.) 148. See III, below.

8. Countess v. Prodgers, 2 Vern. 104, 105. See II of this article.

9. Love v. Moynahan, 16 Ill. 277, 282. See VIII of this article.

10. Gregory v. Paul, 15 Mass. 31, 34. See VIII hereof.

11. Stewart M. & D., § 449. See DIVORCE, vol. 5, p. 840, 841.

12. See notes 8, 9 and 10, vol. 5, p. 840.

13. Barber v. Barber, 21 How. (U. S.) 582, 598; Dean v. Richmond, 5 Pick. (Mass.) 461; Pierce v. Burnham, 4 Metc. (Mass.) 303.

capacities of a *feme sole*.¹ Thus, she may contract, will, sue, and be sued, as if unmarried.²

4. *Husband Not Sui Juris*.—As a general rule, the insanity, infancy, or other incapacity of a husband does not affect the personal status of his wife.³ A deed by an infant husband and his wife of her property is voidable by him, and if avoided by him, void as to her also.⁴ A husband's mere sickness or inability does not give his wife the power to act for him, except so far as this is necessary for the support of his family or the preservation of his property; and there can be no implication of her agency in fact if he is insane.⁵ But if he is insane and confined in an asylum out of the State, she has the capacities of a *feme sole*, just as if he were civilly dead.⁶ A statute which provides that when from drunkenness, profligacy, or other cause, a husband fails to provide for his wife, she may act as if sole, does not under "other cause" include insanity, but only some cause within the husband's control.⁷

5. *Wife in Representative Position*.—So, as will hereinafter be shown, a wife could act fully as agent, executrix, trustee, etc.

3. **Legal Existence in Equity**.—Great inconvenience was found to result from the fiction of the nonexistence, in the eye of the law, of wives; and courts of equity, from the earliest times, recognized their legal existence with respect to property settled on them to their sole and separate use;⁸ so that with respect to such property married women have always had many of the capacities of unmarried women.⁹ But these capacities were limited to the aforesaid property: a wife has no greater personal capacity in equity than at law.¹⁰

4. **Effect of Modern Statutes**.—It is to statutes today that we must look, for the most part, in order to determine the status of married women. For in all the States the common law system of coverture has been more or less destroyed by legislation. The main difficulty lies in determining how far a particular statute has modified the pre-existing law.

1. *Worthington v. Cooke*, 52 Md. 297 at 307. "As a general principle it is incontrovertibly true that at common law a married woman cannot contract so as to make herself liable . . . certain exceptions . . . as, for instance, if the husband was banished or had abjured the realm (Co. Litt. 133 a), or if the husband be an alien residing abroad, in such cases the wife would not only have the capacity to contract, but she would be capable of suing and of being sued alone."

2. See III, II and VIII of this article and last note above.

3. There seem to be no cases just on this point, but the proposition is an

easy inference from the well known principles on this subject.

4. *Barber v. Wilson*, 4 Heisk. (Tenn.) 268.

5. *Alexander v. Miller*, 16 Pa. St. 215, 220.

6. *Gustin v. Carpenter*, 51 Vt. 585.

7. *Edson v. Hayden*, 20 Wis. 682.

8. *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 165. See generally EQUITY, HUSBAND AND WIFE, MARRIAGE, MARRIAGE SETTLEMENTS, in this work.

9. See *Stewart on H. & W.*, §§ 197 to 216.

10. *Johnson v. Cummins*, 16 N. J. Eq. 97, 106; *Butler v. Buckingham*, 5 Day

5. Coverture Combined with Other Disabilities—Coverture and Infancy, etc.—When a party labors under several disabilities, each must be considered by itself, and must be given as great effect as if it existed by itself. In the absence of express legislation, neither a man nor a woman attains full age by marriage.¹ A statute which enables a married woman to make certain contracts if of "full age," means full age generally, not full age for marrying.² The husband of an infant has the same marital right and liabilities as the husband of an adult.³ Infancy and coverture are separate and distinct disabilities, and each must be considered by itself.⁴ They may exist separately, or they may coexist. When they coexist, the removal of one in no way is a removal of the other.⁵ And the same applies to insanity and coverture, etc.⁶ The deed of an infant married woman being voidable for infancy, the question arises whether it can be avoided or confirmed while the disability of coverture continues.⁷ The general rule at common law, and even under modern acts (since the coercion of the husband over the wife is not destroyed⁸) is that the wife cannot confirm the deed, except by a new deed executed in accordance with the married women's acts after attaining full age,⁹ until both of her disabilities have been removed;¹⁰ that is to say, until she has attained full age and coverture has been terminated by death¹¹ or divorce.¹² A statute which enables a woman

(Conn.) 492, 501; 5 Am. Dec. 174. See the various heads referred to in note 8, p. 592

1. *McMorris v. Webb*, 17 S. Car. 558, 562; 43 Am. Rep. 629; 2 Bish. M. W., § 513. A marriage, however, with the parents' consent, emancipates an infant. *Bucksport v. Rockland*, 56 Me. 22; *Taunton v. Plymouth*, 15 Mass. 203; *Burr v. Wilson*, 18 Tex. 367.

2. *McMorris v. Webb*, 17 S. Car. 558; 43 Am. Rep. 629.

3. *Nicholson v. Wilborn*, 13 Ga. 467. "Upon the marriage of an adult with a ward under age, the rights and powers of the guardian cease, both as respects her person and her estate, and the husband acquires the same rights and incurs the same obligations which he acquires and incurs in case his wife is of age." But see *GUARDIAN AND WARD*, vol. 9 hereof, at page 95.

4. *Sims v. Bardoner*, 86 Ind. 87, 97; *Adams v. Palmer*, 51 Me. 480, 488; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 129; 31 Am. Dec. 285.

5. *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Adams v. Palmer*, 51 Me. 480, 488.

6. *Webb v. Hall*, 35 Me. 336 and last two notes.

7. *Hughes v. Watson*, 10 Ohio 127, 311.

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133. "The deed was executed by complainant when she had no capacity to do it. She had no capacity because she was a *feme covert*. . . . As to her, then, the deed is void, or at least voidable, and cannot operate to bar her right of dower. This opinion is sustained by the case of *Bool v. Mix*, 17 Wend. (N. Y.) 119, in which it was held by the supreme court of New York that where a party is an infant as well as *feme covert*, the disability arising from infancy remains, although she execute and acknowledge a deed in the form prescribed by the statute."

8. *Miles v. Lingeran*, 24 Ind. 385; *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601, 607.

9. *Williams v. Baker*, 71 Pa. St. 476; *Miles v. Lingeran*, 24 Ind. 385.

10. *Sims v. Everhardt*, 102 U. S. 300, 309; *Magee v. Welsh*, 18 Cal. 155; *Sims v. Bardoner*, 86 Ind. 87; *Youse v. Norcoms*, 12 Mo. 549; 51 Am. Dec. 175; *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601; *Matherson v. Davis*, 2 Coldw. (Tenn.) 443.

11. *Hartman v. Kendall*, 4 Ind. 403, 404.

12. *Sims v. Everhardt*, 102 U. S. 300,

to confirm her deeds during coverture does not compel her so to do.¹ But as to statutory separate property, a married woman may be estopped;² and it seems that by her conduct during coverture, after attaining full age, she may estop herself from avoiding her deed after the determination of coverture.³ Neither can she, it is said, during coverture, disaffirm her deed by any act *in pais*;⁴ but a husband can disaffirm a deed of his wife's in which he as infant joined.⁵ Still, by making another conveyance during coverture,⁶ or by bringing suit for the land,⁷ she may disaffirm her deed; and under modern statutes it is said she may disaffirm her deeds generally during coverture.⁸ She need not restore the consideration;⁹ but she must not delay her avoidance beyond a reasonable time after the cessation of coverture.¹⁰ A statute validating deeds of infant married women is not retrospective in its operation.¹¹

II. WILLS OF MARRIED WOMEN—1. No Capacity at Common Law.—At common law the will of a married woman was, generally, a mere nullity, because by marriage her legal existence was merged into that of her husband;¹² she had no separate disposing power; she was not *sui juris*; she was not a free agent, but was under the power and control of her husband,¹³ her incapacity depended also on the fact that she had nothing to dispose of, it is said.¹⁴ The disability of coverture in respect to wills differs materially from that of infancy, idiocy, or lunacy,¹⁴ and though it be removed, any

1. Miles v. Lingerman, 24 Ind. 385, 388.

2. Discussed fully in part V of this article.

3. Sims v. Everhardt, 102 U. S. 300, 307; Stringer v. Northwestern Mut. L. Ins. Co., 82 Ind. 100, 108, and see part V of this article.

4. Dodd v. Benthall, 4 Heisk. (Tenn.) 601, 607. See McIlvaine v. Kadel, 30 How. Pr. (N. Y.) 193, 195.

5. Barker v. Wilson, 4 Heisk. (Tenn.) 268, 269, 271.

6. Youse v. Norcombs, 12 Mo. 549, 564; 51 Am. Dec. 175; Ross v. Adams, 28 N. J. L. 160, 163; *contra*, Law v. Long, 41 Ind. 586, 597.

7. Webb v. Hall, 35 Me. 336.

8. Buchanan v. Hubbard, 96 Ind. 1. "A married woman may, at any time during coverture, disaffirm a deed made by her while an infant, and she is not estopped by the facts that when the deed was executed she appeared and was believed by the grantee to be an adult; that the grantee, with her knowledge, after reaching majority, improved the land, and that he had conveyed to an innocent purchaser, and that after majority she, with her husband, enjoyed

and exercised dominion over the consideration received."

9. Markham v. Merritt, 8 Miss. 437, 444; Law v. Long, 41 Ind. 586, 600; Miles v. Lingerman, 24 Ind. 385, and last note.

10. Sims v. Bardoner, 86 Ind. 87, 93.

11. Adams v. Palmer, 51 Me. 480, 489.

12. See §§ 1 and 5, part I, of article on HUSBAND AND WIFE, vol. 9, p. 789; Hood v. Archer, 1 McCord (S. Car.) L. 225.

13. Adams v. Kellogg, Kirby (Conn.) 195; 1 Am. Dec. 18; Burton v. Holly, 18 Ala. 408, 411; Marston v. Norton, 5 N. H. 205.

14. Bishop v. Blair, 36 Ala. 80.

"The husband acquires by the marriage the right to use and occupy, during coverture, lands belonging to the wife, whether her title be governed by the 'woman's law' or not." Allen v. Hooper, 50 Me. 371. "The personal property of the wife, in her possession at the time of the marriage, vests absolutely and immediately in the husband, who could dispose of them as he pleases, and on his death they go to his representatives."

From this condition of the law the

other disability will remain.¹

2. Exceptions at Common Law.—At common law a married woman who, owing to peculiar circumstances, had the capacities of a *feme sole*, could make a will,² as where her husband was civilly dead, being, for example, banished for life,³ but the adultery and desertion of her husband did not enable her to make a will.⁴ So when she was acting in a representative capacity, for example, as executrix, she could make a will,⁵ or where she was acting for and in the place of another, as where she made a will of personalty with her husband's consent,⁶ or under a power.⁷ For there is no question of the right of a married woman to execute a power of any kind;⁸ she may will realty even, under a power given by a mere agreement between her and her husband before marriage,⁹ and when she acts under a power the whole doctrine of disability by coverture is eliminated.¹⁰ In executing a power she need not

statement in the text is a direct inference and is so stated in the case of *Willock v. Noble*, Law R., 7 H. L. 580, 603. See *Jarman on Wills* 38, for proposition that disability from coverture differs from other disabilities.

1. *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692, 698.

2. *Cutter v. Butler*, 25 N. H. 343, at 352: "The following cases are recognized in the books which have come under our observation, in which at common law a married woman may make a will: (1) A married woman, executrix, might make a valid will of the personal property held by her in *autre droit* as such executrix. . . . (2) A woman whose husband had been banished for life by an act of parliament may make a will. . . . (3) Personal property may be holden in trust subject to the disposal of a married woman by her will. . . . (4) The husband may agree with the wife or with one of her friends as trustee for her, either before the marriage or after the marriage, upon a sufficient consideration to allow her to dispose of certain property or of a certain amount of personal property, by will. . . . (5) By the assent of the husband the wife may devise her chattels real. . . . She may dispose by her will of her choses in action, including debts and contracts due to her, and her right of action for goods carried away (*bien asports*) before the marriage by a like assent on the part of the husband. . . . (7) She may by her husband's assent bequeath by will the personal chattels in possession, which belonged to her at her marriage, or which have fallen to her afterwards."

3. *Countess v. Proddgers*, 2 Vern. 104, and last note.

4. *Freeland v. Ryno*, 26 N. J. Eq. 160, 163.

5. See note 5 above, and *Hudson v. Lloyd*, 2 Bro. C. C. 534, 543; *Scammell v. Wilkinson*, 2 East 556; *Lee v. Bennett*, 31 Miss. 119; 57 Am. Dec. 330; *West v. West*, 3 Rand. (Va.) 373, 375.

6. See note 5, above, and *Marston v. Norton*, 5 N. H. 205, 210.

7. *Noble v. Willock*, L. R., 8 Ch. 778, 787; *Ross v. Ewer*, 3 Atk. 156, 160; *Osgood v. Breed*, 12 Mass. 525, 532; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523, 540; *Jones v. Shields*, 14 Ohio 359; *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21.

8. *Schley v. McCeney*, 36 Md. 266, 273. "There can be no question made of the right of a *feme covert* to execute a power, whether collateral, appendant or in gross, and in no case is the concurrence of the husband necessary, unless made so by the power itself. The law prescribes no particular ceremonies to be observed in the execution of a power; but the terms of the power may direct it to be executed by a note in writing, or by will or deed, or may prescribe any ceremonies which the will or caprice of the party creating it may think proper, all of which must be complied with, however unessential or unimportant they may appear to be in themselves. 2 Wash. Real Prop. 317; 1 Sugden on Powers 211; *Hawkins v. Kemp*, 3 East 410, 430."

9. See note 5 above, and *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523, 540; *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 203.

10. *Noble v. Willock*, L. R., 8 Ch. 778,

conform to the requirements of married women's statutes,¹ nor have the consent or joinder of her husband;² she may execute it in favor of her husband;³ her mode of executing it and her right to do so are unaffected by married women's enabling acts.⁴ But she must refer to the power, unless the will would be of no effect otherwise;⁵ and a power to sell, use or exchange is not a power to will.⁶ She may revoke a will made under a power by another subsequent will.⁷ But any paper which is to take effect as a will must be probated.⁸

3. Capacity in Equity.—Since courts of equity have long recognized the separate existence and separate property of married women, the reasons for the incapacity to will under the common law do not exist in equity, and married women's wills of equitable and separate estate are very common.⁹ So wills which are valid only through the consent of the husband are sustained only in equity.¹⁰

Wills of Equitable Separate Estate.—As to a married woman's wills of her equitable separate estate there are three views, corresponding to the three views of her power over such estate generally: (1) That she stands towards this estate precisely as a *feme sole*, and can will it, be it real or personal; this is the English and the common view.¹¹ That she has over this estate only the power given by the instrument creating it, and can will it only under a power.¹² (3) That she has the powers of a *feme sole* over the personalty and the profits of the realty;¹³ but none over the realty itself, except such as are given by the instrument creating the estate.¹⁴ Her right to will, when it exists, includes the right to destroy the husband's curtesy,¹⁵ to will to the husband him-

787, and the chief question becomes whether or not the power has been strictly obeyed.

1. Schley v. McCeney, 36 Md. 267, 274.

2. See Stewart on H. & W., § 208, and case cited in last note.

3. Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523, 540.

4. George v. Bussing, 15 B. Mon. (Ky.) 558.

5. Mory v. Michael, 18 Md. 227, 241.

6. Harris v. Harbeson, 9 Bush (Ky.) 397, 402.

7. Hawksley v. Barrow, L. R., 1 Pro. & D. 147, 152.

8. Stone v. Forsyth, 2 Doug. 707; Ross v. Ewer, 3 Atk. 156; Picquet v. Swan, 4 Mason (U. S.) 443, 461; Cutter v. Butler, 25 N. H. 343, 359; 57 Am. Dec. 330; Newlin v. Freeman, 1 Ired. (N. Car.) L. 514, 520.

9. Stewart on H. & W., § 208, see note 6 below.

10. Bradish v. Gibbs, 3 Johns. (N. Y.) Ch. 523, 540.

11. Willcock v. Noble, L. R., 7 H. of

L. 580, at 596. "A married woman, however, is capable of making a will with respect to personal property settled to her separate use, or over which she has a power of appointment, or when the will is made with the assent of her husband. In these cases when the married woman has a disposing power notwithstanding her coverture, there is no difference in the operation of her will from that of an unmarried woman." See also Cutter v. Butler, 25 N. H. 343, 351; 57 Am. Dec. 330; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523, 540; Barnes v. Irwin, 2 Dall. (Pa.) 199, 203; 1 Am. Dec. 278.

12. Wagner v. Wagner, Ashm. (Pa.) 448, 451.

13. West v. West, 3 Rand. (Va.) 373, 375.

14. See same case.

15. Cooper v. McDonald, 7 Ch. D. 288, 296; Poole v. Blakie, 35 Ill. 495, 502. And in this way it may be said that a married woman has greater power of testamentary disposition than a man, for a widow, notwithstanding the provi-

self,¹ and to appoint an executor.²

4. **Capacity Under Statutes.**—General statutes as to wills do not affect the capacity of married women.³ A statute authorizing a wife to will generally has been held not to authorize a will to her husband;⁴ but the soundness of this rule is questionable.⁵ A statute authorizing her to will her "separate property" includes whatever property the legislature may afterwards declare separate.⁶ A separate property act, which says nothing as to wills, does not authorize wills,⁷ though a contrary view is sometimes taken.⁸ A statute which authorizes conveyances by implication excludes wills.⁹ An enabling act does not take away the power to execute a will in accordance with the common law rules.¹⁰ A statute which is declaratory of the common law is construed in accordance therewith, so that when the husband's consent is required, a particular consent is meant.¹¹ A statute prohibiting a husband from witnessing his wife's will does not render it unlawful for him to be present when she executes her will.¹² These

sions of a will, is always entitled to her thirds.

1. *Burton v. Holly*, 18 Ala. 408, 411, 412.

2. *Churchill v. Dibben*, 9 Sim. 447, 452.

3. *Baker v. Chastang*, 18 Ala. 417 at 423. "The construction which was placed by the English courts upon the first statute of wills seems generally to have been followed by the American courts in the several states whose statutes are similarly worded, and the better opinion seems to be that a married woman cannot make a valid will of lands, even with the consent of her husband, and without any statute prohibition to that effect." *Adams v. Kellogg, Kirby* (Conn.) 195; *Reese v. Cochran*, 10 Ind. 195; *Osgood v. Breed*, 12 Mass. 525, 530; *Marston v. Norton*, 5 N. H. 205. But see *Noble v. Enos*, 19 Ind. 72; *Bennett v. Hutchinson*, 11 Kan. 398, 410; *Allen v. Little*, 5 Ohio 65.

4. *Fitch v. Brainard*, 2 Day (Conn.) 163, 189; *Wakefield v. Phelps*, 37 N. H. 295, 305.

5. *Wakefield v. Phelps*, 37 N. H. 295, 302.

6. *Emmert v. Hays*, 89 Ill. 1. "Since the passage of the Married Woman's act of 1861, a married woman, married before that act took effect, may devise, by will, real estate which she owned at the time of her marriage. Under the Rev. Stat. of 1845 she could devise her separate property, and the act of 1861 enlarged the meaning of the term 'separate property,' and made

it embrace such property as a married woman owned at the time of her marriage, or such as she should acquire during coverture, in good faith, from any person other than her husband, and made the same subject to devise by her."

7. *Cain v. Bunkley*, 35 Miss. 119, 145; *Compton v. Pierson*, 28 N. J. Eq. 229, 231; *Naylor v. Field*, 25 N. J. L. 287, 288.

8. *Mosser v. Mosser*, 32 Ala. 551, 555.

9. *Harker v. Harker*, 3 Harr. (Del.) 51, 59.

10. *Buchanan v. Hubbard*, 26 Md. 1, at 7. "The power of the testatrix to dispose of her property by such an instrument as the will before us was not derived alone from any provision of the code; under the decisions of this court before cited it would have been a good will to pass the property in question if executed by a married woman before the code was adopted, and notwithstanding the provisions of the sixth section of the act of 1842. The property being held by her to her sole and separate use, that act did not apply to it, and when re-enacted in the code it must have the same operation and effect, and cannot be construed as abridging or taking away the power of the testatrix to dispose of her property by will executed as if she were a *feme sole*."

11. *Kurtz v. Saylor*, 20 Pa. St. 205, 209.

12. *Dickinson v. Dickinson*, 61 Pa. St. 401, 406.

statutes are said to be strictly construed, but this rule must be taken with qualifications.¹

Wills of Statutory Separate Property.—In most of the States the separate property acts provide for the willing of separate property.² Whether a statute which says nothing of disposition by will, but secures her property to her as a *feme sole*, enables her to will it, is doubtful, the decisions not being directly in point, as those relating to equitable property are. But few cases seem to have arisen, and some of them are cited hereunder.³

5. Validity and Operation of such Married Women's Wills Distinguished.—A distinction must be made between the validity and the operation of a married woman's will. At common law she could not will; first, because she had no legal capacity, and second because during her husband's life she had no property for a will to act upon;⁴ and on the one hand we find her wills sustained when she has no capacity, as where she disposes of her husband's property, whether held in her right, or in his own, with his consent,⁵ while on the other we find a perfectly valid will inoperative as to certain property, for example, to property which passes to her husband by survivorship.⁶ It would seem that when her power to will is given by the instrument or statute which secures the property to her separate use, she can will the whole of the same and defeat the marital rights of her husband;⁷ but that when her incapacity to will is removed by statute generally, her will operates only so far as it does not conflict with the marital rights of her husband.⁸ In probating a married woman's will, its opera-

1. *Compton v. Pierson*, 28 N. J. Eq. 229, 231.

2. *Wills of Statutory Separate Property.*—In 3 Jarm. on Wills, p. 752, are collected the statutes of a great many States on this subject; specific mention is made of married women in most of them.

3. *Mosser v. Mosser*, 32 Ala. 551, 555; *Harker v. Elliott*, 3 Harr. (Del.) 51, 59; *Urquhart v. Oliver*, 56 Ga. 344, 347; *Emmert v. Hays*, 89 Ill. 1, 13; *Noble v. Enos*, 19 Ind. 72; *Bennett v. Hutchinson*, 11 Kan. 397, 408; *Schull v. Murray*, 32 Md. 9, 16; *Burroughs v. Nutting*, 105 Mass. 228; *Stewart v. Ross*, 50 Miss. 776; *Wakefield v. Phelps*, 37 N. H. 295; *Compton v. Pierson*, 28 N. J. Eq. 229, 231; *Huston v. Cone*, 24 Ohio St. 11, 20; *Clarke's Appeal*, 79 Pa. St. 376; *Stroud v. Connelly*, 33 Gratt. (Va.) 217, 220; *Warner v. Warner*, 37 Vt. 356, 368.

4. *Validity and Operation of Such Wills Distinguished.*—*Willcock v. Noble*, L. R., 7 H. L. 580, 603.

5. See § 6, below, and *Lee v. Bennett*, 31 Miss. 119, 126.

6. *Stroud v. Connelly*, 33 Gratt. (Va.) 217, 221. Compare *Alsop v. McArthur*, 76 Ill. 20, 25.

7. *Pool v. Blakie*, 53 Ill. 495. "A husband cannot be tenant by the curtesy of real estate conveyed to the wife for her sole and separate use, and with power of disposal, and who has disposed of it by will duly executed and attested." *Cooper v. McDonald*, 7 Ch. Div. 288, 296.

8. *Clark's Appeal*, 79 Pa. St. 376, 377. "A husband is entitled to his curtesy in the real estate of inheritance of his deceased wife, when he elects to take it against her last will. In considering the legislation upon the power of a married woman to devise her real estate, the fact must not be overlooked that his curtesy estate was one arising at common law in the life time of his wife, and becoming fixed in him at the instant of her death. It was, therefore, not a subject upon which her devise could operate. As soon as issue is born alive capable of inheriting, the husband becomes tenant by the curtesy initiate, and the estate vested by

tion must be limited to the kinds of property which it is in her power to dispose of.¹

6. Effect of Husband's Consent.—A husband cannot by his consent give his wife any personal capacity to make a will,² for the status of married women depends on the law and not on contract;³ the most his consent can do is to enable her to dispose by will of property which belongs to him, either in his own right or in her right, as her husband,⁴ and it seems that this applies only to personal property.⁵ In fact when a wife makes a will which is valid by virtue of her husband's consent, she makes it simply as his agent;⁶ and she must be specially authorized to make the will in question,⁷ a general consent not being sufficient,⁸ and knowledge on the part of the husband of the contents of the will being necessary.⁹ The assent may be given during or after coverture,¹⁰ orally or in writing,¹¹ and may be proved directly or in-

the birth cannot be determined either by the death or coming of age of the infant. 'After issue born,' says C. J. GIBSON, 'he has a freehold in his own right, for which he is separately bound to do homage to the lord, whose tenant he then becomes, and the wife cannot forfeit for treason.'

1. Willock v. Noble, L. R., 7 H. L. 580, 590, 597; Cutter v. Butler, 25 N. H. 343, 359; 57 Am. Dec. 330.

2. Lord St. John v. Lady St. John, 11 Ves. Jr. 525 at 532. "The contract of marriage cannot be affected by any contract between the parties. It is admitted everywhere that by the known law, founded upon policy, for the sake of keeping together individual families, constituting the great family of the public, there shall be no separation *a mensa et thoro*, except *propter sævitiam aut adulterium*." The principle in the note is the same as that in the text; that is, the parties cannot by agreement alter the law.

3. Lee v. Bennett, 31 Miss. 119, 126; Cutter v. Butler, 25 N. H. 343, 356; 57 Am. Dec. 330; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384; Thorndike v. Reynolds, 22 Gratt. (Va.) 21, 29.

4. Osgood v. Breed, 12 Mass. 525, 532.

5. Baker v. Chastang, 18 Ala. 417. "The construction which was placed by the English courts upon the first statute of wills seems generally to have been followed by the American courts, in the several States whose statutes are similarly worded, and the better opinion seems to be that a married woman cannot make a valid will of lands, even with the consent of her husband, and without any statute prohibition to that

effect." See also Adams v. Kellogg, Kirby, Conn. 195, 196; 1 Am. Dec. 18; Lee v. Bennett, 31 Miss. 119, 126; Sanborn v. Batchelder, 51 N. H. 426, 431; Newlin v. Freeman, 1 Ired. (N. Car.) L. 514, 520. This follows from the fact that while at common law a will of personalty made by a married woman with her husband's consent, served to carry the property to the legatees, since a wife's personalty vests absolutely in her husband by marriage, and he may do with it as he pleases, yet as has been seen in the above extract, he has no such interest in her realty. A devise by a wife would therefore have no effect as against the heir, or even against the husband as to his life interest.

6. See note 5 to part II, § 2, above.

7. Cutter v. Butler, 25 N. H. 343, 357; 57 Am. Dec. 330.

8. Rex v. Betterworth, 2 Strange 891; Willock v. Noble, L. R., 7 H. L. 580, 597; George v. Bussing, 15 B. Mon. (Ky.) 558, 563; Jones v. Brown, 34 N. H. 439, 446; Kurtz v. Saylor, 20 Pa. St. 205, 209.

9. Willock v. Noble, L. R., 7 H. L., 580, 590. Unless the husband has knowledge there can of course be no consent.

10. Van Winkle v. Schoonmaker, 15 N. J. Eq. 384.

11. Reed v. Blaisdell, 16 N. H. 194. "If a husband, at sundry times before, and at the execution of, a testamentary paper by the wife disposing of a chose in action, verbally consent to such disposition, it is such consent as is required for the validity of such instrument as a will."

directly,¹ as, for example, by the fact that the will was in his hand-writing;² the usual and proper mode is by his assenting to the probate of the will.³ The assent is generally revocable by the husband, at pleasure, until probate;⁴ it is revoked by his death, and he must, therefore, survive her to render the will good.⁵ The will must be probated,⁶ and the husband should assent to the probate;⁷ if he does so, he cannot afterwards revoke his consent.⁸ It is said, even, that he cannot revoke any consent given after his wife's death.⁹ But he may render his assent irrevocable by a contract on valuable consideration,¹⁰ or under seal,¹¹ and he may by his conduct estop himself from denying his consent.¹² When the will is valid without the husband's consent, by assenting thereto he waives his rights inconsistent with the provisions of the will.¹³ Whether a statute which requires the husband's consent to his wife's will renders a will made without such consent invalid, or simply inoperative as to the husband's interest, must depend on the wording of the act itself.¹⁴ Generally, under the statutes, his assent is not necessary for any purpose.¹⁵

7. Gifts Causa Mortis of Married Women.—The principles appli-

1. *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 386; *Cutter v. Butler*, 25 N. H. 354, 357; 57 Am. Dec. 330.

2. *Grimke v. Grimke*, 1 Dessaus. (S. Car.) 366, 381.

3. *West v. West*, 3 Rand. (Va.) 373.

4. *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 387. "The consent is not obligatory, but is revocable at the pleasure of the husband at any time before probate is granted."

5. The wife is acting here as an agent, and as in all other cases of agency the death of the principal terminates the authority of the agent. See the cases of *Noble v. Willock*, L. R., 8 Ch. 778, 789, 790; *Willock v. Noble*, L. R., 7 H. L. 580, 591, 597; 1 Redf. Wills 25.

6. *Schull v. Murray*, 32 Md. 9, 10. "The will of a feme covert, professing to dispose of her property, must be admitted to probate in the same manner as that of any other person, capable in law of making a will."

7. *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Lee v. Bennett*, 31 Miss. 119, 126; *West v. West*, 3 Rand. (Va.) 373.

8. *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 388. "It is reported to have been held by SIR H. JENNER FUST, in *Maas v. Sheffield*, that if after the death of the wife the husband does assent to a particular will, he is bound by that assent; and as a consequence of that decision, it is stated by elementary writers, that if, after the death of the wife, the husband acts upon the will, or

or once agrees to it, he is not, it seems, at liberty to retract his assent and oppose the probate. 1 Williams on Exrs. 47, and note w.; 1 Bright 65, and note d."

9. *Cutter v. Butler*, 25 N. H. 343, 357, 358; 57 Am. Dec. 330.

10. *Lloyd v. Hodsden*, 2 Bro.C.C. 534, 543; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 386.

11. *Fisher v. Kimball*, 17 Vt. 323, 328.

12. *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 388. "If for instance, the executor, in advance of the probate, with the assent of the husband, dispose of the property bequeathed to third persons, or if rights are otherwise acquired under the will, it may well be that the husband would not be permitted to retract his assent and oppose the probate."

13. *McBride's Estate*, 81 Pa. St. 303, 305. "The joinder of the husband in a will of lands executed by the wife in *Pennsylvania*, when her power of disposition is unqualified (act of 1848, § 8, Pamph. L. 537), can mean nothing else but that he consents and agrees to the disposition therein made, and if it is an immediate disposition, it must mean a release of his courtesy or it means nothing."

14. *Schley v. McCeney*, 36 Md. 267, 273, and *Vreeland v. Ryno*, 26 N. J. Eq. 160, 162.

15. *Urquhart v. Oliver*, 56 Ga. 344, 346.

cable to wills of married women seem generally applicable to their gifts *causa mortis*.¹ A wife may make a *donatio mortis causa* of her equitable separate estate,² or of any of her personalty with her husband's consent,³ and she may make such a gift to her husband himself.⁴ But she cannot, of course, give away what she has previously disposed of.⁵

8. Revocation of Wills by Married Women.—The same capacity is required to revoke a will as to execute it,⁶ and it is because a married woman cannot revoke a will at common law that marriage itself works a revocation.⁷ Any valid will made during coverture revokes all other wills, so far as they are inconsistent with it.⁸ If she may make a will, she may revoke one.⁹

9. Wills of Married Women Made Before Marriage.—A will made before marriage by a woman was at common law revoked by her marriage.¹⁰ This rule has been said to rest on the following grounds: (1) That as she could not make a will during coverture, her antenuptial will ceased on marriage to be ambulatory, which is contrary to the nature of wills;¹¹ (2) that by marriage her power to dispose of her property was taken away, and her husband's rights attached by operation of law;¹² (3) that marriage worked so great a change in her condition that the law would presume

1. *Jones v. Brown*, 34 N. H. 439, 446. "Now a married woman by her husband's assent, may bequeath by will personal property in possession which belonged to her at her marriage, or which has fallen to her afterwards. A general assent that the wife may make a will is hardly sufficient. There must ordinarily be evidence of an assent to the particular will which is made by the wife. The assent may be proved by circumstances as well as by direct proof. . . . If these principles are applicable, as we think they are, to the case of a *donatio causa mortis*, the husband in this case would be bound by the gift, by his wife, of the things which he saw divided."

2. *Kilby v. Godwin*, 2 Del. Ch. 61, 71.

3. *Jones v. Brown*, 34 N. H. 439, 446.

4. *Caldwell v. Kenfrew*, 33 Vt. 213, 219.

5. See *Stewart on H. & W.*, § 350. This proposition is self evident.

6. *Mosser v. Mosser*, 32 Ala. 551, 556. See note 9, below.

7. *Morton v. Onion*, 45 Vt. 145, 153. "It is the opinion of the court that the rule that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact that by virtue of the husband's marital rights, the woman becoming *covert* became thereby disabled to

dispose of the property named in the will. The will ceased to be ambulatory. It is only in view of the supervening rights of the husband, accruing by the fact of marriage, as to her property, that the rule had any ground or reason."

8. *Hawksley v. Barrow*, L. R., 1 Pro. & D. 147, 152.

9. *Mosser v. Mosser*, 32 Ala. 551, 556. "The instrument of June, 1854, being a will, it results that it was revocable. The will of January 25th, 1855, if valid, expressly revoked the former one."

10. See note 4, above, and *Forse v. Hembling*, 4 Coke Rep. 60, 61; *Douglas v. Cooper*, 3 Mylne & K. 378, 481; *Hodsdon v. Lloyd*, 2 Bro. C. C. 540, 544; 2 Term 684; *Cotter v. Laver*, 2 P. Wms. 623, 624; *Tuller v. Tuller*, 79 Ill. 99, 101; *Garrett v. Dabney*, 27 Miss. 335, 342; *Allen v. Fellows*, N. H. (1884); *Compton v. Pierson*, 28 N. J. Eq. 229, 230; *Brown v. Clark*, 77 N. Y. 369; *Loomis v. Loomis*, 51 Barb. (N. Y.) 257; *Wood v. Bullock*, 3 Hawks. (N. Car.) L. 298; *Kurtz v. Saylor*, 20 Pa. St. 205, 209; *Davis's Estate*, 1 Tuck. (N. Y.) 107. And see note 2, p. 603.

11. See note 3, above, and 3, below, and *Tuller v. Tuller*, 79 Ill. 99, 101, and article in this work on WILLS.

12. See note 6, and article on Hus-

that she had not meant her will to operate in case of her marriage.¹ Whatever the grounds were, there was no question at common law but that her will was revoked; but whether modern statutes, securing to her separate property or authorizing her to dispose of her property by will, indirectly repeal this rule is disputed. On the one hand, it is said that by these statutes her will is no longer ambulatory, and her rights to her property are full, and that therefore the reasons for the rule at common law are gone and the rule must go also;² that marriage alone does not work a revocation, because it does not do so in the case of a man;³ and that a will is revoked only by marriage and birth of issue.⁴ On the other hand, it is said that it is perfectly consistent with the legislative intent in passing these statutes that antenuptial wills should be governed by the previous rule;⁵ and that the rule that a will is not revoked by marriage alone, but only by marriage and birth of issue, is not a reasonable one, and should not be applied to married women unless expressly adopted by statute.

BAND AND WIFE, vol. 9, p. 789, especially pages 841 to 845.

1. *Brown v. Clark*, 77 N. Y. 369, 372. "We concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. *Force and Hembly's Case*, 4 Co. 61. The reason of the rule is stated by LORD CHANCELLOR THURLOW in *Hodsden v. Lloyd*, 2 Bro. Ch. 534. He says: 'It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void.' See also *Swan v. Hammond* (Mass.), 19 Cent. L. J. 431, and *Tuller v. Tuller*, 79 Ill. 99, 102.

2. *Noyes v. Southworth*, 55 Mich. 173, 174. "Laying aside such decisions as are made under statutes, the only foundation which has been suggested for holding a woman's marriage to operate as an implied revocation, is the common law rule to that effect which was based on the effect of marriage on a woman's property and testamentary capacity. . . . These were reasons enough to maintain the common law doctrine. Our constitution has done away with all the disabilities of coverture on this head, and expressly authorized every married woman to make wills of her estate as if she were *sole*. This leaves her case to be governed by the same rule which would apply to anyone else

on change of condition. . . . But there is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage."

3. *Tuller v. Tuller*, 79 Ill. 99, 103.

4. *Tyler v. Tyler*, 19 Ill. 151.

5. *Swan v. Hammond*, 138 Mass. 45, 46. "It is urged in argument, that, since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a *feme sole* is revoked by marriage, no longer exists, and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why in the case of a man both marriage and the birth of a child should be held necessary for the revocation of his will. . . . But we are of opinion that the question now before us has been so far settled by statute as not to admit of change by construction. . . . has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in *Brown v. Clark*, 77 N. Y. 369, upon a similar question, under a statute of New York."

ute.¹ In many States the rule that marriage alone revokes any will is adopted by statute, and where this rule was adopted by statute only as to married women, statutes afterwards passed increasing the powers and capacity of married women do not repeal it.² The rule at common law applied to cases where the wife survived her husband,³ but not to wills made under and by virtue of a power.⁴

10. Republication of Wills After Dissolution of Marriage.—A will made before marriage and revoked by marriage is not revived by the death of the husband, but must be republished.⁵ A valid will made during coverture remains valid, and does not have to be republished when the marriage is dissolved.⁶ And an invalid will made during coverture does not become valid when the husband dies; the widow's intention to adhere thereto will not suffice; nothing can give it efficacy save a republication.⁷ A republication means a re-execution, with all the formalities required by law.⁸ A codicil duly executed is a republication.⁹ The delivery by a widow of a will executed during coverture has been held to make a valid will.¹⁰ The death of the husband revokes a will made with his consent at common law.¹¹

11. Conflict of Law as to Married Women's Wills.—Wills of real estate are governed by the law of the State where the lands lie,¹² wills of personalty by the law of the testator's domicile.¹³ The validity and effect of the will of a married woman depends on the

1. See case quoted from in last note.

2. *Brown v. Clark*, 77 N. Y. 369, 373.

"But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statutes prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force although the new statutes took away the reason upon which it was based."

3. *Cotter v. Layer*, 2 P. Wms. 623, 624; *Garrett v. Dabney*, 27 Miss. 335, 343.

4. *Logan v. Bell*, 1 Com. B. 873, 886; *Noyes v. Southworth*, 55 Mich. 133. Compare *Hodsden v. Lloyd*, 2 Bro. C. C. 540, 544.

5. *Garrett v. Dabney*, 27 Miss. 335. "Where a *feme sole* duly executes a will, which is valid at the time it bears date, but subsequently to the execution of the will she marries, *held*, that her subsequent marriage annuls the will, and leaves it no longer subject to the wife's control; nor is the will revived

by the death of the husband, the wife surviving." See also *Cotter v. Layer*, 2 P. Wms. 623. *Contra*, *Wood v. Bullock*, 3 Hawks (N. Car.) 298, 300.

6. *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21, 32.

7. *Osgood v. Breed*, 12 Mass. 525, 530.

8. *Willock v. Noble*, Law R., 7 H. of L. 580, 597. "But if the validity of the will depended upon her husband's assent, and, as already shown, his dying in her lifetime prevented that assent from having any efficiency. Mrs. Dawes could not have given new life to the will without a republication, and that could not be without an execution of it with all the formalities required by law."

9. *Kurtz v. Saylor*, 20 Pa. St. 205, 209.

10. *Miller v. Brown*, 2 Hagg. Ecc. 209.

11. See case quoted from in note 8 above.

12. 1 Jarman Wills, ch. 1, 4 Kent 513, 524. *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 504.

13. See above note and *Lawrence v. Kitteridge*, 21 Conn. 577; *Fellows v. Miner*, 119 Mass. 541; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

law which exists at the time of her death,¹ though its validity had been held to depend on the law existing at the time of its execution.²

III. CONTRACTS OF MARRIED WOMEN—1. Law of Contracts as Affected by Law of Married Women.—The law of contracts requires that there shall be two parties at least to every contract, and that the parties shall be capable of giving their consent. In the first of these rules, since at common law husband and wife are one person, lies the main reason for the invalidity of contracts between husband and wife;³ in the second, since a wife is said at common law to have no will of her own, but to be under the power and control of the husband, lies the reason for the invalidity of all contracts of married women.⁴ As the unity of husband and wife has been gradually encroached upon in equity and by statute, and as the disabilities of married women have been gradually directly and indirectly removed, the number of contracts which a married woman can make has been gradually growing. But so blind has been legislation, and so inconsistent have been decisions, that the present state of the law of contracts of married women is most confused. The word contracts used in this part of this article includes all transactions between consenting parties, although deeds are particularly discussed under the next part.

2. Capacity of Married Women at Common Law, Generally.—At common law, generally, all contracts, agreements, covenants, promises, and representations of married women were absolutely null and void,⁵ at law and in equity.⁶ The grounds of their in-

1. *Wakefield v. Phelps*, 37 N. H. 295, 306. "A will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity depend upon the law as it then stands. A statute passed after the making of a will, but before the death of the testator, by which the law is changed, takes affect upon the will. To give the statute such a construction is not to make it retrospective in its operation, since it affects no rights vested before its passage."

2. *Kurtz v. Saylor*, 20 Pa. St. 205. "But a will made in 1833, if invalid for such want of authority, was not validated by the act of 1848 passed during her lifetime. Her right to make a will was to be determined by the law as it existed when the will was made, and not as it was at the time of her death."

3. **Contracts of Married Women.**—See title HUSBAND AND WIFE, vol. 9; *White v. Wager*, 25 N. Y. 328, 329.

4. See this title, *ante*, part I; *Mortin v. Dwelby*, 6 Wend. (N. Y.) 9, 12, 13; 4 Am. Dec. 245.

5. In *Neef v. Redmon*, 76 Mo. 195,

197, a vendor who has contracted in writing to convey land to a married woman, and has received part of the purchase money, is so far bound that he cannot rescind without tendering back the money; and one purchasing from him with notice of the contract will take subject to her equitable right, so that if the vendor afterward conveys to her, she may maintain an action against him for the title. See also *Stewart on H. & W.*, § 368.

6. *Pond v. Carpenter*, 12 Minn. 430, 432. A married woman cannot, either at law or in equity, bind her person or her property generally by contract, and the only remedy allowed will be against her separate property. In an action against a wife and her husband the complaint alleged "that goods, wares and merchandise were sold and delivered to the wife, for her sole use and benefit, and on credit of her separate estate and property, at her instance and request, and at the instance and request of her husband, and that the defendants jointly and severally promised to pay for them." *Held*, on demurrer to

validity were that a married woman had no legal existence, being merged in her husband;¹ that she had no separate existence,² and that she had no consenting capacity, as she was under the power and control of her husband, and his wish was her law.³ The common law rule, although for the greater part done away with by equity and statutes, still so far exists that any capacity of a married woman to contract is regarded as exceptional, and the grounds thereof must be alleged and proved by one setting it up.⁴ Married women are still *prima facie* unable to contract at all.⁵

3. Contracts of Married Women at Common Law—Exceptions.—

Under certain circumstances at common law married women had the capacities of unmarried women, and could therefore contract as *femes sole*. This was the case when the husband was an alien residing abroad,⁶ or when he had been banished,⁷ or had abjured the realm,⁸ or was civilly dead.⁹ In the United States a permanent departure from the State, and renunciation of his married rights by a husband, invests his wife with the capacities of a *feme sole*,¹⁰ though whether under such circumstances she can make a

the complaint, that the allegation of the sale to the wife in the manner stated, at the instance and request of her husband, is a sufficient allegation of the consent of the husband to the charge of her separate estate by the will. The fact that the husband, under these circumstances, assumed a joint and several liability for the indebtedness, does not deprive the creditor of his remedy against the separate property of the wife. See also Stewart on H. & W., § 389.

1. Rodemeyer v. Rodman, 5 Iowa 426, 427; Stewart on H. & W., § 39, 331.

2. Kelso v. Tabor, 52 Barb. (N. Y.) 125, 128; Stewart on H. & W., § 39.

3. In Martin v. Dwelby, 6 Wend. (N. Y.) 9, a deed of lands executed by a *feme covert*, together with her husband, but not acknowledged by her pursuant to the statute conveying lands belonging to the *feme*, and the payment of the consideration money by the grantee, is not such an agreement to convey as will be enforced against the heirs at law of the *feme*, by a decree for specific performance. It seems that a covenant entered into by a *feme covert*, except as to property held by her as her separate estate, or subject to her exclusive control, or as a trustee, is absolutely void. See also Sanford v. McLean, 3 Paige (N. Y.) 117, 122; 23 Am. Dec. 773.

4. Hinkson v. Williams, 41 N. J. Eq. 35, 37; S. P., Stilwell v. Adams, 29

Ark. 346; Way v. Peck, 47 Conn. 23; Tracy v. Keith, 11 Allen (Mass.) 214, 215; West v. Laraway, 28 Mich. 464, 467; Pollen v. James, 45 Miss. 129, 133; Lewis v. Perkins, 36 N. J. L. 133; Nash v. Mitchell, 71 N. Y. 199.

In Nash v. Mitchell, 71 N. Y. 199, in an action upon contract against a married woman, the burden is upon the plaintiff, not only to prove the contract, and that it was made by her or her authorized agent, but that it was a contract she was capable of making.

5. In Rodemeyer v. Rodman, 5 Iowa 426, *prima facie* a *feme covert* is still unable to contract—to sue and be sued. With reference to certain matters, however, a *feme covert* may contract, and sue and be sued.

6. Gallagher v. Delargy, 57 Mo. 29, 37.

7. Rhea v. Renner, 1 Pet. (U. S.) 105, 107; Stewart on M. & D., § 177.

8. Musick v. Dubson, 76 Mo. 624, 628; 43 Am. Rep. 780.

9. Worthington v. Cook, 52 Md. 297, 306; Stewart on H. & W., § 334.

10. In Musick v. Dodson, 76 Mo. 624, the abandonment of a married woman by her husband for a period of time sufficient to entitle her to a divorce does not remove her disability to contract, unless he has gone beyond the limits of the State. See also 43 Am. Rep. 780; Danner v. Berthold, 11 Mo. App. 351, 355; Stewart on M. & D., § 177; Stewart on H. & W., § 332.

valid deed seems to be disputed.¹ Though in Texas mere separation, if permanent, is sufficient to produce this result, the true rule seems to be that neither departure from the State alone nor separation alone is sufficient; but the husband must have both renounced his marital rights and put himself permanently beyond the process of the courts of the State.² The effect of a divorce *a mensa et thoro* is different in different States.³ A married woman may also, as agent, under a power, and in representative capacities, contract as a *feme sole*.⁴

4. Contracts of Married Women—Capacity in Equity.—Independently of statute, a married woman's personal contracts are no more binding in equity than they are at law;⁵ as to her person and her general property her contracts are absolutely void,⁶ so that even her deed, if not properly executed at law, cannot be reformed, corrected, or enforced in equity.⁷ But equity recognizes the separate property and existence of married women, and, in most States, a wife is with respect to such property treated as a *feme sole*, and her contracts relating to the latter are enforced in a proceeding *in rem*.⁸ Thus, her contract to sell her equitable separate estate is valid,⁹ and even if not enforceable against her specifically, if she has received the purchase money the property is liable for its repayment;¹⁰ and a contract, in consideration of a loan, to pay it back, and to give a mortgage for it on her equitable separate estate, may be enforced as an equitable mortgage.¹¹ That is to say, any contract charging her equitable sepa-

1. In *Rhea v. Rhenner*, 1 Pet. (U. S.) 105, by the laws of Maryland a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time until her husband shall have been absent seven years, and shall not have been heard of during that time. By those laws a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman of real property acquired by her while a *feme sole* trader while she was abandoned by her husband, is void. See also *Beckman v. Stanley*, 8 Nev. 257, 261; *Contra*, *Pro Gallagher v. Delargy*, 57 Mo. 29, 37; *Danner v. Berthold*, 11 Mo. App. 351, 355.

2. See case of *Danner v. Berthold*, 11 Mo. App. 317.

3. Discussed in *Stewart on H. & W.*, § 333; *Stewart on M. & D.*, § 449.

4. *Stewart on H. & W.*, §§ 89, 98,

363, 482, 487; *Martin v. Dwelby*, 6 Wend. (N. Y.) 9, 12; 21 Am. Dec. 245.

5. *Vaughan v. Vanderstegen*, 2 Drew. 165, 180; *Miller v. Newton*, 23 Cal. 554, 564; *Hodges v. Price*, 18 Fla. 342; *Patterson v. Lawrence*, 90 Ill. 174, 179; *Rodemeyer v. Rodman*, 5 Iowa 426; *Norris v. Lantz*, 18 Md. 260, 269; *Jenne v. Marble*, 37 Mich. 319, 323; *Loomis v. Brush*, 36 Mich. 40, 46; *Boatman Sav. Bank v. Collins*, 75 Mo. 280, 281; *White v. Wager*, 25 N. Y. 328, 334.

6. *Rodemeyer v. Rodman*, 5 Iowa 426. "In order to make a wife liable in her separate property upon a contract entered into during coverture, the plaintiff should show that such contract related to the expenses of the family, or to other proper purposes, as contemplated by section 1455 of the code; or that it related to her separate property; or that the contract purports to bind herself only."

7. *Loomis v. Brush*, 36 Mich. 40, 46.

8. *Pawley v. Vogel*, 42 Mo. 291, 302.

9. *Stead v. Nelson*, 2 Beav. 245, 248.

10. *Girault v. Adams*, 61 Md. 1, 12, 13.

11. *Stead v. Nelson*, 2 Beav. 245, 248;

rate property for the payment of money may be enforced against such property,¹ and such contracts may be made through anyone, including her husband,² as her agent.³ Though a married woman's capacity to contract with reference to her equitable separate property has always been recognized to some extent, the reasons for and limits of this capacity are not clearly determined, and different rules relating thereto have prevailed at different times and in different places. One theory has been that her contracts are enforceable against her property as equitable appointments, mortgages, or conveyances thereof, on the ground that her power to dispose includes a power to encumber, and that private powers need not be strictly executed to create valid appointments.⁴ Under this theory only express charges would be enforceable,⁵ and no oral charge would have any effect as to real estate.⁶ Since, as to these matters, the weight of the law is otherwise, and for other reasons, this theory has of late met with much disfavor,⁷ though it is the only one possible where, although the wife has only such powers over her estate as are expressly given her, such estate is held liable for contracts which are not expressly authorized.⁸ Another more satisfactory theory has been accepted in States where a married woman is, as to her equitable separate estate, a *feme sole*; namely, that it is an incident of ownership that property should be liable for its owner's debts, or at all events an incident of the *jus disponendi*, and that the liability of equitable separate property for her debts is a consequence of the fact that a married woman is in equity absolute owner thereof.⁹ There are some rules as to the liability aforesaid upon which there seems to be some general agreement.

(1) It is not liable unless the wife has the *jus disponendi*.¹⁰

Wainwright v. Hardisty, 2 Beav. 363, 365; Hall v. Eccleston, 37 Md. 510, 520.

1. McDermott v. Garland, 1 Mackey (D. C.) 496; Taylor v. Shelton, 30 Conn. 122, 128; Crickmore v. Breckenridge, 51 Ind. 294, 297; Merrill v. Parker, 112 Mass. 250.

2. Same cases.

3. Crickmore v. Breckenridge, 51 Ind. 294, 297.

4. Hall v. Eccleston, 37 Md. 510, 520. "We suppose it to be equally clear that a contract, founded upon proper consideration, by which the husband and wife bind themselves to execute a mortgage of the separate estate of the wife, will be enforced by a court of equity, and such estate held liable for the debt intended to be secured; and it is quite as free from doubt that the separate estate held by the wife is liable in equity for all the debts, encumbrances, or other engagements, which she, together with her husband, may by express terms, or

clear implication, charge thereon." Ellett v. Wade, 47 Ala. 456, 464.

5. Knox v. Jordan, 5 Jones (N. Car.) Eq. 175. Nearly everywhere intent to charge may be implied. Miller v. Newton, 23 Cal. 554, 564; Yale v. Dederer, 22 N. Y. 451, 459.

6. Clark v. Miller, 2 Atk. 379; Burch v. Breckinridge, 16 B. Mon. (Ky.) 482, 487. Writing generally held not necessary; Murray v. Barlee, 3 Mylne & K. 209, 223; Ozley v. Ikelheimer, 26 Ala. 332; Miller v. Newton, 23 Cal. 554; Girault v. Adams, 61 Md. 1, 13; Miller v. Brown, 47 Mo. 504, 510; Radford v. Carwile, 13 W. Va. 573, 635.

7. Vaughan v. Vanderstegen, 2 Drew. 165, 181.

8. Knox v. Jordan, 5 Jones (N. Car.) Eq. 175; Creighton v. Clifford, 6 Rich. (S. Car.) 188, 198.

9. Vaughan v. Vanderstegen, 2 Drew. 165, 182; Shattock v. Shattock, Law R., 2 Eq. 182, 189.

10. Aylett v. Ashton, 1 Mylne & C.

Thus, when she has only a life estate the reversion is not liable;¹ when she cannot dispose of the corpus of her land, only the rents and profits are liable,² and when she cannot dispose of it at all, it is not liable at all.³

(2) It is not liable when no credit is given to it,⁴ as when the credit is given to the husband,⁵ and in the case of household expenses the credit is presumed to have been given to the husband.⁶

(3) It is not liable when there is no consideration;⁷ the wife is not estopped in equity by her seal.⁸ Still, usually, the consideration need not benefit her.⁹

(4) It is liable if expressly charged.¹⁰ As to this all agree, and the intention need not be expressed in the contract,¹¹ or in writing.¹²

(5) It is liable if impliedly charged.¹³ The intent to charge may, except in North Carolina,¹⁴ be proved by circumstantial evidence.¹⁵ In many courts, to prevent the implication of a fraudulent intent in the married woman at the time she contracted her debts not to pay them, the law raises a presumption that she intended to pay them in the only way possible, namely, out of her separate property; and such courts hold her property *prima facie* liable on all her contracts, on the doctrine of implied intent.¹⁶ This presumption may be rebutted by showing that neither party had in mind payment out of her estate.¹⁷ Very rarely, however, is this liability said to be independent of express or implied intent to charge, as it is in Virginia.¹⁸ Some courts which recognize implied charges refuse to raise the implication from the mere fact of coverture.¹⁹

105, 111; Shattock v. Shattock, Law R., 2 Eq. 182, 189; Buckner v. Davis, 20 Ark. 447; Radford v. Carwile, 13 W. Va. 573, 674.

1. Shattock v. Shattock, Law R., 2 Eq. 182, 189.

2. McChesney v. Brown, 25 Gratt. (Va.) 393, 404.

3. Clark v. Makenna, Cheves (S. Car.) Eq. 163.

4. No wrong is then done to the third party. Matthewman v. Matthewman, Law R., 3 Eq. 781, 787; Staley v. Hamilton, 19 Fla. 275, 297.

5. First case cited in last note.

6. For he is the head of the household. Powers v. Russell, 20 Mich. 179, 184.

7. Then it is *nudum pactum*.

8. Radford v. Carwile, 13 W. Va. 572, 683.

9. Stewart on H. & W., § 134. *Contra*, Perkins v. Elliott, 23 N. J. Eq. 526, 535.

10. A charge is an equitable mortgage. First Nat. Bank v. Haire, 36 Iowa 443, 446; Harrison v. Stewart, 18 N. J. Eq. 451.

11. Miller v. Newton, 23 Cal. 554, 564; Koontz v. Nabb, 16 Md. 549, 554; Wilson v. Jones, 46 Md. 349; Second Nat. Bank v. Miller, 63 N. Y. 639.

12. Murray v. Barlee, 3 Mylne & K. 208, 223.

13. Greatly v. Noble, 3 Mod. 77, 94; Patton v. Kinsman, 17 Iowa 428; Pond v. Carpenter, 12 Minn. 430, 432; Yale v. Dederer, 22 N. Y. 451, 459; Finch v. Marks, 76 Va. 207, 210.

14. Knox v. Jordan, 5 Jones (N. Car.) Eq. 175, 176.

15. Miller v. Newton, 23 Cal. 564; Jackson v. West, 22 Md. 71, 76, 84.

16. Phillips v. Graves, 20 Ohio St. 371, 390.

17. Kimm v. Weippert, 46 Mo. 532.

18. Burnett v. Hawie, 25 Gratt. (Va.) 481, 486; Radford v. Carwile, 13 W. Va. 572, 581, 602, 608.

19. Jones v. Harris, 9 Ves. 485, 497; Staley v. Hamilton, 19 Fla. 275, 297; Shannon v. Bartholomew, 53 Ind. 54, 56; Patton v. Kinsman, 17 Iowa 428, 433; Wilson v. Jones, 46 Md. 349; DeVries v. Conklin, 22 Mich. 255; Pond v. Carpenter, 12 Minn. 430, 432;.

(6) It is liable for a debt incurred for its preservation,¹ or for some purpose connected necessarily with its full enjoyment.² Other courts have extended this principle, and hold the estate liable whenever the contract benefits it or the married woman, on the ground, it seems, of implied intent.³ Others, on the other hand, do not hold it liable even for improvements on it, if there is no express or implied charge.⁴ A few courts refuse to hold it liable for a debt not for its benefit, even on a charge.⁵

(7) It is liable on contracts in relation to it,⁶ or on the faith and credit of it.⁷

But the only satisfactory way of determining the law in each particular State is to examine the decisions therein.

5. Contracts of Married Women—Capacity Under Statutes.—The present capacity of married women to contract depends largely on statutes; and the effect of statutes, general and special, on the common-law rules, forms a most important subject, which will be separately discussed. Separate property acts do not enable a married woman to make personal contracts—this is universally admitted.⁸ But three classes of her contracts have been recognized as binding on her statutory separate property: (1) contracts

Johnson *v.* Cummin, 16 N. J. Eq. 97; Partridge *v.* Stocker, 36 Vt. 108, 117.

1. London *v.* Lempriere, Law R., 4 P. C. 572, 594; Crickmore *v.* Breckenridge, 51 Ind. 294.

2. Batchelder *v.* Sargent, 47 N. H. 262; Montgomery *v.* Eveleigh, 1 McCord (S. Car.) Eq. 267; Magwood *v.* Johnson, 1 Hill (S. Car.) Eq. 228.

3. Orange Bank *v.* Traver, 7 Sawy. (U. S.) 210, 216; Henry *v.* Blackburn, 32 Ark. 445, 451.

4. Shannon *v.* Bartholomew, 53 Ind. 54, 56; Wilson *v.* Jones, 46 Md. 349, 357. *Contra*, Henry *v.* Blackburn, 32 Ark. 445, 451.

5. Williams *v.* Hugunin, 69 Ill. 214, 217; Perkins *v.* Elliott, 23 N. J. Eq. 526, 535.

6. London *v.* Lempriere, Law R., 4 P. C. 572, 594; Collins *v.* Underwood, 33 Ark. 265.

7. Stately *v.* Hamilton, 19 Fla. 275, 298; Williams *v.* Hugunin, 69 Ill. 214, 217; Black *v.* Bryan, 18 Tex. 453, 465; Todd *v.* Lee, 15 Wis. 365.

8. O'Daily *v.* Morris, 31 Ind. 111. "Our statutes do not change the rule of the common law, so far as it applies to the contracts at large of a married woman, that she is incapable of binding herself by an executory contract, and that all such contracts made by her, whether in writing or by parol, are absolutely void at law." McKee *v.* Rey-

nolds, 26 Iowa 578; Pond *v.* Carpenter, 12 Minn. 430, 432; Ames *v.* Foster, 42 N. H. 381, 385.

Late Decisions on Contracts of Married Women from Various State Courts Under Statutes:

California.—A married woman, in California, is incapable of contracting a personal obligation except in cases provided by statute. Norton *v.* Meader, 4 Sawy. (U. S.) 604.

Under Civ. Code, a married woman may enter into any agreement or transaction respecting her property which she might if unmarried. She may mortgage or convey it by deed of trust to secure the debts of her husband, and, having done so, his creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers. Burkle *v.* Levy, 70 Cal. 250.

District of Columbia.—The common law disability has not been removed in the District of Columbia (Ritch *v.* Hyatt, 3 MacArth. (D. C.) 536); but a married woman may contract to repair her house, or to put it into rentable condition. Harmon *v.* Garland, 1 Mackey (D. C.) 1.

Florida.—Though the wife may conduct a mercantile business in Florida and the husband may act as agent for her in that business, yet she cannot make a contract herself or by him as

agent on which she will be personally liable.

To determine whether the credit was given to him or to her, it should be shown that the fact was known to the vendor, or that between him and the husband there was a clear and distinct understanding that the credit was given to her; else the husband will be liable. *McQuaid v. Fontane*, 24 Fla. 509.

A married woman is by the common law incapable of making a contract that will bind her personally, either in law or equity; and for this reason there cannot, in the absence of legislation changing the common law, be a judgment or decree against her personally for the recovery of money, as distinguished from a decree charging her separate estate, or other property, with the payment of money. No exception to this rule is created by the existence of a marriage contract between husband and wife giving her the right to control and manage her separate estate and property the same as if she had remained unmarried.

Wherever coverture avoids a contract which a wife has attempted to make, it likewise bars a personal recovery against the wife on the ground of the fraud connected therewith; and the bar cannot be overcome by suing her in an action *ex delicto*.

It is error to decree a recovery of money of or against a married woman personally in a suit in equity instituted to set aside a contract for the sale of land on the ground of fraud, and to recover the amount of a cash payment made thereon by the complainant. *Prentiss v. Paisley*, 7 L. R. A. 640.

Georgia.—A married woman is not liable on her note given for money borrowed to pay the premium due by the husband upon a policy of insurance on his life, where it is not shown that the policy was for her benefit alone. *Jones v. Bradwell* (Ga.) 1890, 10 S. E. Rep. 745.

Illinois.—As to the power of the wife, under the enabling laws of Illinois, to engage in trade, etc., see *Re Kinkead*, 3 Biss. (U. S.) 405; *Farwell v. Kinkhead*, 1 Am. L. Rec. 323.

Indiana.—A married woman may execute a promissory note for property purchased by her. *Lane v. Schlemmer*, 114 Ind. 206.

Kentucky.—A note given by a married woman, not for necessities for herself or family, and for which credit was not given her, is void. *Stevens v.*

Deering (Ky.) 1888, 9 S. W. Rep. 292.

Maryland.—A bond executed by a *feme covert* alone, without the joinder of her husband, is void, and no action can be maintained upon it, either during coverture or afterwards. *Harris v. Dodge* (Md.) 1890, 19 Atl. Rep. 597; *Davis v. Carroll* (Md.) 1889, 18 Atl. Rep. 965.

Massachusetts.—A married woman who endorses bank promissory notes at her husband's request, for him to fill up and use, which afterward and in her absence he fills up and negotiates for value at a bank, is liable to the bank as endorser, under the Massachusetts statutes, which give her the unrestricted right to contract except with her husband. *Binney v. Globe Nat. Bank* (Mass.), 6 L. R. A. 379.

Michigan.—A married woman cannot make an executory contract that is not directly connected with her estate. *Howe v. North*, 69 Mich. 272.

But she may render herself liable for things bought by her for family use. *Ibid*.

Yet she is not liable upon a contract for the board of herself and husband. *Ibid*.

She cannot make a valid contract for the erection of a building upon the joint property of herself and husband, but can contract only with reference to her sole or separate property. *Curtis v. Crowe* (Mich.) 1889, 41 N. W. Rep. 876.

A contract in writing to bind her must have been made on behalf of her sole property. *Mutual Ben. L. Ins. Co. v. Wayne Co. Sav. Bank*, 68 Mich. 116.

The statutes do not authorize a wife to become personally liable on an executory promise except concerning her separate estate. *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Reed v. Buys*, 44 Mich. 80; *Edwards v. McEnhill*, 51 Mich. 160; *Harvey v. Galloway*, 48 Mich. 532; *Richards v. Proper*, 44 Mich. 96; *Wilson v. Coolidge*, 42 Mich. 112; *Gantz v. Toles*, 40 Mich. 725.

Minnesota.—The capacity of married women to be bound and estopped by their conduct is incident to their enlarged power to deal with others under Minnesota statutes. *Dobbin v. Cordiner* (Minn.), 4 L. R. A. 333.

Mississippi.—The statutes of Mississippi in relation to married women have not relieved a wife from common law disabilities to make contracts.

Canal Bank *v.* Partee, 99 U. S. 325.

With certain exceptions a married woman cannot bind herself by any covenant, nor can she be bound by the covenants of her trustee in a deed of separation; nor can she, in consideration of such separation, convey or release to her husband her claims on his estate. *Stephenson v. Osborne*, 41 Miss. 119, 125.

In Mississippi, unless a married woman has a separate estate she is subject, as to her contracts, to the disability of coverture. *Canal Bank v. Partee*, 99 U. S. 325.

A personal judgment against a married woman, in an action against her on her promissory note, is a nullity under the laws of Mississippi. *Ibid.*

Missouri.—Under the Revised Statutes of Missouri a married woman may act as *feme sole* as to her separate property, and may make contracts for purchase of personal property with her separate means. *Dailey v. Singer Mfg. Co.*, 88 Mo. 301; *Rosenheim v. Hartsock*, 90 Mo. 357; *Miller v. Brown*, 47 Mo. 504.

The restriction by Missouri Rev. Stat. 669, on the power of a married woman to covenant in a joint deed with her husband of her statutory estate, does not apply to her covenants in a conveyance of her separate estate in equity. *Barlow v. Delaney*, 40 Fed. Rep. 97.

New Jersey.—Under the New Jersey revision, a wife may contract to sell her real estate, and specific performance thereof will be decreed, after her husband's death, against one purchasing with knowledge thereof. *Union Brick & Tile Mfg. Co. v. Lorillard*, 44 N. J. Eq. 1.

New York.—In New York, a married woman may carry on business and may make contracts in the prosecution of such business. *United States v. Garlinghouse*, 11 Int. Rev. Rec. 11. See *Voorhees v. Bonesteel*, 83 U. S., 16 Wall. (U. S.) 16.

In the course of her separate business she can make negotiable paper which will be governed by the law merchant. *Noel v. Kinney*, 106 N. Y. 74.

Her contracts may be either express or implied, and may be made either personally or by agent, and when within the statute they will charge her separate estate. *Dickerson v. Rogers*, 114 N. Y. 405.

As to all contracts relating to her separate estate a married woman stands

at law, under the Married Woman's acts, on the same footing as if unmarried. *Noel v. Kinney*, *supra*; *Overseers of Poor of Parker City v. Overseers of Poor of Du Bois Borough* (Pa., 1887), 9 Atl. Rep. 457; *Freeking v. Rolland*, 53 N. Y. 422; *Bodine v. Killeen*, 53 N. Y. 93.

North Carolina.—As to the power of a wife, in North Carolina, to make contracts which will charge her separate estate, see *Matthews v. Murchison*, 17 Fed. Rep. 760.

Ohio.—The *ius disponendi* which attaches in Ohio to the estate of a married woman is largely regulated by statute. *Levi v. Earl*, 30 Ohio St. 147.

The ground upon which a court of equity charges her separate estate for her general engagements is not because her contracts have any validity, but because the circumstances are such that equity decrees it to be just that they should be paid out of her estate. *Ibid.*

Her separate property is not liable for her general engagements in the absence of a contract valid in law to bind the same. *Rice v. Columbus etc. R. Co.*, 32 Ohio St. 380.

Except so far as capacity has been given to her by statute to bind herself by her contracts, they are void. *Payne v. Thompson*, 44 Ohio St. 192.

She may charge her separate estate at least to the extent that such liability may be incurred for its benefit. *Phillips v. Graves*, 20 Ohio St. 371; *Patrick v. Littell*, 36 Ohio St. 79.

Pennsylvania.—The wife has only such power over her personal property as is conferred by statute. *Hinkle v. Landis* (Pa.), 25 W. N. C. 218.

All contracts made by the wife concerning her separate estate, other than for labor and materials for improving the same, are subject to her disabilities as a *feme covert*, except where a case is made out for the court to charge her separate estate. *Spearman v. Ward*, 114 Pa. St. 634.

Under Pennsylvania Act of February 29th, 1872, a married woman can make a valid judgment note for a sewing machine purchased for her own use. *Baker v. Singer Mfg. Co.*, 122 Pa. St. 363.

Under the Pennsylvania Act of June 3d, 1887 (Pub. Law, 332, known as the Married Persons' Property Act), a married woman may confess judgment, or bind herself or her estate by contract, for three purposes, viz: where

which would bind her equitable separate property;¹ (2) contracts which are expressly authorized by the statute—as when a statute empowers to make contracts “relating to,” or “with reference to,” her property;² (3) contracts which are impliedly authorized by statute—contracts without the capacity for making which she could not possess, use and enjoy her property as it was intended, under the statute, that she should.³ On some of these contracts, the remedy is at law; on others, it is in equity; and on still others, there are current remedies at law and in equity.⁴ But the remedy and the obligation must be kept quite distinct.⁵ Unfortunately, the above distinctions have not been generally recognized or regarded and it is almost impossible to lay down rules applicable to all the States. The burden is upon the party alleging the liability of the property to show that the contract is one that binds it.⁶ When a separate property act gives a married woman capacity to make certain specified contracts with respect to her property, or to charge or encumber it only by contract executed with certain formalities, it impliedly restrains her from making any others, or any without such formalities, even in equity; but the fact that courts of law imply from the terms of a statute a limited capacity to contract, does not necessarily prevent courts

she engages in trade or business, in the management of her separate estate, and for necessities; but she cannot bind her estate generally as a *feme sole*. *Real Estate Invest. Co. v. Roop* (Pa.), 7 L. R. A. 211.

A married woman cannot enter into a valid agreement with a third person, without the consent of her husband, transferring to such person a sum of money in consideration of his obligating himself to pay her an annuity out of such sum during her natural life; and if she does so it will be presumed that such third person knew that she was acting *ultra vires*. *Hinkle v. Landis* (Pa.), 25 W. N. C. 218.

South Carolina.—Under the South Carolina law, a married woman cannot execute a valid contract of suretyship. *Harris v. McCaslan* (S. Car., 1889), 10 S. E. Rep. 104.

A note given by a married woman for money borrowed for her own use is valid, under S. C. Gen. Stat. 2037. *Howard v. Kitchens* (S. Car.) 1889, 10 S. E. Rep. 224.

And a note given by her for money expended on account of her child at her request is valid. *Ibid*.

Wisconsin.—In Wisconsin, married women have not been vested by statute with general power to bind themselves or their separate estates by the ordi-

nary contract of endorsement of a note. *Avery v. Doane*, 1 Biss. (U. S.) 64.

1. *Johnson v. Cummin*, 16 N. J. Eq. 97, 104; *Bedford v. Burton*, 106 U. S. 338; *Donovan v. Donovan*, 41 Conn. 551; *Cox v. Wood*, 20 Ind. 54, 59; *Hall v. Eccleston*, 37 Md. 510, 520; *Pond v. Carpenter*, 12 Minn. 430, 432; *Doyle v. Orr*, 51 Miss. 229, 232; *Pemberton v. Johnson*, 46 Mo. 342; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613, 628; *Patrick v. Littell*, 36 Ohio St. 79, 83; *Glass v. Warwick*, 40 Pa. St. 140, 145; *Hall v. Dotson*, 55 Tex. 520; *Stockton v. Farley*, 10 W. Va. 171.

2. *Marshall v. Berry*, 13 Allen (Mass.) 43, 45; *Plumer v. Lord*, 5 Allen (Mass.) 460, 462; *West v. Laraway*, 28 Mich. 464; *Batchelder v. Sargent*, 47 N. H. 262, 264.

3. *Williams v. Hugunin*, 69. Ill. 214, 219; *Smith v. Howe*, 31 Ind. 233; *Durea v. Getchell*, 55 Me. 241, 248; *Albin v. Lord*, 39 N. H. 196, 201; *Frecking v. Rolland*, 53 N. Y. 422; *Wieman v. Anderson*, 42 Pa. St. 311, 317; *Krouskop v. Shontz*, 51 Wis. 204, 214.

4. *Phillips v. Graves*, 20 Ohio St. 371, 389; *Bradford v. Greenway*, 17 Ala. 797; *Johnson v. Cummin*, 16 N. J. Eq. 97, 106.

5. *MacLay v. Love*, 25 Cal. 367, 382.

6. *Tracey v. Keith*, 11 Allen (Mass.)

of equity from recognizing some further capacity.¹ And, though some courts have taken, as it is believed, the true ground, that equity has nothing to do with statutory separate property, the majority have held that her statutory estate is bound by her contracts in equity precisely as it would have been had it been created by a deed to her sole and separate use instead of by a statute.² Whether a particular contract is binding on particular statutory separate estate depends on the rule which would determine in the State where it was made, whether the said contract would be binding on an equitable separate estate.³ Thus, in New Jersey the contract must be beneficial to her, or must be an express charge;⁴ in Kansas, any contract is irrebuttably presumed to have been intended as a charge and to be binding, etc.⁵ Two limitations to this liability have been recognized: (1) She cannot charge unless she can convey—a rule which has been questioned, but which prevails as to equitable separate estate.⁶ (2) If her husband's consent to her conveyances is required, any contract of hers to be a charge must be made with his consent—rule also questioned.⁷ There are cases, as suggested above, which deem charges as indirect conveyances, and will not recognize them unless executed with all the formalities required of a conveyance.⁸ A power to convey always includes a power to charge.⁹

When the separate property act authorizes a married woman to make contracts "relating to," or "with respect to," or "with reference to," her separate property, the question is, what contracts do so relate, etc.? Whether a contract for the purchase money of certain property is a contract relating to that property is disputed.¹⁰ But contracts for the cultivation, improvement, stocking, supplying with tools, or with work horses, of her separate farm, are contracts relating thereto;¹¹ so is a contract for furniture for her house;¹² but not a contract for supplies for the family,¹³ or for the purchase of a saddle horse.¹⁴ So a contract providing for damages for an injury to her property is a contract with reference thereto.¹⁵ When the wife's capacity to contract with reference to

214; *West v. Laraway*, 28 Mich. 464; *Pollen v. James*, 45 Miss. 129, 133.

1. *Todd v. Lee*, 15 Wis. 365, 380; *Jones v. Crosthwaite*, 17 Iowa 393, 403.

2. *Perkins v. Elliott*, 23 N. J. Eq. 526.

3. *Scott v. Scott*, 13 Ind. 225; case in last note and *Staley v. Hamilton*, 19 Fla. 275.

4. *Perkins v. Elliott*, 23 N. J. Eq. 526.

5. *Wicks v. Mitchell*, 9 Kan. 80, 87.

6. See § 4, *ante*.

7. *Radford v. Carwile*, 13 W. Va. 572, 674; *Holl v. Eccleston*, 37 Md. 510, 520; *Selph v. Howland*, 23 Miss. 264, 267.

8. *Staley v. Hamilton*, 19 Fla. 275, 295.

9. *Hall v. Dotson*, 55 Tex. 520.

10. *Pro Labaree v. Colby*, 99 Mass. 559, 560. *Contra*, *Jones v. Crosthwaite*, 17 Iowa 393, 402; *Miller v. Albertson*, 73 Md. 343.

11. *Batchelder v. Sargent*, 47 N. H. 262; *Burr v. Swan*, 118 Mass. 588, 589; *McCormick v. Holbrook*, 22 Iowa 487, 489; *Mitchell v. Smith*, 32 Iowa 484, 487.

12. *Harmon v. Garland*, 1 Mackey (D. C.) 1.

13. *Schneider v. Garland*, 1 Mackey (D. C.) 350.

14. *McDermott v. Garland*, 1 Mackey (D. C.) 496.

15. *Duren v. Getchell*, 55 Me. 241, 248.

her separate property is implied from her capacity to hold, use and enjoy the same, as being involved therein, the question is, what contracts are necessary and proper to render her tenure, use and enjoyment of the property as full and beneficial as was intended? Whether, when she may acquire by purchase, she may buy on credit, is disputed;¹ but if she may trade, she may buy a bill of goods on credit,² and may make all contracts in the usual course of business.³ If she may earn for her own use, she may buy a sewing machine to do her sewing on,⁴ or a piano to give lessons on.⁵ She may employ counsel to litigate her rights to her property;⁶ she may employ servants and laborers thereupon;⁷ she may lease it, make contracts for its cultivation, repair, etc., and for disposing of its produce.⁸ Whatever is essential to make its use beneficial, she may do.⁹ These contracts, it must be remembered, are not binding on her personally, but they are enforced against her property, in some States by a suit at law, in others by a proceeding in equity.¹⁰

6. General Rules as to Construction of Statutes Relating to Contracts of Married Women.—(1) General statutes relating to contract, but not expressly referring to married women, do not affect the validity of married women's contracts, but apply to these, only so far as they are valid under other statutes.¹¹

1. *Pro Tiemeyer v. Turnquist*, 85 N. Y. 516, 521; 39 Am. Rep. 674.

2. *Trieber v. Stover*, 30 Ark. 727.

3. *Plumer v. Lord*, 5 Allen (Mass.) 460; *Frecking v. Roiland*, 53 N. Y. 422.

4. *Williamson v. Dodge*, 5 Hun (N. Y.) 498, 499; *Dayton v. Walsh*, 47 Wis. 113, 120.

5. *Dayton v. Walsh*, 47 Wis. 113, 120.

6. *Leonard v. Rogan*, 20 Wis. 540.

7. *Cookson v. Toole*, 59 Ill. 515, 520.

8. *Carpenter v. Mitchell*, 50 Ill. 470.

9. *Batchelder v. Sargent*, 47 N. H. 262.

10. *Doyle v. Orr*, 51 Miss. 229, 232; *Johnson v. Cummin*, 16 N. J. Eq. 97, 104; *Cookson v. Toole*, 59 Ill. 515, 519; *Stockton v. Farley*, 10 W. Va. 171, 175.

11. **Effect of General Statutes not Mentioning Married Women on Married Women's Contract.**—In illustration of the rule stated in the text, a statute providing that all deeds "shall be valid between the parties though not recorded," would not render the deed of a married woman valid; a statute providing for the giving of replevin bonds does not enable a married woman plaintiff to give such a bond. See *Ward v. Whitney*, 12 Phila. (Pa.) 246. A statute relating to auction bids would not make the bid of a married woman valid. See *De Hay v. Dennis*, 14 Rich. (S.

Car.) Eq. 27, 29. General insolvent laws have been held inapplicable to married women. *Relief Building Assn., Schmidt*, 55 Md. 97, 98. A statute requiring the officer to certify that the party executing a deed "was known to me" does not apply to married women's deeds executed under another special act not requiring this. *Bell v. Lyle*, 10 Lea (Tenn.) 44, 45. As to recording, see *Applegate v. Tracy*, 9 Dana (Ky.) 215, 224.

On the other hand, under the National Bank acts which do not mention married women, these are liable for assessment on their stock. *Anderson v. Line*, 14 Fed. Rep. 405, 406; *In re Reciprocity Bank*, 22 N. Y. 9, 15. And under statutes defining the liability of purchasers at mortgage sales without referring to married women, these have been held bound. *Fowler v. Jacob*, 62 Md. 326. Because other statutes had empowered them to hold stock and purchase property separately from their husbands. So where a married woman may sue as if sole, her attorney may under a general law obtain a lien for his fees. *Putnam v. Tennyson*, 50 Ind. 456, 458. And her valid general mortgage may be foreclosed under a general law. *Hartman v. Ogborn*, 54 Pa. St. 120, 123. And when a married

(2) Statutes which secure to a married woman the separate use and enjoyment of her property, and which either do not refer to her contracts at all, or authorize contracts "relating to," or "with respect to," etc., such property, do not enable her to contract generally, but only in connection with such property.¹ And there are three classes of contracts which may be authorized by these statutes, to-wit: 1, contracts binding the property, in equity, as if it were equitable separate property; 2, contracts falling within the classes expressly authorized by the words "with reference to," etc.; and 3, contracts necessary to the separate use and enjoyment of the property as secured by the statute.¹

(3) A married woman's contracts which would be binding on her equitable separate property in equity are valid as against her statutory separate property in the same way.²

(4) A married woman is not, with respect to her statutory separate property, a *feme sole*. She has by implication the capacity to make such contracts, and no others, as are necessary to the exercise of the capacities, or the enjoyment of the rights, expressly given her by the statute.³

woman may contract, statutes like the statute of frauds apply to her contracts; she must be liable under the general as well as the marriage laws. See *Hetherington v. Hixon*, 46 Ala. 297; *Sawyer v. Fernald*, 59 Me. 500; *DeVries v. Conklin*, 22 Mich. 255, 258; *Bayler v. Com.*, 40 Pa. St. 37, 44.

1. Effect of Statutes Creating Married Women's Statutory Separate Estates.—The meaning of the rule in the text is that statutes, such as have been passed in all the States, destroying the husband's common law estate in his wife's property, and securing to the wife her own property to her own use, do not affect the general personal status of the wife, and give her no capacity to make any contract which is not in some way connected with the property so secured to her. See the following cases. *Canal Bank v. Partee*, 99 U. S. 325, 332; *Sykes v. Chadwick*, 18 Wall. (U. S.) 141, 151; *Hodges v. Price*, 18 Fla. 342, 344; *Jenne v. Marble*, 37 Mich. 319, 321; *Russell v. People's Sav. Bank*, 39 Mich. 671, 673, 33 Am. Dec. 444; *Doyle v. Orr*, 51 Miss. 229, 232; *Huyler v. Atwood*, 26 N. J. Eq. 504, 506.

In three following rules the different kinds of contracts which may be authorized by such statutes are discussed. The distinction is suggested in *Bressler v. Kent*, 61 Ill. 426, 430; 11 Am. Rep. 67; *Todd v. Lee*, 15 Wis. 365, 380.

2. Contracts in Equity Under Married Women's Separate Property Acts.—Courts

of equity have long recognized a married woman's contracts with respect to her property secured to her separate use by act of party—by deed, etc. See *ante*, part III, § 4; and for the same reasons and to the same extent they enforce her contracts with reference to her separate property created by act of State—by statute. *Johnson v. Cummins*, 16 N. J. Eq. 97, 104, 105. See *ante*, part III, § 5. The rule states the prevailing opinion, though some courts have held that equity has nothing to do with the legal separate property of wives. See *MacLay v. Love*, 25 Cal. 367, 382; *West v. Laraway*, 28 Mich. 464, 465; *Cain v. Burkley*, 35 Miss. 119, 145.

But whether a particular contract is binding on a particular piece of property must depend upon the rule which would determine, in the place where the contract is made (see *post*, rule (9)), whether the contract could be binding on the property if it were equitable separate estate and the terms of the statute were the terms of the deed. *Scott v. Scott*, 13 Ind. 225, 228. So that in New Jersey the contract must be beneficial or an express charge. *Perkins v. Elliott*, 23 N. J. Eq. 526, 534. While in Kansas any contract is irrebuttably presumed to be intended as a charge on the property. *Wicks v. Mitchell*, 9 Kan. 80, 87. For other limitations of this rule see *ante*, part III, § 5.

3. Implied Power to Contract Under Married Women's Separate Property

(5) When the statute authorizes a married woman to contract "with reference to," "with respect to," etc., her separate property, her contracts to be valid must be "with reference to," etc., her said property.¹

Acts.—This rule means that the power to contract must be expressly given, or it must be incidental and necessary to the use and enjoyment of the property as the statute says it shall be used and enjoyed. *Bressler v. Kent*, 61 Ill. 426, 427; 14 Am. Rep. 67; *Cole v. Van Riper*, 44 Ill. 58.

Under a statute providing that a married woman shall have over her property the same rights and power as a *feme sole*, she may dispose of it. *Beal v. Warren*, 2 Gray (Mass.) 447, 459; *post*, part IV. She may agree to dispose of it. *Dreutzer v. Lawrence*, 58 Wis. 594, 598; *post*, part IV, § 10. She may do this by power of attorney. *Patton v. King*, 26 Tex. 685, 686; *post*, part IV, § 9. She can do with respect to it whatever any other person can do with respect to his or her property. *Beard v. Dedolph*, 29 Wis. 136, 141. She may invest it. *Rieper v. Rieper*, 79 Mo. 352, 361. She may charge it for her debts. *Williams v. Hugunin*, 69 Ill. 214, 219; 18 Am. Rep. 268.

When a married woman may "hold, enjoy and possess her property as if *sole*" she may make all contracts necessary to such holding and enjoyment. *Williams v. Hugunin*, 69 Ill. 214, 219; 18 Am. Rep. 268. *Cookson v. Toole*, 59 Ill. 515, 519; *Smith v. Howe*, 31 Ind. 233, 234; *Lindley v. Cross*, 31 Ind. 106; *Duren v. Getchell*, 53 Me. 241, 248; *Albin v. Lord*, 39 N. H. 196, 201; *Freeking v. Rolland*, 53 N. Y. 422, 425; *Mahon v. Gormley*, 24 Pa. St. 80; *Wright v. Blackwood*, 57 Tex. 644, 648; *Krouskop v. Shontz*, 51 Wis. 204, 214. She may lease it. *Parent v. Callerand*, 64 Ill. 97, 99. She may contract for legal services to it. *Leonard v. Rogan*, 20 Wis. 540, 542. Or for manual labor on it. *Cookson v. Toole*, 59 Ill. 515, 519. For cultivating it. *Carpenter v. Mitchell*, 50 Ill. 470. For repairing it. *Beard v. Dedolph*, 29 Wis. 136, 141. For selling its crops. *Cookson v. Toole*, 59 Ill. 515, 521. And she may render it liable for her debts. *Williams v. Hugunin*, 69 Ill. 214. To the extent at least of its income. See *Cox v. Wood*, 20 Ind. 54.

This implied capacity does not conflict with her capacity in equity discussed under rule (3); the two capaci-

ties exist side by side. *Todd v. Lee*, 15 Wis. 365, 380. In some States it is held that the implied capacity can be enforced only in equity. *Hugler v. Atwood*, 26 N. J. Eq. 504, 506. But the cases cited above hold that it is properly enforced at law.

1. Express Power to Contract Under Married Women's Separate Property Acts.—On the principle, referred to more fully under rule (7), *expressum unius est exclusio alterius*, the enumeration in a statute of certain contracts which a married woman may make is a denial of her capacity to make any others; but it is probable that statutes providing that a married woman's contracts with reference to her property shall be valid are simply attempts to create a rule which had previously existed in equity as to equitable separate property. See *Albin v. Lord*, 39 N. H. 196, 203; *Leake v. Sebaco*, 21 N. J. Eq. 269, 282; *Yale v. Dederer*, 18 N. Y. 265, 272; *Walker v. Reaney*, 36 Pa. St. 410, 414. So that there would be no conflict between this rule and rule (3).

The following contracts "relate to," "concern," "refer to" and "respect" a married woman's separate property, to-wit: contracts for the direct benefit of the same. *Russell v. People's Sav. Bank*, 39 Mich. 671, 674. For selling it. *Bailey v. Pearson*, 29 N. H. 77. Leasing. *Vandevoort v. Gould*, 36 N. Y. 639, 643. Mortgaging. *Marlow v. Barlew*, 53 Cal. 456, 459. For cultivating. *Basford v. Pearson*, 7 Allen (Mass.) 504, 505. For improving. *Burr v. Swan*, 118 Mass. 588, 589. For stocking. *Batchelder v. Sargent*, 47 N. H. 262, 264. For fencing. *Albin v. Lord*, 39 N. H. 196, 202. For repairing. *Parker v. Kane*, 4 Allen (Mass.) 346, 347. For supplying with laborers. *Cookson v. Toole*, 59 Ill. 515, 520. Or with tools. *McCormick v. Holbrook*, 22 Iowa 487, 489. Also a covenant for title in a deed of such property. *Richmond v. Tibbles*, 26 Iowa 474, 476; *Basford v. Pearson*, 7 Allen (Mass.) 504, 505. So an agreement for the sale of the same. Last cases cited and *Baker v. Hathway*, 5 Allen (Mass.) 103, 104; *Durfee v. McClurg*, 6 Mich. 223, 232. Not an agreement for the purchase of such property. *Jones v.*

(6) Statutes expressly authorizing or prohibiting certain specified contracts are strictly construed and, respectively, neither authorize nor prohibit any contracts not specified;¹ but statutes expressly authorizing specified contracts may, by implication, prohibit all others, and contracts expressly prohibiting certain contracts may, by implication, authorize others.²

(7) Under a statute expressly enabling a married woman to contract as if unmarried, she may make contracts generally, entirely unaffected by her coverture,³ but it is doubtful whether she may

Gosthwaite, 17 Iowa 393, 402. A purchase of furniture for her separate house. *Tillman v. Shackleton*, 15 Mich. 447, 454. Or of a horse for her separate farm. *Mitchell v. Smith*, 32 Iowa 484, 487. Whether a purchase of property for her separate use is a contract with respect to that property as separate property is disputed, but the better view is that the obligation to pay arises only after, or at the moment as, the property vests, and therefore it is separate property when the promise to pay for it is made, and the latter is thus a contract with reference to it. *Messer v. Smyth*, 58 N. H. 298, 299-301; *Adams v. Charter*, 46 Conn. 551, 554; *Tillman v. Shackleton*, 15 Mich. 447, 456; *Hugler v. Atwood*, 26 N. J. Eq. 504, 507; *Tlemeyer v. Turnquist*, 85 N. Y. 516, 522; 39 Am. Rep. 674; *Gamer v. Hanaford*, 53 Wis. 85, 87. A contract buying a horse for pleasure riding is not a contract with reference to her separate property. *McDermott v. Garland*, 1 Mackey (D. C.) 496. Nor is one for supplies for the family. *Schneider v. Garland*, 1 Mackey (D. C.) 350. Nor a contract by which money is borrowed to buy the property. *Ames v. Foster*, 42 N. H. 381, 385. But see *Cashman v. Henry*, 75 N. Y. 103, 108; 31 Am. Rep. 437. Nor a contract of suretyship. *Russel v. People's Saving Bank*, 39 Mich. 671, 673; *Hugler v. Atwood*, 26 N. J. Eq. 504, 506. See more fully also *ante*, III, §§ 4, 5.

1. **Effect of Statutes Expressly Authorizing or Prohibiting Specified Contracts.**—Under a statute which authorizes one kind of contract, no other can be made. *Abshire v. State*, 53 Md. 64, 67; *Sturmfelz v. Frickey*, 43 Md. 560, 571; *Robertson v. Bruner*, 24 Miss. 242, 244. So that when a married woman is authorized to dispose of her property by sale, she cannot dispose of it by gift. *Mott v. Smith*, 16 Cal. 533, 536. The only capacities implied are those which are necessarily incidental to rights or

capacities expressly given. See last rule.

Likewise statutes prohibiting certain contracts are strictly interpreted, so that a prohibition against contracts between husband and wife will not apply to contracts of the wife as surety for her husband. *Major v. Holmes*, 124 Mass. 108, 109. See article MARRIAGE SETTLEMENTS.

2. On the other hand, when a married woman is authorized to make certain contracts or to make contracts with certain formalities, she is impliedly restrained from making any others. *Staley v. Hamilton*, 19 Fla. 275, 295. And a prohibition of certain contracts in a statute may make clear the intention of the legislature to authorize all other contracts of the class to which the prohibited contract belongs; thus, under a statute authorizing a married woman to acquire property, "provided that no acquisition from her husband in prejudice of the rights of his creditors shall be valid," authorizes her to acquire from her husband in all cases when the rights of his creditors are not prejudiced. *Trader v. Lowe*, 45 Md. 1, 14.

3. **Effect of Statutes Expressly Authorizing Married Women to Contract as if Unmarried.**—When a statute says that a married woman may contract as if unmarried, it is presumed to mean this literally and fully. *Edwards v. Shoeneman*, 104 Ill. 278, 283. And her contracts are not affected by coverture at all. *Worthington v. Cooke*, 52 Md. 297, 308. She may make all kinds of contracts which an unmarried woman may make. See *Pelzer v. Campbell*, 15 S. Car. 581, 601; 40 Am. Rep. 705. Including contracts of suretyship. *Hart v. Grigsby*, 14 Bush (Ky.) 542; title MARRIAGE SETTLEMENTS. Promissory notes. *Messer v. Smyth*, 58 N. H. 298, 299; *post*, III, § 15. Contracts binding on her equitable separate property. *Watte v. Wolfe*, 16 S. Car. 256,

make contracts directly with her husband.¹

(8) If a statute which enables a married woman to contract requires her contracts to be executed in a certain way, this requirement must be substantially complied with to give her contract any validity;² but if she has the capacity to contract independently of the statute which requires the formalities, a contract not complying therewith may still be valid.³

(9) The capacity of a married woman to contract personally, or as to movables, depends on the law of the place where the contract is made;⁴ to contract as to immovables, on the law of the place where they lie.⁵

(10) The validity of a contract, and the rights of the parties thereunder, depend upon the law existing at the time it is made.⁶

7. Contracts of Married Women Made Before Marriage.—Marriage suspends the remedies against a married woman on her antenuptial contracts, or rather it makes her husband liable for them with her, and a judgment recovered on such a contract against husband and wife can be satisfied out of the property of either of them.⁷ Her husband's liability ceases on her death or on divorce,⁸ while on divorce or his death her full liability revives.⁹ And the same is said to be the effect of any event which gives her the powers of a *feme sole*.¹⁰ And her promise during coverture to pay an antenuptial debt does not take such debt out of the statute of limitations, being itself void.¹¹ In many States the husband's liability for his wife's antenuptial debts has been

268, 269. An implied promise rises against her when it would rise against a *feme sole*, and on such contracts she is liable at law. *Worthington v. Cooke*, 52 Md. 297, 298.

1. An exception may be in the case of her contracts with her husband. See title HUSBAND AND WIFE, where this question is fully discussed.

2. **Effect of Statutes Requiring Formalities.**—The whole discussion of this rule belongs rather to the subject of DEEDS OF MARRIED WOMEN, treated hereinafter in part IV.

3. See *Bedford v. Burton*, 106 U. S. 338, 341; *Edwards v. Schoeneman*, 104 Ill. 278, 284; *Scranton v. Stewart*, 52 Md. 68, 80; *Phillips v. Graves*, 20 Ohio St. 371, 389; *Dreutzer v. Lawrence*, 58 Wis. 594, 598, 599.

4. **Conflict of Laws.**—This is the general rule. See title CONFLICT OF LAWS. But there is another view—that this depends on the law of the married woman's domicile. *Dow v. Gould* etc. *Silver Min. Co.*, 31 Cal. 629, 652; *Snelson v. Williams*, 57 Miss. 451, 462.

5. **Statutes Operate Prospectively.**—

The validity of the contract and the rights of the parties thereunder, depends upon the law existing at the time it is made. *Edwards v. Schoeneman*, 104 Ill. 278, 282; *Loomis v. Brush*, 33 Mich. 40, 47; *Eckert v. Reater*, 31 N. J. L. 133.

6. A statute providing that "all contracts of married women shall be valid" does not affect existing contracts. *Lee v. Lanahan*, 59 Me. 478, 481; *Bryant v. Merrill*, 55 Me. 515, 516. And a note made before the act but delivered afterwards is invalid, though it is good if delivery authorized afterwards. *Taylor v. Boardman*, 92 Ill. 566, 568.

7. *Hall v. White*, 27 Conn. 488, 494; *Peace v. Spierin*, 2 Dessaus. (S. Car.) Eq. 460, 470. *Contra*, *Haygood v. Harris*, 10 Ala. 291, 292.

8. See article on DIVORCE in this work, and *Cureton v. Moore*, 7 Jones (N. Car.) Eq. 204, 206.

9. *Hull v. White*, 27 Conn. 488, 494.

10. *Clarke v. Windham*, 12 Ala. 798, 801.

11. *Parker v. Cowen*, 1 Heisk. (Tenn.) 518, 520.

destroyed by statute, and her full liability on the same has been declared.¹

8. Contracts of Married Women—Confirmation Thereof.—It involves somewhat difficult questions to determine what is required of a woman who has made a contract while under the disabilities of coverture to confirm it.

The mere fact that a wife survives her husband does not give any efficacy to her contracts made during coverture,² though it has been held that a contract enforceable against her during coverture only in equity could be enforced at law against her after coverture;³ but her liability on her antenuptial contracts revives.⁴ As her contracts made during coverture are void and not voidable, they cannot be ratified, and therefore, according to the better view, her mere promise to perform them made after coverture (after divorce or death of husband) is without consideration and void;⁵ but in some States the moral consideration is deemed sufficient to support and render valid such a promise,⁶ and in others the courts have expressly declined to decide this point.⁷ But whatever be the opinion as to the effect of an express promise, there is no doubt that a mere recognition of the contract gives it no new validity.⁸ A contract enforceable in equity is, however, ample consideration for an express promise;⁹ so is the surrender of a note void as to her, but binding on others;¹⁰ so is a note given for an antenuptial debt.¹¹ A married woman cannot set up her invalid deed by parol,¹² but she can confirm her assignments and deeds by reacknowledgment and recording,¹³ by estop-

1. Ala. Code, 1876, § 2704; Cal. Civ. Code, § 170; Wood v. Orford, 52 Cal. 412; Md. Acts 1880, §§ 31, 32; Pa. Purd. Dig. 1872, p. 1006.

2. Candy v. Coppock, 85 Ind. 594, 597. "The agreement made with decedent while she was a married woman was void and cannot be enforced. The question as to whether a promise made by a *feme sole* to pay a debt, created while she was a *feme covert*, is supported by a sufficient moral obligation to make the promise binding, it is unnecessary to decide. . . . An acknowledgment of an agreement does not constitute a promise to pay." Ross v. Singleton, 1 Del. Ch. 149.

3. Schaeffer v. Ivory, 7 Mo. App. 461.

4. Clarke v. Windham, 12 Ala. 798.

5. Musick v. Dodson, 76 Mo. 624; Hayward v. Barker, 52 Vt. 429; Hetherington v. Hixon, 46 Ala. 297; Cook v. Bradley, 7 Conn. 57, 61; Howard v. Simpkins, 70 Ga. 322, 326; Thomas v. Passage, 54 Ind. 106, 112; Loomis v. Brush, 36 Mich. 40, 47; Foster v. Wilcox, 10 R. I. 443.

6. Hemphill v. McClimans, 24 Pa.

St. 367, 371. "But the legal disability was gone when she made her last promise. That, too, was worthless, if there was no consideration to ground it upon. But the rule is a very familiar one, that an existing moral duty, not enforceable by law, is a sufficient consideration for an express promise to perform that duty." Viser v. Bertrand, 14 Ark. 267; Franklin v. Beatty, 27 Miss. 347; Atkins v. Banwell, 2 East 506; Gibbs v. Merrill, 3 Taunt. 311.

7. Spitz v. Fourth Nat. Bank, 8 Lea (Tenn.) 641; Candy v. Coppock, 85 Ind. 584, 597; Hubbard v. Bugbee, 55 Vt. 506, 509.

8. Candy v. Coppock, 85 Ind. 594, 597.

9. Cleveland v. Low, 32 Ga. 458, 463; Hubbard v. Bugbee, 55 Vt. 506, 509.

10. Spitz v. Fourth Nat. Bank, 8 Lea (Tenn.) 641.

11. Parker v. Cowan, 1 Heisk. (Tenn.) 518, 520.

12. Price v. Hart, 29 Mo. 171, 172.

13. Riggs v. Boylan, 4 Biss. (U. S.) 445, 446.

pel,¹ etc., and in Iowa may ratify her deed of the homestead as if she had never been married.² So by bringing suit on an invalid contract she confirms it by matter of record.³

9. Contracts of Married Women Through Agents.—A married woman had at common law no legal existence and could not, therefore, have any legal representatives;⁴ or rather her legal existence was merged in that of her husband, and he was for all things her agent in law;⁵ so her antenuptial appointment of agent was revoked by her marriage.⁶ Her capacity to contract through agent is now co-extensive with her capacity to contract directly:⁷ thus, she cannot make a contract through an agent which she could not make herself, as a contract with respect to her property not separate;⁸ and she can make through an agent such contracts as she could make herself, as contracts charging her separate estate,⁹ or in the course of her business.¹⁰ The position of her husband as her agent,¹¹ her appointment of attorneys at law,¹² and her powers of attorney,¹³ are elsewhere discussed.

10. Distinction Between Personal Contracts of Married Women and Her Contracts Binding Her Property.—In considering the contracts of a married woman it is important to distinguish between her personal contracts, which bind her personally, and her contracts with reference to her separate property, which are binding thereupon. The distinction originated in equity, which recognized her separate ownership of property settled to her sole and separate use, and her capacity to change the same with her contracts. Such contracts were not enforceable against her personally, but only against the property, which became a kind of artificial person, in a proceeding *in rem*.¹⁴ And so, under statutes creating statutory separate estate, the courts continued to hold that her contracts to be valid should be "with reference to" her estate, and that mere personal contracts were void unless expressly authorized.¹⁵ The distinction, originally one both of capacity and of remedy, has in some States under the statutes become one of capacity only, the woman being liable as if un-

1. See part V of this article.

2. Spafford v. Warren, 47 Iowa 47, 51.

3. Walker v. Owen, 79 Mo. 563, 571.

4. Kelso v. Tabor, 52 Barb. (N. Y.) 125, 128. "By the marriage, at common law, the husband and wife become one person, and the very being or legal existence of the woman is suspended during the marriage."

5. Rodemeyer v. Rodman, 5 Iowa 426, 427.

6. Montague v. Carneal, 1 A. K. Marsh. (Ky.) 351, 352.

7. Wilder v. Abernethy, 54 Ala. 644, 646.

8. Hall v. Callahan, 66 Mo. 316, 324.

9. Vail v. Meyer, 71 Ind. 159, 165; Morrison v. Thistle, 67 Mo. 596, 600.

10. Paine v. Farr, 118 Mass. 74.

11. See vol. 9, pp. 837, 838, 839.

12. See vol. 9, pp. 837, 838, 839.

13. See vol. 9, pp. 837, 838, 839.

14. Pawley v. Vogel, 42 Mo. 291, 302. "She may pledge and bind that property, but none other; her general disability at law continues as before; but a court of equity may proceed *in rem* against that property, though not in personam against herself, and subject it to the payment of her separate debts."

15. Bailey v. Pearson, 29 N. H. 76, 87.

married on all contracts made with reference to her estate.¹ On this point, however, much confusion exists.

11. Implied Contracts of Married Women.—A promise will not be implied by law when the law would not recognize an express promise; so that, at common law, there was no implied assumpsit against a married woman;² and her payment during coverture on account of an antenuptial debt did not affect the running of the statute of limitations.³ But when she can contract she may be suable on the common counts.⁴ If she occupies premises, the law raises an implied promise to pay rent.⁵ If she orders materials, the law implies a contract to pay for them.⁶ But if she buys necessities, the implied promise is one of the husband's, for he is liable therefor.⁷ And if she receives money claimed by another, there is no implied promise to pay it back.⁸

12. Effect of Husband's Joiner in His Wife's Contracts.—The joinder of a husband with his wife does not, independently of statute, affect her capacity to contract, for the status of married women cannot be destroyed by agreement;⁹ so that the joint bond or note of husband and wife is the note or bond of the husband alone.¹⁰ But a husband's joinder in his wife's disposition of property to which he is entitled by his marriage rights makes such disposition effectual.¹¹ His joinder may be required by statute, and in such cases he may so contract as not to bind himself, this being the effect of his joinder in Louisiana.¹² When he joins, his wife is not discharged of her obligation by the adjudication that he is a bankrupt.¹³ Whether a wife must have her husband's joinder to a contract with reference to her separate property when she cannot dispose of such property without his joinder, does not seem to be settled; some cases seem to infer the negative, while others point towards the affirmative.¹⁴ It is a general rule that a married woman cannot bind by contract property which she cannot dispose of.¹⁵

13. Purchases and Sales of Married Women.—Generally speaking, a married woman cannot contract to buy or sell property, because a contract to buy is a mere personal contract, and a contract to

1. *Kavanagh v. O'Neill*, 54 Wis. 101, 106.

2. *Tucker v. Cocke*, 32 Miss. 184. "A *feme covert* is not competent to contract to act as the agent or bailiff of another so as to bind herself personally, and where she cannot expressly contract the law will not raise an implied assumpsit."

3. *Farrar v. Bessey*, 24 Vt. 89.

4. *Hinkson v. Williams*, 41 N. J. L. 35, 38; *Spafford v. Warren*, 47 Iowa 47, 51.

5. *Ackley v. Westervelt*, 86 N. Y. 448, 453.

6. *Vail v. Meyer*, 71 Ind. 160.

7. See vol. 9, p. 840.

8. *Platt v. Hawkins*, 43 Conn. 139, 143.

9. *Stewart on M. & D.*, §§ 172, 181.

10. *Cummings v. Miller*, 3 Grant Cas. (Pa.) 146, 147.

11. *Palmer v. Davis*, 28 N. Y. 242, 247.

12. *Lehman v. Barrow*, 23 La. An. 185, 188.

13. *Allers v. Forbes*, 59 Md. 374, 376.

14. *Matthews v. Murchison*, 17 Fed. Rep. 760, 767; *Pierce v. Osman*, 79 Ind. 259, 260; *Hall v. Eccleston*, 37 Md. 510, 520; *Townsend v. Chapin*, 12 Allen (Mass.) 476, 479; *Cozzens v. Whitney*, 3 R. I. 79, 83.

15. See section 4 of part III, *ante*.

sell is not one of the modes usually specified for the disposition of married women's separate property. Still an agreement to sell is a contract with reference to the property, and may be valid as such.¹ But with a married woman's actual purchases and sales it is different. It is not one of her privileges to buy without paying, and therefore where she may acquire by purchase she may buy on credit, and be bound for the purchase money.² A promise to pay for separate property is a contract with respect to her separate property.³ So if she follows the modes prescribed she may sell her property, and is bound by her acceptance of any consideration, as when in part payment she took the release of a debt of her husband.⁴ If her sale is void and the purchaser has paid her the purchase money, it is generally settled that he must bear the loss.⁵ She may recover the property without restoring the purchase money;⁶ though in some cases this has been denied.⁷

14. Covenants and Bonds of Married Women.—Generally a married woman's seal adds nothing to the validity of her contract; it does not, for example, estop her as to the consideration.⁸ Her covenants, like her simple contracts, were void at common law; no judgment or damages could be recovered on them at law, nor has any case presented itself in which one of them has been enforced in equity.⁹ By statute she is sometimes expressly authorized to covenant, and on such a covenant she is liable at law.¹⁰ But statutes authorizing her to convey, to make deeds, etc., do not render valid her covenants in such deeds, etc.; so that a warranty deed of a married woman is no better than a quit-claim deed.¹¹ Still a covenant or title in a deed of her property may be valid as a contract "with respect" thereto;¹² and covenants for purposes

1. *Baker v. Hathway*, 5 Allen (Mass.) 103, 104. "The real estate was her sole and separate property, and she was under the statute authorized to sell and convey the same, having the assent of her husband in writing, or he joining with her in the conveyance. The husband joining . . . obviates the objection that the wife could not be bound by a contract to sell, because she could not make a written conveyance without the assent of her husband."

2. *Dayton v. Walsh*, 47 Wis. 113, 120; *Thiemeyer v. Turnquist*, 85 N. Y. 516, 521.

3. *Messer v. Smyth*, 58 N. H. 298, 299.

4. *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 165.

5. Sections 368, 412, *Stewart on H. & W.*

6. *Alexander v. Salisbury*, 37 Ala. 375; *Wood v. Terry*, 30 Ark. 385, 393; *Oglesby v. Pasco*, 79 Ill. 164, 170; *Glidden v. Strupler*, 52 Pa. St. 400, 404;

McLaurin v. Wilson, 16 S. Car. 402, 410.

7. *Pilcher v. Smith*, 2 Head (Tenn.) 208, 211.

8. *Radford v. Carwile*, 13 W. Va. 573, 683. "The debts of a married woman, for which her separate estate is liable, arise from any transaction out of which a debt would arise, if she were a *feme sole*, except that she is not liable for a bond or covenant which she has signed and sealed, but which was given without any consideration, she not being estopped from denying the consideration in a court of equity."

9. *Pilcher v. Smith*, 2 Head (Tenn.) 208, 211.

10. *Worthington v. Cooke*, 52 Md. 297, 307.

11. *Batsford v. Wilson*, 75 Ill. 133, 134.

12. *Richmond v. Tibbles*, 26 Iowa 474, 481; *Bosford v. Pearson*, 7 Allen (Mass.) 504, 505. Not a covenant in her husband's deed. *Griffin v. Sheffield*, 38 Miss. 359, 392.

immediately connected with the use, etc., of her property may be valid under her implied powers.¹ There are cases in which a married woman has been held estopped by her covenants, though she could not have been held liable in damages for the breach thereof.² So her bonds were void;³ though in equity, one to secure purchase money was held valid as to the property purchased,⁴ and one expressly charging her separate property may be valid.⁵ Nor can she file a bond in a judicial proceeding unless expressly authorized.⁶

15. Promissory Notes of Married Women.—At common law the promissory note of a married woman was void;⁷ a mortgage for the sole purpose of securing it was void;⁸ if made jointly with another it was void as to her, but valid as to her copromissor;⁹ so as to a surety;¹⁰ it was equally void in the hands of *bona fide* assignees for value without notice.¹¹ By accepting a note from a married woman purchaser a vendor did not lose his lien.¹² Now a party endeavoring to enforce a promissory note must show that it falls within some equitable or statutory exception;¹³ in Michigan, for example, it must be shown that it was for something connected with her separate estate;¹⁴ in Louisiana, that it benefited her.¹⁵ Under an act enabling a married woman to contract as if *sole*, she may make a promissory note,¹⁶ and validly endorse a note of her husband's firm,¹⁷ and execute a note in blank,¹⁸ and be liable, though her husband joined with her and has been adjudged a bankrupt.¹⁹ Under an act enabling her to contract with reference to

1. *Kolls v. De Leyer*, 41 Barb. (N. Y.) 208, 211; *Houghton v. Milburn*, 54 Wis. 554, 564.

2. *Davis v. Tingle*, 8 B. Mon. (Ky.) 593, 543; *Fowler v. Shearer*, 7 Mass. 14, 21; *Wadleigh v. Glines*, 6 N. H. 17; *Hill v. West*, 8 Ohio 222, 225; *Fletcher v. Coleman*, 2 Head (Tenn.) 384.

3. *Wilson Sewing Machine Co. v. Fuller*, 60 How. Pr. (N. Y.) 480, 481; *Huntley v. Whitner*, 77 N. Car. 392, 393; *Schnyder v. Noble*, 94 Pa. St. 286, 289.

4. *Schnyder v. Noble*, 94 Pa. St. 286, 289.

5. *Woolsey v. Brown*, 11 Hun (N. Y.) 52, 53.

6. *Ward v. Whitney*, 12 Phila. (Pa.) 246; *Woolsey v. Brown*, 74 N. Y. 82, 84.

7. *Taylor v. Boardman*, 92 Ill. 566. "Prior to July 1st, 1874, a married woman living with her husband was totally incapacitated to give a note, with her husband or otherwise as surety, and could not give any binding authority to do any act essential to the making or delivery of the same." *Vance v. Wells*, 6 Ala. 737; *Simpers*

v. Sloan, 5 Cal. 457, 458; *Shannon v. Canney*, 44 N. H. 593, 594.

8. *Hodges v. Price*, 18 Fla. 342, 345; *Sperry v. Dickinson*, 82 Ind. 132, 135.

9. *Robinson v. Robinson*, 11 Bush. (Ky.) 174, 179.

10. *Willingham v. Leake*, 7 Baxt. (Tenn.) 453, 457.

11. *Kenton v. McClellan*, 43 Mich. 564, 565; *Cooley v. Barcroft*, 43 N. J. L. 363.

12. Case in note 1, above.

13. *Buhler v. Jennings*, 49 Mich. 538, 539; *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250, 256.

14. See preceding note.

15. *Taylor v. Carlisle*, 2 La. An. 579, 580.

16. *Messer v. Smyth*, 58 N. H. 298; *Marlow v. Barlew*, 53 Cal. 456, 459; *Wood v. Orford*, 52 Cal. 412; *Kenworthy v. Sawyer*, 125 Mass. 28.

17. *Kenworthy v. Sawyer*, 125 Mass. 28.

18. *Hord v. Taubman*, 79 Mo. 101, 103.

19. *Kenton Ins. Co. v. Hill*, 125 Mass. 587.

her separate property, a note with reference to something else is not valid;¹ but a note for repairs on the same is valid.² In equity her note might be a charge, as any other promise to pay might.³ At common law she could in her own name endorse a note drawn to her order, with her husband's consent, and her said endorsement passed a good title,⁴ and his said consent could be indirectly proved;⁵ but she could not be liable as endorser.⁶ Under a statute enabling her to dispose of her separate property jointly with her husband, his joint endorsement of her separate note was not required, but only his consent express or implied.⁷ And she can be liable as endorser only when she can be liable as maker.⁸ Her acceptance of a bill given for the debt of another is void, where she cannot bind herself for the debt of another.⁹

16. Releases and Receipts of Married Women.—A release is a contract, and works as an estoppel, while a receipt is a mere statement—a mere admission of payment, and not conclusive. When a married woman is entitled to certain property, her sole receipt therefor, unless impeached, is a perfectly good discharge;¹⁰ the receipt of her husband, except as her agent in fact, being on the other hand, worthless.¹¹ But a married woman is not bound by a seal, is not estopped, where she could not contract;¹² and as if she accepted part of her property for the whole, or something in place of her legal rights, she would really dispose of such rights

1. *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 568.

2. *Parker v. Kane*, 4 Allen (Mass.) 346.

3. *Hord v. Taubman*, 79 Mo. 101, 103.

4. *Stevens v. Beals*, 10 Cush. (Mass.) 291, 293.

5. *McClain v. Weidemeyer*, 25 Mo. 364, 367.

6. *Norris v. Lantz*, 18 Md. 260.

7. *Whitridge v. Barry*, 42 Md. 140; *Trader v. Lowe*, 45 Md. 1.

8. *Shannon v. Canney*, 44 N. H. 592, 593.

9. *Cooley v. Barcroft*, 43 N. J. L. 363, 366.

Promissory Note.—A note given by a married woman, not for necessities for herself or family, and for which credit was not given her, is void in Kentucky. *Stevens v. Deering* (Ky. 1888), 9 S. West. Rep. 292.

A married woman cannot claim that a note executed by her as surety for her husband was without consideration, on the ground that it was for a loan previously made to him, where the money had been handed to him on condition that she was to sign the note, and it was all one transaction. *Sypert v. Harrison*, 11 S. West. Rep. 435.

In Connecticut a married woman is not estopped by a note executed jointly with her husband which recites that the said sum is procured for her benefit, where the real consideration is a loan to the husband by the payee. *Kilbourn v. Brown*, 56 Conn. 149. Note for repairs of house good in Kentucky. *Baird v. Bruning*, 84 Ky. 645. Note substantially as surety for husband is void in Michigan. *Littlefield v. Dingwall*, 71 Mich. 223. So in Mississippi. *Enochs v. Newton*, 65 Miss. 86. And in South Carolina. *Livingston v. Shingler*, 30 S. Car. 159. Mere personal note void in South Carolina. *Booker v. Wingo*, 29 S. Car. 116. There as in Tennessee note must be "with reference" to separate estate. *Warren v. Freeman*, 85 Tenn. 513; *Jordan v. Keeble*, 85 Tenn. 412; *Eckerly v. McGhee*, 85 Tenn. 661.

10. *Gore v. Carl*, 47 Conn. 291, 293; *Windsor v. Bell*, 61 Ga. 671; *Nevins v. Gourley*, 95 Ill. 206, 213; *Trader v. Lowe*, 45 Md. 1; *Read v. Earle*, 12 Gray (Mass.) 423, 425; *Early v. Rolfe*, 95 Pa. St. 58, 60.

11. *Rieper v. Rieper*, 79 Mo. 352, 458.

12. *Radford v. Carwile*, 13 W. Va. 572, 583; *Powell's Appeal*, 98 Pa. St. 403, 413.

in whole or in part, her release is not valid except as a receipt unless she can contract as if unmarried,¹ or has full power of disposition over the rights released.² At common law she could give neither release nor receipt, as her legal existence was gone, and her present property rights vested in her husband.³

17. Rents, Repairs and Family Expenses.—At common law a married woman could, of course, not lease property, and in her leaseholds her husband had very full rights.⁴ When she can lease by statute expressly she is liable for the rent at law.⁵ A lease is, in fact, the purchase of a term, and a married woman is liable for the rent just as she would be for purchase money.⁶ If she can lease, she is liable on an implied promise for the use and occupation of premises which she holds after the expiration of the lease, and this though her husband and family are living with her.⁷ For repairs on her property at common law she was in no way liable,⁸ and even for repairs on her equitable separate estate she was liable only if she made the contract in such a way as to bind her said estate.⁹ From her mere knowledge that repairs were being made on her property at her husband's request, no promise on her part to pay therefor can be implied.¹⁰ But when she is collecting the rents of her separate property, and allows out of them for repairs, she is bound.¹¹ So a contract for repairs is beneficial to her estate,¹² and is a contract with reference thereto,¹³ and is a contract which, owing to her ownership of her separate property, she may by implication make.¹⁴ From a purchase by the wife of family supplies, a promise to pay on the part of the husband and not of the wife is implied.¹⁵ If she expressly contracts to pay therefor, she is liable only if she is liable generally on her contracts, or expressly charges her estate.¹⁶ For a purchase

1. See § 371, Stewart on H. and W.

2. Consult preceding and following sections of this article and that on HUSBAND AND WIFE, in vol. 9.

3. Mobley v. Leophart, 47 Ala. 257, 261; Kidwell v. Kirkpatrick, 70 Mo. 214, 216.

4. See pp. 842, 843 of vol. 9 of this work

5. Cruzen v. McKaig, 57 Md. 454, 462. "But by statute she is enabled, as if she were a *feme sole*, to bind herself by any covenant that runs with or relates to the estate demised; and as we have said, there can be no reason why an estate for a term of years, or of greater extent, may not be conveyed to a married woman jointly with another . . . and obligated herself in the form authorized by the statute, as if she were *feme sole*."

6. Bush v. Babbitt, 25 Hun (N. Y.) 213, 214.

7. Ackley v. Westervelt, 86 N. Y. 448, 453.

8. Crane v. Kelley, 7 Allen (Mass.) 250, 251.

9. Wilson v. Jones, 46 Md. 357. "We have carefully examined the decisions in England and in this country, and have reached the conclusion that a married woman having a separate estate, cannot affect that separate estate, unless the obligation sought to be enforced presents upon its face some evidence of the intent to charge the estate, or there is evidence aliunde tending to prove such intent."

10. Bickford v. Dane, 58 N. H. 185, 186.

11. Cheney v. Pierce, 38 Vt. 515.

12. Batchelder v. Sargent, 47 N. H. 262, 266.

13. Vail v. Meyer, 71 Ind. 159, 164.

14. Parker v. Kane, 4 Allen (Mass.) 346.

15. Shaw v. Thompson, 16 Pick. (Mass.) 198, 200.

16. Radford v. Carwile, 13 W. Va. 572, 661.

of family necessities is not of itself a contract with reference to her separate estate,¹ nor is it a contract which she can make by virtue of her powers implied from her ownership of her property.² In some States her property is made jointly liable with her husband's for all family supplies, but this is a liability of her property and not of herself.³

18. Endorsements, Suretyships, Contracts of Married Women.—At common law a married woman could not be a surety because she could not contract at all.⁴ In equity, though in most States a contract made with intent to charge equitable separate property therewith is enforceable, even if made for the benefit of another, in some States such contracts are enforced only if beneficial to the woman or the property, and suretyship contracts are void.⁵ But the general rule is that all deeds, mortgages, etc., of a married woman, made in accordance with the law, are valid, no matter whom they benefit;⁶ for a general power or enabling act does not limit a married woman to contracts for her benefit.⁷ But some statutes expressly except suretyship contracts, and under these a contract of a married woman jointly with another for his debt is void as to her;⁸ nor is a contract between her and her husband any consideration in favor of the payee for her endorsement of her husband's note.⁹ And a suretyship contract is not a contract "with reference," etc., to her separate property, unless it is charged thereon;¹⁰ nor is it a contract which she is empowered to make by implication from her power to hold, enjoy, etc.¹¹ Her acceptance of a bill of exchange for goods sold another is a suretyship contract;¹² but her liability as stockholder is not the liability of a surety.¹³ The rules are the same whether a wife goes surety for her husband or for a stranger, and her liabilities in the former case have already been fully discussed.¹⁴

IV. DEEDS OF MARRIED WOMEN—1. At Common Law.—At common law a married woman has no legal existence and no present prop-

1. *Schneider v. Garland*, 1 Mackey (D. C.) 350.

2. *Thomas v. Passage*, 54 Ind. 106, 114.

3. *Frost v. Parker*, 65 Iowa 178.

4. *Schmidt v. Postel*, 63 Ill. 58. "In an action against a husband and wife, upon a promissory note executed by both of them, the wife pleaded in bar that at the time of the making the promises, etc., mentioned, she was and still is the wife of her codefendant, and that the note was given for hogs bought by her husband; that the debt was his, and that she signed the note only as security for him, and such note was the only cause of action, the court below sustaining a demurrer to the plea. *Held*, that the court erred, the plea presenting a complete bar as to the wife."

5. *Perkins v. Elliott*, 23 N. J. Eq. 526, 528, 533.

6. *Comegys v. Clarke*, 44 Md. 108, 111.

7. *Hart v. Grigsby*, 14 Bush (Ky.) 542; *Mayo v. Hutchinson*, 57 Me. 546; *Major v. Holmes*, 124 Mass. 108; *Witte v. Wolfe*, 16 S. Car. 256, 268.

8. *Brent v. Mount*, 65 Ga. 92, 93.

9. *Reed v. Buys*, 44 Mich. 80, 82.

10. *State Sav. Bank v. Scott*, 10 Neb. 83, 86.

11. *Russell v. People's Sav. Bank*, 39 Mich. 671; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Kavanagh v. O'Neill*, 53 Wis. 101, 105.

12. *Cooley v. Bancroft*, 43 N. J. L. 363, 365.

13. *Hobart v. Johnson*, 19 Blatchf. (U. S.) 359, 362.

14. See section 134, *Stewart on H. &*

erty rights, and therefore her deed, whether of dower or of her own property, was, like her other contracts, a mere nullity.¹ She could be barred of her dower² or divested of her property only by fine and common recovery.³ Fines and common recoveries have never existed in this country, and now do not exist anywhere,⁴ but statutes have taken their place.⁵ In some States, independently of statute, the joint deed of husband and wife has always been recognized as if authorized by the common law.⁶ Whenever a wife held the position of an unmarried woman, as when her husband was civilly dead,⁷ or had abandoned the realm,⁸ or as to her equitable separate property,⁹ she could deed her own property as if unmarried.

2. Under Statutes.—Everywhere statutes have been passed relating to married women's deeds of dower, of the reversionary interest in her realty, and of her statutory separate estate. These are statutes expressly referring to married women, as the general statutes do not apply to their deeds,¹⁰ unless they deed as if unmarried.¹¹ The general rule is that a married woman can convey her property, except her equitable separate estate, only in the mode prescribed by statute.¹² The deed must be acknowledged and certified to substantially as required by the statutes, or it is mere waste paper.¹³

W., and articles on HUSBAND AND WIFE, and MARRIAGE in this work.

1. See, generally, articles in this work on Husband and Wife, Marriage, Stewart on Husband & Wife, §§ 402-404, and Gillespie v. Worford, 2 Coldw. (Tenn.) 632, 638.

2. Leonis v. Lazzarovich, 55 Cal. 52, 55; Hartley v. Ferrell, 9 Fla. 374, 378; Bressler v. Kent, 61 Ill. 426; 14 Am. Rep. 67; Lane v. McKeen, 15 Me. 304, 305.

3. Lawrence v. Heister, 3 Har. & J. (Md.) 371, 377; Helms v. Franciscus, 2 Bland (Md.) 544, 563; 20 Am. Dec. 402; Bool v. Mix, 17 Wend. (N. Y.) 119, 129; 31 Am. Dec. 285.

4. Martin v. Dwelly, 6 Wend. (N. Y.) 9, 12; 21 Am. Dec. 245.

5. Last note and Lawrence v. Heister, 3 Har. & J. (Md.) 371, 377.

6. Manchester v. Hough, 5 Mason (U. S.) 67, 68; Fowler v. Shearer, 7 Mass. 14; Davey v. Turner, 1 Dall. (U. S.) 11; Albany Fire Ins. Co. v. Bay, 4 Const. (S. Car.) 9.

7. Rhea v. Rhenner, 1 Pet. (U. S.) 108. "The law seems to be settled that when the wife is left without maintenance or support by the husband, has traded as a *feme sole* and has obtained credit as such, she ought to be liable for her debts. . . . And the same

reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue as a widow for her dower. In such case she has been permitted to alien her land, without her husband, and is exempted from the disabilities of coverture."

8. See last note and Danner v. Berthold, 11 Mo. App. 351, 355; Rosenthal v. Mayhugh, 33 Ohio St. 155, 161.

9. See note 7, and Miller v. Newton, 23 Cal. 554, 567.

10. Applegate v. Gracy, 9 Dana (Ky.) 215, 224; Belle v. Lyle, 10 Lea (Tenn.) 44. See DEEDS.

11. Edwards v. Schoeneman, 104 Ill. 278, 283.

12. Lewis v. Waters, 3 H. & McH. (Md.) 430. "No deed of lands from a *feme covert* can be valid and operative to pass her interests therein, unless her acknowledgment is made according to the act of 1715, ch. 47. This act prescribes a precise and particular form which must be substantially complied with." And see Leonis v. Lazzarovich, 55 Cal. 52, 57; Schroyer v. Nickell, 55 Mo. 264, 267; Gilchrist v. Buie, 1 Dev. & B. (N. Car.) Eq. 346, 359; Brown v. Farren, 3 Ohio 140, 155; Rosenthal v. Mayhugh, 33 Ohio St. 155.

13. It is the observance of the statute which gives the ability. Hepburn v.

3. Of Equitable Separate Property.—When a married woman has the capacity to deed her equitable separate property she executes the deed, unless the settlement provides otherwise, as if unmarried.¹ As to whether or not she has the capacity there are three rules: (1) That she has the capacity unless the settlement takes it away;² (2) that she has not the capacity unless the settlement gives it;³ and (3) that she has the capacity to deed away her estate during coverture, but not her reversion.⁴ Her equitable property, which is not separate, she must deed as she does her legal estates of the same kind.⁵

4. Of Statutory Separate Property.—The general rule is that a married woman has no capacity to dispose of her statutory separate lands unless this is expressly given by statute.⁶ The power to dispose is not, for example, included within the power to "own enjoy, and possess, as if unmarried,"⁷ and when the capacity is not expressly given her she must dispose of her statutory separate property in the same way as she would dispose of property held as at common law,⁸ and her invalid deed would have no effect.⁹ If the statute expressly gives her the power to dispose of her property, but prescribes some particular mode of disposition—some particular formalities—the deed must substantially conform with the requirements of the statute or it will be wholly void.¹⁰ If the statute expressly gives her the power of disposition, but names no particular mode of execution, etc., she may execute her deed as if unmarried,¹¹ and if it is imperfect it may be confirmed,¹¹ and will be valid in equity just as the imperfect deed of an unmarried woman is.¹¹

Dubois, 12 Pet. (U. S.) 345, 374; Lane v. Dolick, 6 McLean (U. S.) 200; Leonis v. Lazzarovich, 55 Cal. 52, 57; Mariner v. Saunders, 10 Ill. 113; Cross v. Everts, 28 Tex. 523, 532.

1. American Home Missionary Soc. v. Wadhams, 10 Barb. (N. Y.) 597, 602. "Hence it follows, that in relation to a separate estate held by a *feme covert*, without the prohibition of anticipation, she is, to all intents and purposes, a *feme sole*, and so she is treated in all the books." Essex v. Atkins, 14 Ves. 542; Radford v. Carwile, 13 W. Va. 572, 578.

2. Chew v. Beall, 13 Md. 348, 360.

3. Swift v. Castle, 23 Ill. 209, 222.

4. Radford v. Carwile, 13 W. Va. 573, 682, 683.

5. Clayton v. Rose, 87 N. Car. 106, 110; Young v. Young, 7 Coldw. (Tenn.) 461, 477; Hawley v. Twyman, 29 Gratt. (Va.) 728.

6. Swift v. Luce, 27 Me. 285. "The statute of 1844, ch. 117, entitled 'An act to secure to married women their rights in property,' has not so altered

the common law as to enable a *feme covert* to sell her personal property without the assent of her husband.

There does not appear to have been any language used in the act with a design to remove the disabilities imposed by the common law upon a *feme covert*, and to enable her, contrary to its rules, to make sales and purchases of property."

7. Parent v. Callerand, 64 Ill. 97, 99.

8. Bressler v. Kent, 61 Ill. 426. "The act of February 21st, 1861, 'to protect married women in their separate property,' does not go to the extent of authorizing married women to sell real estate without concurrence of the husband. Such power cannot be implied, but must be given in direct terms."

9. Lucas v. Cobbs, 1 Dev. & B. (N. Car.) L. 228, 232; Rogers v. Higgins, 48 Ill. 211, 216.

10. Silliman v. Cummins, 13 Ohio 116, 118.

11. Edwards v. Schoeneman, 104 Ill. 278, 284; Scranton v. Stewart, 52 Ind. 68,

5. Joinder of Husband.—The husband's joinder in his wife's deed is generally necessary to render it valid,¹ and is unnecessary only when she is expressly authorized to deed "as if *sole*," or "as if unmarried."² At common law he had an actual estate to convey, and it would seem that he had to join as a cograntor;³ but when the whole estate is vested in the wife and his assent is required to prevent imposition, his mere signature to the deed is enough,⁴ and he need not be named in the body of the deed.⁵ But his assent cannot be proved by parol, although, where his assent was required in writing, his joinder in a mortgage note was held sufficient, though he did not join in the mortgage at all. The joint deed of husband and wife need not be executed at the same time and place. Whether he shall join is discretionary with him, and he cannot be compelled to join; so it is a personal right and cannot be delegated; nor can he honestly claim compensation for joining. His joinder is not necessary in his wife's deed of her equitable separate estate, when she has the power to convey as if *sole*, nor need he join in her deed executed under a special power. Where, by statute, a husband must join in his wife's deeds, she cannot without him make a deed good in equity, or a good agreement to convey.

6. Execution, Acknowledgment and Recording of Married Women's Deeds.—When a married woman executes a deed under a power she must strictly conform with the terms of the power;⁶ she must execute it herself; she would not be bound by another signing her name in her presence,⁷ nor by another filling in blanks left by her,⁸ and she must acknowledge it in conformity with the power if the power refers to the mode of acknowledgment.⁹ When a privy examination apart from her husband is required, omission thereof is fatal.¹⁰

89; *Silliman v. Cummins*, 13 Ohio 116, 119.

1. *Alexander v. Saulsbury*, 37 Ala. 375, 377; *Hartley v. Ferrell*, 9 Fla. 374, 378; *Bressler v. Kent*, 61 Ill. 426; *Scott v. Scott*, 13 Ind. 225; *Shumaker v. Johnson*, 35 Iowa 33, 35; *Jewett v. Davis*, 10 Allen (Mass.) 68, 71; *Buchanan v. Hazzard*, 95 Pa. St. 240, 243; *Young v. Snyder*, 3 Grant (Pa.) 150, 151.

2. *Rake v. Lawshee*, 24 N. J. L. 613, 616.

3. *Blythe v. Dargoin*, 68 Ala. 370, 375.

4. *Pease v. Bridge*, 49 Conn. 58, 61; *Evans v. Summerlin*, 19 Fla. 858, 861; *Hills v. Bearse*, 9 Allen (Mass.) 403, 406; *Stone v. Montgomery*, 35 Miss. 83, 107; *Elliott v. Sleeper*, 2 N. H. 525, 529.

5. *Chapman v. Miller*, 128 Mass. 269, 271. "In the case at bar, the wife, having acquired her title by deed since the statute of 1857, might convey it without her husband joining as a grantor,

and the insertion of his name in the last clause of the mortgage, with his signature and seal, manifest the 'assent in writing,' which was all that was requisite to make it valid."

6. *Drury v. Foster*, 2 Wall. (U. S.)

24. "A paper executed under seal for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one *bona fide* and without knowledge of the mode of execution."

7. *Hord v. Taubman*, 79 Mo. 101, 104, and reasoning in above note.

8. See note 1.

9. *Cross v. Everts*, 28 Tex. 523.

10. *Pratt v. Battels*, 28 Vt. 685; 2

An examination apart means an examination out of the presence of the husband so that he cannot communicate with his wife by word, look or motion.¹ The husband and wife need not acknowledge at the same time.² If a married woman has full power to deed her property and no special acknowledgment is required, the effect of defects in the acknowledgment is the same as in the case of unmarried women.³

The Certificate.—The certificate is the legal evidence of the execution of the deed,⁴ and it must show that everything has been done which is necessary to the validity of a married woman's deed.⁵ The certificate is *prima facie* evidence of all that it states;⁶ it is not conclusive as against the wife,⁷ so that she may show, for example, that there was in fact no prior examination,⁸ except, perhaps, where the grantee was a party to, and had no notice of, the defect,⁹ and except as to *bona fide* purchasers for value.¹⁰ Without a proper certificate the deed is absolutely void;¹¹ an in-

Scribner Dow., ch. 13; Hepburn v. Dubois, 12 Pet. (U. S.) 345, 374.

1. Belo v. Mayes, 79 Mo. 67. "The examination of the wife separate and apart from the husband, required by the statute, means an examination out of the presence of the husband, so that he cannot communicate by word, look or motion."

2. Newell v. Anderson, 7 Ohio St. 12, 16. Compare Adams v. Buford, 6 Dana (Ky.) 406, 408.

3. Edwards v. Schoeneman, 104 Ill. 278, 284; Scranton v. Stewart, 52 Ind. 68, 89; Silliman v. Cummins, 13 Ohio 116, 119.

4. Young v. Duvall, 109 U. S. 573, 577. "The certificate of the officer states every fact essential under the statute to make the deed, upon its being delivered for record, as effectual in law as if Mrs. Young was an unmarried woman. The duties of that officer were plainly defined by statute. It was incumbent upon him to explain the deed fully to the wife, and to ascertain from her whether she willingly signed, sealed and delivered the same, and wished not to retract it. The responsibility was upon him to guard her against coercion or undue influence upon the part of the husband, in respect to the execution and delivery of the deed. To that end he was required to examine her privily and apart from the husband. These facts were to be manifested by a certificate under his hand and seal."

5. Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; S. B. Toulmin v. Heidelberg, 32 Miss. 268; Bagby v. Ember-

son, 79 Mo. 139; Browder v. Brownder, 14 Ohio St. 589; Mullins v. Weaver, 57 Tex. 5, 6.

6. Carpenter v. Dexter, 8 Wall. (U. S.) 513; Rhoades v. Selin, 4 Wash. (U. S.) 718; Smith v. McGuire, 67 Ala. 34, 37; Blackman v. Hawks, 89 Ill. 512; Heeter v. Glasgow, 79 Pa. St. 79.

7. Russell v. Baptist Theological Union, 73 Ill. 337. "It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and in such case the evidence must be clear and convincing beyond a reasonable doubt; and whilst the making of a false certificate is a fraud upon the party against whom it is perpetrated, yet the mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate, nor will such evidence, slightly corroborated, overcome it." Jackson v. Hayner, 12 Johns. (N. Y.) 469, 472; Central Bank v. Copeland, 18 Md. 305; Fisher v. Meister, 24 Mich. 447; Marsh v. Mitchell, 26 N. J. Eq. 497; Priest v. Cummings, 16 Wend. (N. Y.) 617, 631.

8. See above note.

9. Davis v. Kennedy, 58 Tex. 516; Drury v. Foster, 2 Wall. (U. S.) 24, 34; O'Ferrall v. Simplot, 4 Iowa 381; Dodge v. Hollingshead, 6 Minn. 1; Stone v. Montgomery, 35 Miss. 83; Williams v. Robson, 6 Ohio St. 510, 515; Baldwin v. Snowden, 11 Ohio St. 203; Shrader v. Decker, 9 Pa. St. 14; Hartley v. Frosh, 6 Tex. 208; Harkins v. Forsythe, 11 Leigh (Va.) 294.

10. Reasoning in above cases.

11. Smith v. McGuire, 67 Ala. 34, 37; Leonis v. Lazzarovich, 55 Cal. 52, 56.

sufficient certificate cannot be helped out by parol evidence,¹ or reformed in equity.²

7. Confirmation of Married Women's Deeds.—If a married woman's deed is defective it may be confirmed, if confirmable, in three ways: by act of party, by statute, and by suit in equity.

(1) *By Act of Party.*—If a married woman's deed is imperfectly executed, it is usually utterly void, and cannot, therefore, be ratified by her;³ her subsequent assent to it, during⁴ or after coverture,⁵ or her parol adoption of it,⁶ or her declarations of her willingness to do everything necessary to make it valid,⁷ give it no validity. To give it effect it must be re-acknowledged and delivered;⁸ it must be made a new deed;⁹ and in such case it does not relate back, but takes effect only from the date of such re-acknowledgment and delivery;¹⁰ and so it is defeated by an intermediate valid deed of the same property.¹¹ In cases where the deed, though defective, is executed by her while acting with the powers of a *feme sole*, it is not wholly invalid and may therefore be confirmed.¹²

(2) *By Curative Statutes.*—As a general rule, statutes curing the defects in deeds of married women are void;¹³ but in some States they have been held valid,¹⁴ especially where the State constitution authorized them.¹⁵ There seems to be no reason why a statute

1. Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 274; Pendleton v. Bulton, 3 Conn. 406, 412; Martin v. Hargardine, 46 Ill. 322; Smith v. Hunt, 13 Ohio St. 260; Harty v. Ladd, 3 Oreg. 353.

2. Barnett v. Shackleford, 6 J. J. Marsh (Ky.) 532; 22 Am. Dec. 100; Lindley v. Smith, 58 Ill. 250; Wannall v. Kem, 51 Mo. 150.

3. Buchanan v. Hazzard, 95 Pa. St. 240, 243. "Nothing is better settled than that a deed by a married woman without joining her husband is absolutely void; and the evidence of the husband's verbal assent could not help the matter. . . . Nothing but a new deed, duly executed and acknowledged, could avail."

4. Adams v. Buford, 6 Dana (Ky.) 406, 408; Watson v. Bailey, 1 Binn. (Pa.) 470.

5. Price v. Hart, 29 Mo. 171.

6. Same case, and § 366, Stewart on Husband and Wife.

7. Adams v. Buford, 6 Dana (Ky.) 406, 408.

8. See note 1 above and Smith v. Shackleford, 9 Dana (Ky.) 452, 476; Boatman v. Curry, 25 Mo. 433; Doe v. Howland, 8 Cow. (N. Y.) 277, 284; 18 Am. Dec. 445; Newell v. Anderson, 7 Ohio St. 12, 16; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 276.

9. Miller v. Shackleford, 3 Dana (Ky.) 289, 297.

10. Doe v. Howland, 8 Cow. (N. Y.) 277, 284; 18 Am. Dec. 445; Buchanan v. Hazzard, 95 Pa. St. 240, 243.

11. Jackson v. Stevens, 16 Johns. (N. Y.) 110. "A deed executed by a *feme covert* is not binding upon her, until acknowledged, and her subsequent acknowledgment does not relate back to the time of the acknowledgment of the deed. So, where a husband and wife execute a deed for land of the wife, but which she does not then acknowledge, and the husband and wife afterwards execute another deed of the same land, which is acknowledged by the wife, and the wife then acknowledges the first deed, the title to the land is vested in the grantee in the second deed."

12. Spafford v. Warren, 47 Iowa 47, 51.

13. Loomis v. Brush, 36 Mich. 40, 46. "It is very well settled that such an instrument is of no more validity as an actual conveyance in equity than at law. . . . There can be no ground for claiming that a deed absolutely void in law when made is validated as a conveyance by the subsequent laws which enable married women to take and enjoy property as if *sole*."

14. Randall v. Kruger, 23 Wall. (U. S.) 137, 149.

15. Purcell v. Goshorn, 17 Ohio St. 641, 646; 49 Am. Dec. 448; Smith v. Turpin, 20 Ohio St. 478, 491.

should be able to cure a defect which neither the parties nor a court of equity could remedy.¹

(3) *By Courts of Equity*.—Although it lies within the ordinary jurisdiction of courts of equity to carry out the intentions of parties, and to correct, reform and compel a re-execution of an imperfect deed, this jurisdiction is founded, not on the validity of the deed, as a deed, but on the evidence which it gives of a contract between the parties, on its validity as a contract to give a deed.² This jurisdiction depends, therefore, on the capacity of the parties to the contract to give and take a deed, and as married women have usually no general capacity to contract, and as a contract to execute a statutory power could not be specifically enforced,³ courts of equity have not been in the habit of reforming or giving effect to the imperfect deeds of married women.⁴ Generally a married woman's deed invalid at law is equally invalid in equity.⁵ When she can convey only under a power which prescribes a certain mode, if that mode is not pursued the power is no more executed in equity than at law, and if equity enforced the deed it would give the grantor an additional power.⁶ But where the grantor has the power of a *feme sole* to convey, independently of the mode followed, equity will reform a defect and compel a conveyance in accordance with the intentions of the parties.⁷ And as a deed of property is a contract with reference thereto, wherever such contracts are valid, although the grantee may perhaps not have a specific performance of an imperfect deed, he may probably enforce it as a contract against the property,⁸ and recover any purchase money paid thereupon.⁹ For the reasons above

1. See note 2 above and *Silliman v. Cummins*, 13 Ohio 116, 119.

2. *Gebb v. Rose*, 40 Md. 387, 393. "But clearly no relief can be afforded. The instrument involved is without effect even as a contract to convey, the least objectionable footing upon which it could be placed." *Carr v. Williams*, 10 Ohio 305, 310.

3. *McBryde v. Wilkinson*, 29 Ala. 662; *Wilks v. Burns*, 60 Md. 64, 71.

4. *Holland v. Moon*, 39 Ark. 120, 124.

5. *Williams v. Walker*, 9 Q. B. D. 576, 581; *Drury v. Foster*, 2 Wall. (U. S.) 24, 34; *Holland v. Moon*, 39 Ark. 120, 124; *Leonis v. Lazzarovich*, 55 Cal. 52; *Breit v. Yeaton*, 101 Ill. 242, 262; *Stevens v. Parish*, 29 Ind. 260, 263; *Grapengether v. Fijervary*, 9 Iowa 163; *Gebb v. Rose*, 40 Md. 387, 394; *Bagby v. Emberson*, 79 Mo. 139; *Marvin v. Smith*, 46 N. Y. 571, 574; *Purcell v. Goshorn*, 17 Ohio 105, 124; *Roseburgh v. Sterling*, 27 Pa. St. 292; *Wright v. Dufield*, 11 Heisk. (Tenn.) 218.

6. See *Leonis v. Lazzarovich*, 55 Cal. 52, 55.

7. *Edwards v. Schoeneman*, 104 Ill. 278. "Under the acts of 1869, and section 18 of the act of 1872, relating to conveyances, a married woman might, by joining with her husband in the execution of a deed or mortgage relating to the sale or disposition of her real estate, bind and conclude herself, the same as a *feme sole*. . . . Since the passage of the act of 1869, in regard to conveyances, a court of equity may correct a mistake in the description of the property in a deed or mortgage of a married woman's land."

8. *Felkner v. Tighe*, 39 Ark. 357. "A married woman cannot make an executory contract to convey land which will bind her or her heirs; but if her vendee, under such contract, should make payments on the land, such payments will be a charge upon the land, enforceable in equity, upon her refusal to convey." See also *Shroyer v. Nickell*, 55 Mo. 264, 269; *Danner v. Berthold*, 11 Mo. App. 351, 358.

9. Inference from above cases.

given, equity will not prevent a married woman from setting² up the validity of a deed which in equity and good conscience she ought to recognize, in cases where it would not confirm it;¹ though there are a few cases where equity has upheld the deed of a married woman to prevent great injustice.²

8. Avoidance of Married Women's Deeds.—Although the deed of a married woman be perfect on its face, she may show that in fact it was obtained by fraud or duress, or was improperly executed, and that it is therefore void.³ As to her right to do this as against a party to the fraud,⁴ or any party with notice of the defect or fraud,⁵ or with notice of such facts as should have put him on his guard,⁶ or on whose behalf the husband has perpetrated a fraud,⁷ there is no doubt; and if she in fact never executed the deed, and it is a forgery, she may impeach it as against anyone,⁸ but if, though she executed the deed improperly, the certificate is perfect, she cannot, it seems, impeach it as against purchasers without notice, it being a general rule, founded on public policy, that defects of execution cannot be alleged against *bona fide* purchasers or assignees for value if the certificate be perfect,⁹ as to them, in such cases, the certificate is conclusive.¹⁰ The officer who made the certificate cannot impeach the same,¹¹ nor will the unsupported testimony of the wife be sufficient to overcome the certificate.¹² If she acknowledged the signature, she cannot say she did not sign the deed;¹³ nor can she allege that she did not

1. *Drury v. Foster*, 2 Wall. (U. S.) 24, 34; *Alexander v. Saulsbury*, 37 Ala. 375, 378; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 170; *Glidden v. Strupler*, 52 Pa. St. 400.

2. *Cahill v. Martin*, 7 Law Rec. 361, 379; *Reis v. Lawrence*, 63 Cal. 129; *Patterson v. Lawrence*, 90 Ill. 174; *Glass v. Warwick*, 40 Pa. St. 140.

3. *Allen v. Lenoir*, 53 Miss. 321, 331. A proper acknowledgment is an essential part of the execution of a conveyance of her land by a married woman. The bill charges the execution of the mortgage by Mr. and Mrs. Lenoir. In her answer, she denies that he ever acknowledged it. There is nothing but the official certificate of her acknowledgment to contradict her answer, which is supported by a number of circumstances which fully sustain it."

4. *Davis v. Kennedy*, 58 Tex. 516, 9.

5. *Eyster v. Hathaway*, 50 Ill. 521, 4; *Ford v. Teal*, 2 Bush (Ky.) 156; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Chrader v. Decker*, 9 Pa. St. 14, 16.

6. *Louden v. Blythe*, 27 Pa. St. 22, 25.

7. *Central Bank v. Copeland*, 18 Md. 5, 318.

8. *Allen v. Lenoir*, 53 Miss. 321, 331; *Drury v. Foster*, 2 Wall. (U. S.) 24, 34; *Burns v. Lynde*, 6 Allen (Mass.) 305, 312; *Conover v. Porter*, 14 Ohio St. 450.

9. *De Arnaz v. Escandon*, 59 Cal. 486, 489. "The grantee may properly regard her execution and acknowledgment of the instrument as evidence of her consent to its delivery; and if, without notice of her dissent, it is delivered by the husband, she cannot afterwards be permitted to question his right to do so without allowing a fraud to be practiced against the grantee. Were it otherwise, a large majority of all the deeds executed by husband and wife within this State, have never been delivered by the wife and would not bind her." *Kerr v. Russell*, 69 Ill. 666, 670; 18 Am. Rep. 38; *Johnston v. Wallace*, 53 Miss. 331, 337; *Baldwin v. Snowden*, 11 Ohio St. 203, 212; *Hall v. Patterson*, 51 Pa. St. 289.

10. *Johnston v. Wallace*, 53 Miss. 331, 337.

11. *Central Bank v. Copeland*, 18 Md. 305, 318; *Harkins v. Forsythe*, 11 Leigh (Va.) 294.

12. *Kerr v. Russell*, 69 Ill. 666.

13. Same case.

read or understand the deed if she had full opportunities for so doing, and alleges no fraudulent concealment;¹ nor can she deny that she assented when she silently did so;² her declarations made at the time of the execution are evidence as part of the *res gesta*.³ If she has duly executed the deed, and has left it with her husband, she cannot deny his authority to deliver it⁴ (but the delivery must be made before her death).⁵ She cannot be estopped from impeaching her deed by her assent thereto during coverture, or by her mere delivery thereof, or even by her retention of the purchase money; she cannot do indirectly by matter *in pais* what she can do directly only by deed duly acknowledged and recorded.⁶ As to conveyances to her husband, owing to their relation, he is treated much as he would be were he her trustee, and must show good faith throughout.⁷

9. Married Women's Powers of Attorney.—Independently of express statute, a married woman may, where she has over her equitable separate property the powers of a *feme sole* convey it by power of attorney;⁸ but she cannot through an attorney execute even a private power,⁹ or release her dower,¹⁰ or convey her property held as at common law,¹¹ unless, as to the last, owing to her husband's civil death, etc., she has the capacities of a *feme sole*.¹² In some States powers of attorney are expressly regulated by statute;¹³ but whether a married woman is ever authorized by implication to convey through an attorney is not settled, and the difficult question relating to this subject is, whether under the statutes authorizing her to convey her statutory sepa-

1. *Comegys v. Clarke*, 44 Md. 108, 111. "The paper was merely handed to her with the remark that there was another paper to which her name was wanted. She could read and write and had every opportunity to ascertain what the paper was before executing it, but she neither read it herself nor asked any explanation from either her husband or the justice of the peace, who was present, as to the character or contents of the paper. Under these circumstances she has no right to relief by injunction to restrain the appellant from a foreclosure of the mortgage upon the ground that its execution was procured by fraud and deceit."

2. *Rexford v. Rexford*, 7 Lans. (N. Y.) 6, 9.

3. *Louden v. Blythe*, 16 Pa. St. 532, 542.

4. *Ackert v. Pultz*, 7 Barb. (N. Y.) 386, 388; *Baldwin v. Snowden*, 11 Ohio St. 203, 213.

5. *Shoenberger v. Hackman*, 37 Pa. St. 87, 94. This is but an illustration of the general law that death is a revocation of delegated powers.

6. *Lewis v. Lazzarovich*, 55 Cal. 52, 58.

7. *Witbeck v. Witbeck*, 25 Mich. 438, 442.

8. See § 205, *Stewart on Husband and Wife*.

9. *Hord v. Taubman*, 79 Mo. 101, 104.

10. *Lewis v. Coxe*, 5 Har. (Del.) 401, 402.

11. *Heywood v. Shreve*, 44 N. J. L. 94; *Kenrick v. Wood*, Law R., 9 Eq. 333, 337; *Holladay v. Daily*, 19 Wall. (U. S.) 606, 609; *Hooper v. Smith*, 23 Ala. 639; *Patton v. Stewart*, 19 Ind. 233; *Wilkinson v. Getty*, 13 Iowa 157, 158; *Hall v. Callahan*, 66 Mo. 316, 324; *Sumner v. Conant*, 10 Vt. 9, 20.

12. *Wright v. Blackwood*, 57 Tex. 644, 648.

13. *Drury v. Foster*, 2 Wall. (U. S.) 24, 33; *Douglas v. Fulda*, 50 Cal. 177; *Butterfield v. Beall*, 3 Ind. 203, 207.

Her power of attorney to sell to pay husband's debts is void under statute prohibiting her suretyship contracts. *Veal v. Huet*, 63 Ga. 728.

rate property she may convey by attorney.¹ It seems plain that she cannot, if a privy examination is required, for this must accompany the conveyance itself;² but where she may convey as if *sole*, there seems no reason why she cannot convey by attorney,³ provided that her husband join in executing the power, if his joinder is required in her deed.⁴ Of course any power of attorney to be valid must be executed with all the formalities required with the act which it authorizes.⁵ As to powers of attorney unconnected with the conveyance of land, they gain no validity by the seal and acknowledgment, and their validity is tested as that of other contracts of married women.⁶ At common law a married woman's antenuptial power of attorney was revoked by her marriage.⁷

10. Married Women's Agreements to Give Deeds.—It is commonly said that a wife's executory contract to make a deed of property is absolutely void,⁸ and even her contract to deed property held by her as trustee has been so held.⁹ When she is under her common law disabilities, and can therefore make no contract, she cannot, under statutes authorizing her release of dower, or her conveyance of her common law property by deed, jointly with her husband and privily acknowledged, make an oral contract to give a deed,¹⁰ or one in which her husband does not join,¹¹ or one in which he joins but which is not acknowledged;¹² and it seems equally settled that such statutes invest her simply with statutory powers, which must be strictly executed, and that an agreement to convey is not in itself a conveyance, and therefore not an execution of such powers, though executed with all the formalities required by such statutes for a conveyance,¹³ and that such

1. See cases quoted in note 11, preceding page.

2. *Holland v. Moon*, 39 Ark. 120, 125; *McDaniel v. Grace*, 15 Ark. 465; *Mott v. Smith*, 16 Cal. 533, 556, 557; *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632, 638.

3. *Vail v. Meyer*, 71 Ind. 159, 165. "It may be conceded, as a general rule, that a married woman cannot appoint an agent. But a married woman holds and enjoys her real estate as if she were *sole*, and it becomes essential to its enjoyment that she have the power to make improvements by building new or repairing old buildings upon it. . . . And we think it follows that she may make such contracts in person or by an agent whom she may appoint for that purpose." *Bickford v. Dane*, 58 N. H. 185.

4. *Holland v. Moon*, 39 Ark. 120, 126.

5. *Butterfield v. Beall*, 3 Ind. 203, 207; *Steele v. Lewis*, 1 B. Mon. (Ky.) 48, 49; *Bocock v. Pavey*, 8 Ohio St. 270, 278.

6. *Heywood v. Shreve*, 44 N. J. L. 94, 95, 96.

7. *Montague v. Carneal*, 1 A. K. Marsh. (Ky.) 351, 352.

8. *Miller v. Albertson*, 73 Ind. 343, 345. "No principle of law is better settled than that a married woman could not, previous to the act of March 25th, 1879, concerning married women, bind herself in any way by an executory contract for the sale of real estate." See also *Shroyer v. Nickell*, 55 Mo. 264, 268; *Wright v. Dufield*, 11 Heisk. (Tenn.) 218, 221.

9. *Avery v. Griffin*, Law R., 6 Eq. 606, 609.

10. *Dankel v. Hunter*, 61 Pa. St. 382, 384.

11. *Behler v. Weyborn*, 59 Ind. 143, 145; *Gebb v. Rose*, 40 Md. 387; *Townsend v. Chapin*, 12 Allen (Mass.) 476, 478; *Kingsley v. Gilman*, 15 Minn. 59, 61; *Huff v. Price*, 50 Mo. 228.

12. *Leonis v. Lazzarovich*, 55 Cal. 52, 56; *Watrous v. Chalker*, 7 Conn. 224, 228; *Lane v. McKeen*, 15 Me. 304, 305; *Pentz v. Simonson*, 13 N. J. Eq. 232.

13. *Felkner v. Tighe*, 39 Ark. 357, 362.

agreements cannot be enforced even in equity, because equity will not reform, correct or complete the execution of a statutory power.¹ A married woman who holds her equitable separate property with the powers of a *feme sole* can agree to convey it,² but her husband must join with her if the settlement so provides;³ and as to such property her imperfect mortgage is treated as an agreement to give a mortgage and is enforced as a charge.⁴ How far she can agree to convey her statutory separate estate is doubtful, when she has neither the general ownership thereof, nor the general power to convey it as if *sole*, but a particular mode for its conveyance is provided by statute; it is certain that she cannot bind herself under such statutes for its future conveyance by an agreement not executed according to the statute,⁵ and whether she can by one executed according to the statute is disputed.⁶ The true rule seems to be that when a privy acknowledgment is necessary, an agreement to convey, though executed with such acknowledgment, could not be enforced, for a contrary rule would lead to the absurdity of a married woman being compelled to execute a deed, and to acknowledge that she executed it freely and of her own accord;⁷ but when she can convey as a *feme sole*, even though it be provided that her husband shall join, there is no reason why her agreement to convey should not be enforced as the agreement of a *feme sole* would be.⁸ When she has full ownership of her property, or may contract generally as a *feme sole*, her agreement to convey is valid.⁹ When her contracts with reference to her separate estate are valid, an agreement to convey or an imperfectly executed deed should be valid as such.¹⁰ When-

"In Bishop's work on the Law of Married Women, vol. 1, § 601, it is said, though the statutes authorize *femmes covert* to convey their lands, and this authority ought to be construed to comprehend everything properly belonging to the contract of actual sale, yet it does not qualify them to enter into a valid executory agreement to sell; for a prior agreement to sell is not an essential part of the actual selling. . . . In a State like *Pennsylvania*, where the thing agreed to be done is looked upon by the tribunals as done, it might take effect as a conveyance. But in the other States generally, and in *England*, no executory agreement to convey, formal or informal, with or without the concurrence and joinder of the husband, will bind the wife. Not even a court of equity will give such an agreement effect by decreeing its fulfillment against her."

1. See last note and *Bright v. Boyd*, 1 Story (U. S.) 478, 487; *McBryde v. Wilkinson*, 29 Ala. 662, 667; *Silliman v. Cummins*, 13 Ohio 116, 118. *Contra*,

Clayton v. Frazier, 33 Tex. 91, 100. Otherwise as to private powers. 2 Wash. Real Prop. 300, *et seq.*; *Waterman Spec. Perf.*, § 387.

2. *Stead v. Nelson*, 2 Beav. 245, 248; *Wainwright v. Hardesty*, 2 Beav. 363, 365; *Butler v. Buckingham*, 5 Day (Conn.) 492, 497; *Pilcher v. Smith*, 2 Head (Tenn.) 208, 211.

3. *Gelston v. Frazier*, 26 Md. 329, 344.

4. *Hall v. Eccleston*, 37 Md. 510, 520; *Whitely v. Stewart*, 63 Mo. 360, 363.

5. *Shroyer v. Nickell*, 55 Mo. 264, 268.

6. *Pro Dankel v. Hunter*, 61 Pa. St. 382, 384. *Contra*, *Stedham v. Matthews*, 29 Ark. 650, 658.

7. *Leonis v. Lazzarovich*, 55 Cal. 52, 58; *Love v. Watkins*, 40 Cal. 547, 559; 6 Am. Rep. 624.

8. *Dreutzer v. Lawrence*, 58 Wis. 594, 598.

9. *Brown's Appeal*, 94 Pa. St. 362, 367; *Dreutzer v. Lawrence*, 58 Wis. 594; *Love v. Watkins*, 40 Cal. 547, 559; *Spafford v. Warren*, 47 Iowa 47, 51.

10. *Baker v. Hathway*, 5 Allen

ever her contract is valid she can be compelled to specifically enforce it,¹ though if this would require her privy acknowledgment a different rule might apply;² but there are some cases where, though the right to specific performance has been denied her land has been held responsible for any money paid on account of, or expended on the faith of, the contract.³ At common law the husband could not by his agreement to convey affect the wife's interest in her lands, though such an agreement bound him.⁴

V. ESTOPPELS AGAINST MARRIED WOMEN—1. **General Rules.**—One may be estopped by a judgment, by a deed, by a contract, or by a tort; and the general rule as to married women is that they can be estopped only by valid judgments⁵ or deeds;⁶ by contracts only so far as they have the capacity to contract;⁷ and only

(Mass.) 103, 105. Husband may have to join. *Behler v. Weyburn*, 59 Ind. 143, 145.

1. *Love v. Watkins*, 40 Cal. 547, 559; *Kingsley v. Gilman*, 15 Minn. 59, 61.

2. *Leonis v. Lazzarovich*, 55 Cal. 52.

3. *Felkner v. Tighe*, 39 Ark. 357, 363; *Shroyer v. Nickell*, 55 Mo. 264, 269; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 12; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 165.

4. *Steffey v. Steffey*, 19 Md. 5, 12.

5. *Morse v. Toppan*, 3 Gray (Mass.) 411, 412. See on this point *Faithorne v. Blaquiere*, 6 Maule & S. 73; *Gambette v. Brock*, 41 Cal. 72, 82; *Doyle v. Kelly*, 75 Ill. 574; *Elson v. O'Dowd*, 40 Ind. 300, 306; *Guthrie v. Howard*, 32 Iowa 54, 55; *Spalding v. Wathen*, 7 Bush (Ky.) 659, 663; *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29, 30; *Baines v. Burbridge*, 15 La. An. 628; *Magruder v. Buck*, 56 Miss. 314; *Green v. Branton*, 1 Dev. (N. Car.) Eq. 500, 504; *Graham v. Long*, 65 Pa. St. 383; *Baxter v. Dear*, 24 Tex. 17, 21.

But the judgment must be a valid one. *Griffith v. Clarke*, 18 Md. 457, 464. "Persons in the condition of a *feme covert* are not competent to employ an attorney. If she had appeared in the suit at law by attorney employed by her husband, and her coverture had been pleaded in defence to the action, the court would have allowed the plea. But the question here is, whether the defendant, being sued at law on a personal contract altogether void at law, is to be prejudiced by the entry of a judgment by default against her for nonappearance? In our opinion, such a judgment is, at law, merely void, and was properly enjoined by the circuit court."

6. *Oglesby Coal Co. v. Pasco*, 79 Ill.

164, 170; *Glidden v. Strupler*, 52 Pa. St. 400, 406; *Drury v. Foster*, 2 Wall. (U. S.) 24, 33; *Alexander v. Saulsbury*, 37 Ala. 375, 378; *Wood v. Terry*, 30 Ark. 385, 393; *Behler v. Weyburn*, 59 Ind. 143; *Comegys v. Clarke*, 44 Md. 108, 110; *Merriam v. Boston*, 117 Mass. 241; *Norton v. Nichols*, 35 Mich. 148, 150; *Den v. Demarest*, 21 N. J. L. 525, 541; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 161; *Waltee v. Weaver*, 57 Tex. 569; *Radford v. Carwile*, 13 W. Va. 572, 683; *Godfrey v. Thornton*, 46 Wis. 677, 690.

7. *Powell's Appeal*, 98 Pa. St. 403, 413. "It is true she was a married woman, and the general rule undoubtedly is that the doctrine of estoppel does not apply to such persons. But there are exceptions. The rule rests upon the fact that a married woman cannot contract. It follows logically that what she cannot pass by contract she may not pass by estoppel. But where the law clothes her with the power to contract, to the extent of that power she is bound precisely as other persons are bound. The law gives her the right to dispose of her personal estate with the assent of her husband. In doing so she has no more right to injure and mislead others than if she were *sui juris*. To hold otherwise would enable her to continue her operations with her separate estate so long as they were profitable, and then make reprisals for her losses upon those who had trusted her." *Matthews v. Murchison*, 17 Fed. Rep. 760, 766; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Spafford v. Warren*, 47 Iowa 47, 51; *Preston v. Evans*, 56 Md. 476; *Dann v. Cudney*, 13 Mich. 239, 242; *Bodine v. Killeen*, 53 N. Y. 93, 96; *Nash v. Mitchell*, 71 N. Y. 199; *Towles v.*

by torts of a kind for which they would be liable.¹ It is clear that a married woman under disabilities cannot be estopped just as if she were *sui juris*, and the only way of determining in what cases she may be estopped is to ascertain, first, whether the alleged estoppel grows out of a judgment, deed, contract, or tort; and second, whether such judgment, deed, contract, or tort is binding as such on the married woman.²

2. Estoppels of Record.—A judgment, accordingly, against a married woman, on her void contract,³ or warrant of attorney,⁴ or by confession when she cannot contract,⁵ is void and does not estop her. Such a judgment against a married woman under disability is a manifest error, like a judgment against a dead person.⁶ The principle that a party is estopped from alleging, in order to impeach a judgment collaterally, what he alleged or might have alleged as a ground for defence in the suit, does not apply to a case where the defendant was a married woman under disability.⁷ But this has been expressly denied, and it has been held that a judgment against a married woman, if fairly obtained, is binding on her, and that she is estopped thereby from setting up in a collateral suit that she was a *feme covert*, whether she had alleged this defence, or had allowed the suit to go by default.⁸ In cases where she is sued on a valid cause of action, she is estopped by the judgment as any other person is.⁹ And where she is liable

Fisher, 77 N. Car. 437, 443; *Mason v. Jordan*, 13 R. I. 193, 195.

1. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 169; *Drake v. Glover*, 30 Ala. 382; *Reis v. Lawrence*, 63 Cal. 129, 135; *Lathrop v. Soldiers' Loan etc. Assoc.*, 45 Ga. 483.

2. To illustrate: A judgment is obtained against a married woman on a void note; she moves to have it set aside, alleging her *coverture* and its consequent invalidity; it is a general principle that when a person applies to have a judgment set aside he cannot allege any ground which he might have alleged in the suit as a defence. It is held that this rule does not apply to married women, because the judgment is invalid. See *Griffith v. Clarke*, 18 Md. 457, 464. Again, a married woman makes a deed of certain property, and the deed being imperfectly executed is utterly void; but after receiving the purchase money she sues the grantee in ejectment; held, she is not estopped from setting up her title, because the deed is invalid. See *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

3. *Griffith v. Clarke*, 18 Md. 457. "A promissory note signed by a *feme covert* cannot be enforced against her by any proceeding at law; a judgment

by default against her, when sued at law on such a note, is a nullity, and enforcement of it against her separate estate may be restrained in equity by injunction. The principle that a party cannot impeach a judgment on any ground which might have been pleaded or relied on, as a defence to the suit, does not apply to a case where the defendant is a *feme covert* and not *sui juris*." *Doyle v. Kelly*, 75 Ill. 574; *Magruder v. Buck*, 56 Miss. 314.

4. *Faithorne v. Blaquire*, 6 Maule & S. 73; *Graham v. Long*, 65 Pa. St. 383, 386.

5. *Baines v. Burbridge*, 15 La. An. 628.

6. *Spalding v. Wathen*, 7 Bush (Ky.) 659; *Case v. Ribellin*, 1 J. J. Marsh. (Ky.) 29, 30.

7. *Griffith v. Clarke*, 18 Md. 457.

8. *Elson v. O'Dowd*, 40 Ind. 300.

9. *Brown v. Kemper*, 27 Md. 666 at 672. "The judgment was rendered against them jointly. And although it was a judgment by default and the amount found by inquisition, the finding was as effectual as a verdict found upon issues. . . . The judgment, therefore, being in an action for a tort, is not void at law, and this court cannot so regard it. It is different essen-

with her husband, as on her antenuptial contracts and on her torts, she is bound thereby,¹ although her husband, having full power to manage the suit, has neglected it,² unless he has colluded with the plaintiff;³ and her property may be seized under such a judgment if entered generally against them both.⁴ If her land be seized under a void judgment, she is not estopped from recovering it in ejectment.⁵

3. Estoppels by Deed.—A married woman is not estopped by her invalid deed.⁶ She may, for example, recover the property conveyed thereby in ejectment though she has received the purchase money.⁷ But where the said purchase money does not vest in the husband, as at common law, but becomes separate property of the wife, the courts have revolted against this rule as most unjust, and have either held her bound to restore the said money,⁸ or have charged the same on the property as a debt.⁹ If she could be estopped by her invalid deed, she would be able to convey her property without reference to the statutes relating to conveyances of married women, and the said statutes would be in effect repealed.¹⁰ She is not estopped by her seal from showing that the deed was made without the consideration required by law,¹¹ or from showing that the deed is void because executed in blank.¹² But she is estopped, it seems, from saying that she did not sign a deed which she has duly acknowledged,¹³ or that she did not read or understand it,¹³ or did not intend to deliver it when she left it in the hands of her husband and he delivered it.¹⁴ By her deed, voidable on account of infancy, but ratified by re-

tially from the case of *Griffith v. Clarke*, 18 Md. 457." *Baxter v. Dear*, 24 Tex. 17, 21.

1. *Green v. Branton*, 1 Dev. (N. Car.) Eq. 500, 504.

2. Same case and § 461, *Stewart on H. & W.*

3. Same case.

4. *Howard v. North*, 5 Tex. 290, 299; 51 Am. Dec. 769.

5. *Caldwell v. Walters*, 18 Pa. St. 79, 83; 55 Am. Dec. 592.

6. *Alexander v. Saulsbury*, 37 Ala. 375. "A sale by the wife alone, without the concurrence of her husband, of property belonging to her statutory separate estate, is absolutely void and passes nothing to the purchaser." *Wood v. Terry*, 30 Ark. 385, 393; *Morrison v. Wilson*, 13 Cal. 494, 498; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 170; *Behler v. Weyburn*, 59 Ind. 143, 145; *Dukes v. Spangler*, 35 Ohio St. 119, 127; *Godfrey v. Thornton*, 46 Wis. 677, 690.

7. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

8. *Pilcher v. Smith*, 2 Head (Tenn.) 208, 211.

9. *Shroyer v. Nickell*, 55 Mo. 264, 268.

10. *Glidden v. Strupler*, 52 Pa. St. 400, 403. "The next point is that of estoppel. If through the administration of equity we can produce a result which the law denies *ab initio* on the ground of public policy, then estoppel or compensation, its equitable equivalent, will accomplish what the law and policy have forbidden. But we have seen that in such a case equity does not overturn but follows the law. Story's Equity, §§ 64 a, 3, 96, 97, 177, 243." *Morrison v. Wilson*, 13 Cal. 494; *Behler v. Weyburn*, 59 Ind. 143; *Todd v. Pittsburgh etc. R. Co.*, 19 Ohio St. 514, 526; *Pettit v. Fretz*, 33 Pa. St. 118, 120.

11. *Radford v. Carwile*, 13 W. Va. 572.

12. *Drury v. Foster*, 2 Wall. (U. S.) 24, 33.

13. *Kerr v. Russell*, 69 Ill. 666, 673; 18 Am. Rep. 634.

14. *Ackert v. Pultz*, 7 Barb. (N. Y.)

ceipt of the purchase money during coverture, she is estopped,¹ and so she is by her deed, valid because made after her husband had permanently left her and the State;² and when she has validly assigned a mortgage to her husband in blank, she is estopped from denying his right to pledge it.³ But her valid deed estops her only from denying it to be a conveyance; she is not, unless she can contract independently, estopped by her covenants therein,⁴ and she may set up an after-acquired title.⁵ The effect of her deeds of dower,⁶ and the right to impeach her deeds,⁷ have already been discussed.

4. Estoppels in Pais—In General.—A married woman may be estopped *in pais* by a declaration in the nature of a contract or warranty, or in the nature of a fraudulent representation or tort, and she is estopped in one case or the other only when she can render herself liable by such a contract or tort.⁸ But the usual requirements to an estoppel in general apply to estoppels against married women, and a married woman is not estopped unless her representation has been relied on, and unless the other party would be injured by her denying it.⁹

5. Estoppels in Pais—Contracts.—A married woman's liability to be estopped by her contracts is coterminous with her capacity to contract; if the contract is valid it estops her; if it is invalid it does not.¹⁰ The contract may be either express or implied, but a contract which she could not expressly make will never be implied against a married woman.¹¹ But her assent or contract will be implied when she could expressly contract, as where she sells a horse which is her separate property, and allows the money to be paid to her husband;¹² in such case she cannot afterward deny

386, 388; *Baldwin v. Snowden*, 11 Ohio St. 203, 213.

1. *Scranton v. Stewart*, 52 Ind. 68, 94.

2. *Reis v. Lawrence*, 63 Cal. 129, 135; *Danner v. Berthold*, 11 Mo. App. 351, 355; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 161, 162.

3. *Flanagin v. Hambleton*, 54 Md. 222, 232.

4. *Blain v. Harrison*, 11 Ill. 384, 386; *Shumaker v. Johnson*, 35 Ind. 33, 38; *Preston v. Evans*, 56 Md. 476, 491; *Merriam v. Boston*, 117 Mass. 241, 244; *Nash v. Spoffard*, 10 Met. 192; *Den v. Demarest*, 21 N. J. L. 525, 541; *Bartlett v. Boyd*, 34 Vt. 256, 261.

5. *Blain v. Harrison*, 11 Ill. 384, 386; *Shumaker v. Johnson*, 35 Ind. 33, 38; *Nash v. Spoffard*, 10 Metc. (Mass.) 192.

6. See vol. 5, p. 884, of this work.

7. See IV, § 8, above.

8. *Powell's Appeal*, 98 Pa. St. 403, 413. "As to him, Mrs. Powell is estopped from setting up her release. It is true she was a married woman, and the general rule undoubtedly is that the

doctrine of estoppel does not apply to such persons. But there are exceptions. The rule rests upon the fact that a married woman cannot contract. It follows logically, that what she cannot pass by contract she may not pass by estoppel. But where the law clothes her with the power to contract, to the extent of that power she is bound precisely as other persons are bound." *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 169.

9. *McGregor v. Sibley*, 69 Pa. St. 388, 394.

10. See note 8, above, and *Danner v. Berthold*, 11 Mo. App. 351.

11. *Tucker v. Cocke*, 32 Miss. 184, 190; *Farrar v. Bessey*, 24 Vt. 89, 92.

12. *Spafford v. Warren*, 47 Iowa 47. "Where a conveyance of the homestead by the wife was void, but she surrendered possession of the property voluntarily, made no objection to the grantee's title when in her presence he offered to sell it, and permitted him to remain in quiet possession for more

his authority to receive it.¹ When she contracts as if unmarried, she can be estopped as if *sole*.² Whatever she can do herself can estop her if done by her husband with her consent, his agency for her being implied.³ This is the case when she holds him out as her agent in her separate business.⁴ She is estopped by her contract binding on her equitable separate property;⁵ when she assents to the sale of her choses in action, she is estopped from applying for her equity of redemption out of them;⁶ in equity as to this property she is generally a *feme sole*, and is estopped as such. If she can contract, she can be estopped from denying a party's title to property which she has allowed him to improve under claim of title through her;⁷ if she cannot, she is not bound even for improvements put upon her own property with her consent.⁸ An apparent exception to the rule laid down in this section exists in the case where the property of a married woman is sold under void judicial proceedings; in such case if she has received the purchase money, she is estopped from setting up her title.⁹ There is a case in which a married woman was held estopped from claiming her dower by her mere statement made during coverture, at the sale of her husband's land, that she would not claim dower.¹⁰

6. Estoppels in Pais—False Representations.—In case of a party under the disability of coverture—a party who at common law is liable for her torts, but not on her contracts—it is necessary to determine whether the representation is in nature of a contract or tort. If there is no guilty knowledge or fraudulent intent, but the representation is a mere agreement or promise that a certain fact is true, and the other party, by acting on this promise to his

than three years, and make improvements without protest, held that her conduct amounted to a ratification of the deed."

1. *Dann v. Cudney*, 13 Mich. 239, 242.

2. *Nash v. Mitchell*, 71 N. Y. 199; 27 Am. Rep. 38.

3. *Early v. Rolfe*, 95 Pa. St. 58. "Where a husband transacts the ordinary business of his wife's estate, such as the receipt of her rents, interest and the like, with her knowledge, her assent may be fairly inferred, and the jury may adopt the presumption that he was acting under her authority and hold her accordingly. Under such circumstances the wife will be estopped from claiming interest money thus received by the husband." *Schwartz v. Saunders*, 46 Ill. 18, 24.

4. *Bodine v. Killeen*, 53 N. Y. 93, 96.

5. *Drake v. Glover*, 30 Ala. 382, 390; *Wood v. Terry*, 30 Ark. 385, 393; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Dann v. Cudney*, 13 Mich. 239, 242; *Glidden v. Strupler*, 52 Pa. St. 400, 406;

O'Brien v. Hilburn, 9 Tex. 297, 299.

6. *Lush v. Lush*, Law R., 4 Ch. App. 591, 602; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513.

7. See note 12, preceding page.

8. *Corning v. Fowler*, 24 Iowa 584, 586. "But this rule can have no application where the husband makes with his own means improvements on the lands of the wife, without any contract that he acquired an interest thereby in the realty, or that she was to be liable or accountable to him for the value thereof. The expenditure was voluntary—not under any contract—and it would place at the disposal of an insolvent and spendthrift husband the entire real property of the wife, if his creditors could follow the means expended by him thus voluntarily thereon."

9. *Shivers v. Simmons*, 54 Miss. 520; 28 Am. Rep. 372; *Smith v. Warden*, 19 Pa. St. 424, 430; *Freedman Void Judic. Sales*, § 48.

10. *Connolly v. Branstler*, 3 Bush (Ky.) 702.

damage, has paid a consideration therefor, the representation can bind the wife only as a contract, and stop her only if she had the capacity to make such a contract;¹ thus, the covenant of a married woman in her deed, that the title is good, is not binding on her if she has no capacity to contract, and she is not estopped thereby from setting up a subsequent title.² If, on the other hand, there is guilty knowledge or fraudulent intent, her representation is a fraud, and she is estopped from denying its truth;³ thus, where in order to defraud her husband's creditors she represented that property of hers belonged to him, she was estopped from afterwards, as against these creditors, setting up her own title.⁴ But if the false representation relates to her capacity to contract, whether made in good faith or with fraudulent intent, she is not estopped thereby;⁵ she cannot by her statements give herself a capacity she does not possess—a rule which applies equally to parties under the disability of infancy;⁶ thus, she is not estopped by her representations that she is unmarried;⁷ or that she has separate property which she can charge,⁸ from setting up her coverture when sued on the contract, or from showing that she had no separate property to charge. This, however, as far as it applies to statements made with the intention to deceive, has been denied in California,⁹ Illinois¹⁰ and New Hampshire.¹¹ The representation by a *feme sole* that she is married is very different; she is *sui juris*, and is estopped from denying coverture.¹¹ These representations may be made by conduct as well as by words, and the intent to deceive may be inferred; so

1. Discussed in section 5, above.

2. *Preston v. Evans*, 56 Md. 476, 491. "The legislature clearly never intended to authorize a *feme covert* to convey what she did not own, and what was not, at the time of making the deed, the subject of conveyance; and to allow her to be barred of her future or after acquired estate by mere operation of her covenant of warranty, which was void by the common law, and not authorized by statute, would be in plain contravention of the policy and object of the whole legislation upon the subject of conveyances by *femes covert*."

3. See section 8, *post*.

4. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 169.

5. *Keen v. Hartman*, 48 Pa. St. 497, 500. "The case was fully argued and decided after consideration and review of the authorities. POLLOCK, C. B., in delivering the judgment of the court, while admitting the general liability of the husband and wife for her torts, said: 'But when the fraud is directly connected with the contract of the wife, and is the means of effecting it, and

parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind which a *feme covert* could make whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a representation of her capacity."

6. *Brown v. Dunham*, 1 Root (Conn.) 272; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127; *Keen v. Hartman*, 48 Pa. St. 497; *Houston v. Turk*, 7 Yerg. (Tenn.) 13.

7. *Keen v. Coleman*, 39 Pa. St. 299, 302.

8. *Patterson v. Frazer*, 39 Pa. St. 299, 302.

9. *Reis v. Lawrence*, 63 Cal. 129, 135.

10. *Patterson v. Lawrence*, 90 Ill. 174, 179.

11. *Read v. Hall*, 57 N. H. 482, 483; *Mace v. Cadell*, Cowp. 232; *Batthens v. Galindo*, 1 Moore & P. 565.

that questions not discussed in this section may arise, and must be separately treated.

7. **Estoppels in Pais—Silence.**—Since such estoppels as arise out of a failure to assert a right, or out of silence and acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by her silence and acquiescence only in cases when she would have been bound had she expressly made the statement which is implied;¹ Thus, when a married woman makes an invalid deed she is not estopped by afterwards recognizing its validity and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto;² but if she could contract as a *feme sole*, and allowed her grantee to improve property on the faith of a title given him by her, she could not deny the validity of that title.³ Nor, if she can grant a right of way only in the mode prescribed by statute, can she estop herself from closing up a way by allowing it to be used without complaint.⁴ When a party not her husband, in her presence, makes a claim of right inconsistent with her rights, and she allows another to act upon such claim of right without setting up her rights, she is or is not estopped from afterwards setting up her rights, just as she would have been had she expressly said that she had no rights. Thus, when another claims the right to collect money due to her, and such money is paid to him in her presence, she is estopped from denying his right to receive it: she has by her conduct made him her agent.⁵ In some cases silence can speak as loudly as words, and when it appears that a married woman was silent with respect to a matter not connected with her contract, knowing her right, and that her silence was relied on as a disclaimer of right in herself, and an assertion of right in another, her intention to deceive must be implied, and she is bound by her tort just as she would have been had she expressly asserted that the title was in such other person.⁶ The usual case in which these questions arise is where the wife is silent while her husband asserts rights inconsistent with her own, which is discussed below.

1. *Farrar v. Bessey*, 24 Vt. 89, 92. "But to authorize the implication of such new promise, from part payment, or other acknowledgment of a debt, the party whose promise is to be implied must be legally capable of making a valid and binding express promise. And as a *feme covert* cannot make such a promise in her own right, especially while living with her husband, it follows that no effectual promise of the wife can be implied in the present case, from the fact of this part payment of her debt. This is a legitimate and obvious conclusion, from the doctrine held

in *Pittam v. Foster*, 8 C. L. R. 67." *Marable v. Jordan*, 5 Humph. (Tenn.) 417.

2. *Glidden v. Strupler*, 52 Pa. St. 400, 404.

3. *Spafford v. Warren*, 47 Iowa 47, 51.

4. *McBeth v. Trabue*, 69 Mo. 642, 657; *Todd v. Pittsburg etc. R. Co.*, 19 Ohio St. 514, 525.

5. *Dann v. Cudney*, 13 Mich. 239, 244; *Lindner v. Lahler*, 51 Barb. (N. Y.) 322; *City Council of Charleston v. Van Roven*, 2 McCord (S. Car.) 465, 469.

6. *Oglesby Coal Co. v. Pasco*, 79 Ill.

8. **Estoppels in Pais—Pure Torts.**—Coverture cannot be invoked as a cloak for wrong doing, and so, even at common law, a married woman is liable jointly with her husband for her torts.¹ But as her contracts were void, and as the law could not allow her by her mere statements to give herself capacity, it was held that she was not liable for torts consisting of false and fraudulent representations that she was unmarried and could contract, but only for pure torts.² Since an estoppel arising out of tort is founded on the person's liability for the tort, it has been held, generally, that married women are not estopped by their false and fraudulent representations that they are unmarried, or have property which they can charge by contract; though the contrary rule prevails in California, Illinois, and New Hampshire.³ But she is estopped by any tort unconnected with her contract,⁴ and by her tort connected therewith if the contract is valid.⁵ A representation that certain property of hers is her husband's, made for the purpose of deceiving builders, is a pure tort, and estops her;⁶ and so are any false and fraudulent representations of this kind.⁷ She is estopped by a statement that a bill of exchange has been accepted by her husband, which statement led to the discount of the bill,⁸ and by statements made under oath.⁹

9. **Estoppels in Pais—Acts of Husband.**—In considering the effect of a husband's acts and representations as estoppels against his wife, it must be remembered: (1) that at common law the wife was under control of her husband, and subject to his will;¹⁰ (2) that the husband is in some respects the agent in law of his wife;¹¹ and (3) that the husband is very commonly the wife's agent in fact.¹² In the first place, owing to this fiction of coercion, she is *prima facie* not bound by any statement made by her husband in her presence; it is presumed that she is silent through fear, and through deference to her husband as her husband; and

164, 169; *Davis v. Tingle*, 8 B. Mon. (Ky.) 539, 543.

1. *Vaughan v. Vanderstegen*, 2 Drew. 363, 378. "But notwithstanding the incapacity of a married woman to incur a debt merely by her contract, yet it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud."

2. *Adelphi v. Fairhurst*, 9 Ex. 422, 429; *Owens v. Snodgrass*, 6 Dana (Ky.) 229; *Keen v. Hartman*, 48 Pa. St. 497, 499.

3. See notes 9, 10, 11, p. 642.

4. *Wright v. Leonard*, 8 Jur., N. S. 415; *Jones v. Kearney*, 1 Dru. & War. 134, 167; *Lush v. Lush*, L. R., 4 Ch. App. 591, 597; *Matthews v. Murchison*, 17 Fed. Rep. 760, 766; *Oglesby*

Coal Co. v. Pasco, 79 Ill. 164; *Davis v. Tingle*, 8 B. Mon. (Ky.) 539; *Carpenter v. Carpenter*, 25 N. J. Eq. 194, 201; *Towles v. Fisher*, 77 N. Car. 437; *McCullough v. Wilson*, 21 Pa. St. 436, 442; *Mason v. Jordan*, 13 R. I. 193, 195.

5. *Lathrop v. Soldiers' Loan etc. Assoc.*, 45 Ga. 483, 486.

6. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *O'Brien v. Hilburn*, 9 Tex. 297.

7. See cases cited in note 4, above.

8. *Wright v. Leonard*, 8 Jur., N. S. 415.

9. *Lathrop v. Soldiers' Loan etc. Assoc.*, 45 Ga. 483, 486; *Cooley v. Steele*, 2 Head (Tenn.) 605, 608.

10. *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 545; 50 Am. Dec. 528.

11. See article on HUSBAND AND WIFE, vol. 9, pp. 789, 837.

12. See reference in last note.

it must affirmatively appear that she was actuated by other motives—that is to say, that she intended to deceive, or that she voluntarily made her husband her agent and mouthpiece;¹ the question of motive, it seems, being a question of fact for the jury.² Since a married woman is liable for a tort committed in her husband's presence only if her active participation therein is affirmatively made to appear, it is clear that she should not be bound by his fraud simply on account of her noninterference.³ In the second place, leaving out of consideration the question of coercion, she is estopped by her husband's acts only when he is her agent in law or in fact. As to her *personalty*, if she stands by and allows her husband to sell it, and the purchaser relies on her silence, she is estopped from afterwards setting up her title, because at common law her husband had the right to sell it without her consent, and because, under the statutes, she has usually the right to sell her separate property, and therefore to sell it through an agent, and by her presence and silence she constitutes her husband her agent;⁴ and so, at common law, she was estopped from claiming her equity of a settlement out of her choses in action, if she allowed her husband to dispose of them in her presence without making any objection.⁵ Thus, she is estopped by her husband's sale of her horse,⁶ or of her negroes,⁷ or by his collection of her funds,⁸ if she was present and made no objection. But owing to the intimacy of the marriage relation, and to the fact that it is natural and proper that a husband should to some extent possess and manage his wife's property, it is not a fraud on his creditors for his wife merely to allow him to possess and manage her property, and she is not estopped, as a stranger would be, from setting up her title to the same.⁹ Her husband's creditors should enquire of her as to her rights, and in such case, if she or her husband, in her presence, should make any false statements, it is clear that this would be a fraud and she would be

1. *Dann v. Cudney*, 13 Mich. 239. "Where the husband of a woman sold a horse belonging to her, without her authority, and she was informed of the sale before payment had been made, and afterwards had ample opportunity to inform the purchaser of her rights, but neglected to do so until after he had made payment to the husband, it was *held* that she was estopped from thereafter asserting title to the horse against a mortgagee of the purchaser."

2. *Early v. Rolfe*, 95 Pa. St. 58, 61. "However this may be, we repeat such knowledge and want of dissent are evidence from which a jury may infer a power to the husband from the wife to transact the ordinary business of her estate, such as the receipt of her rents, interest and the like."

3. *Carpenter v. Carpenter*, 27 N. J. Eq. 502, 504. But see *State v. Holloway*, 8 Blackf. (Ind.) 45, 47.

4. See note 5, above, and *Wortman v. Price*, 47 Ill. 22, 24; *Lindner v. Lahler*, 51 Barb. (N. Y.) 322, 324; *City Council of Charleston v. Van Raven*, 2 McCord (S. Car.) 465, 469.

5. *Lush, L. R.*, 4 Ch. App. 591, 597; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513.

6. See note 1, above.

7. *O'Brien v. Hilburn*, 9 Tex. 297.

8. *Early v. Rolfe*, 95 Pa. St. 58, 60.

9. *Jones v. Brandt*, 59 Iowa 332. "Plaintiff is not estopped from asserting her title to the property in question because she might have enjoined the sale under which the defendant claims, but did not. She was not bound in law or

estopped.¹ There is no reason why a married woman should not lend her property to her husband to use in his business, and no reason why, if she has made no express disclaimer of title, and has not knowingly allowed his creditors to give him credit supposing her to have no rights, she could be estopped from having back her own.² Of course, if she has made him her general agent with respect to property over which she has the rights of a *feme sole*, she is estopped from going behind his acts, so that she cannot claim the repayment of money paid to him as her recognized agent;³ and if she has put property in his hands to do business with, not as a loan but as capital, she cannot, as against the creditors of that business, claim the property back.⁴ With respect to her *real estate*, different considerations arise. The husband could not dispose of the wife's interest at common law, and even under most modern statutes she can dispose of it only in the mode prescribed by statute; but if she and he join in a contract which is void as to her, he is nevertheless bound, and is estopped thereby;⁵ and if he must join with her in order to enable her to set up her rights, the fact that he is estopped may deprive her of her remedy.⁶ By allowing him to take the title to her realty in his own name, she estops herself from setting up her title as against *bona fide* purchasers for value,⁷ or creditors with a lien;⁸ but not from accepting afterwards the legal title, even though the husband is insolvent.⁹ When she owns realty or personalty as a *feme sole*, and allows her husband to hold himself as owner thereof, she is estopped by all his acts with respect thereto.¹⁰

10. Estoppels in Pais—Acts While Sole.—Coverture does not destroy the effect of acts done before marriage. And by an act after the dissolution of coverture, a widow may estop herself from setting up the invalidity of an act done during coverture.¹¹ Thus, if a widow who has during coverture executed an invalid release

equity to protect defendant by such injunction."

1. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, 169.

2. See previous sections of this article.

3. *Early v. Rolfe*, 95 Pa. St. 58, 60. "It follows that where, in ordinary transactions, as in those above enumerated, the husband receives the moneys of the wife and the circumstances are such that her assent may be fairly inferred, the jury may adopt the presumption that he was acting under her authority and hold her accordingly."

4. *Wilson v. Loomis*, 55 Ill. 352, 357.

5. See *Stewart on H. & W.*, §§ 382, 408.

6. *Huff v. Price*, 50 Mo. 228.

7. *Darnaby v. Darnaby*, 14 Bush (Ky.) 485, 488. No possible notice could be obtained from the land records of the

wife's claim in such a case as above by an innocent purchaser.

8. *Besson v. Eveland*, 26 N. J. Eq. 468, 478; *Ready v. Bragg*, 1 Head (Tenn.) 511, 515.

9. *Summers v. Hoover*, 42 Ind. 153, 157; *Bancroft v. Curtis*, 108 Mass. 47, 49; *Payne v. Twyman*, 68 Mo. 339; *Syracuse Chilled Plow Co. v. Wing*, 85 N. Y. 421, 426.

10. *Anderson v. Armstead*, 69 Ill. 452, 455.

11. *Hart v. Giles*, 79 Mo. 175. "A widow entitled to a dower interest in a city lot, and, although otherwise advised, believing that she had an interest therein, authorized proclamation to be made, at a public sale, for payment of debts by the administrator of her deceased husband, that she did not, and would not, claim dower in the lot, and that it was clear of dower. Relying

of dower, stands by and allows her late husband's property to be sold clear of dower she is estopped from setting up her right to dower;¹ so if a widow continues to hold and enjoy the consideration of property disposed of by her during coverture by an invalid instrument, she is estopped from setting up her title to the property so disposed of.² But unless there is some new act—some new consideration or deed, a widow is not estopped by acts done during coverture which did not estop her as a married woman.³

VI. TORTS OF MARRIED WOMEN—1. Antenuptial Torts.—For torts of any kind, except those against the man she marries, committed before marriage,⁴ a woman remains liable after her marriage; and her husband is generally liable therefor with her.⁵

2. Postnuptial Torts.—For all torts committed by a married woman during coverture, in person, except such as are committed under the coercion of her husband,⁶ and such as are intimately connected with her invalid contracts,⁷ and such as are committed against her husband,⁸ she is liable as fully as if unmarried. Thus, she may be sued, and a judgment obtained may be satisfied out of all her property, for assault and battery,⁸ for trespass,⁹ for conversion,¹⁰ for slander,¹¹ for fraud and false and fraudulent representations unconnected with her invalid contracts,¹² for burning property,¹³ for poisoning geese,¹⁴ etc. But at common law she could not be held responsible for the act of another as her agent, because she could not contract, and therefore could not appoint an agent;¹⁵ still so far as she may, under statutes, appoint an agent, or act by agent, she may be responsible for agent's torts.¹⁶ When the act complained of was committed in the presence of her husband, the presumption is that it was committed by her through the authority and coercion of her husband, and that she is not liable at all;¹⁷ but this presumption may be rebutted by showing that she actively and voluntarily participated

upon the truth of this public announcement, which was made in the hearing of the widow, the purchaser bid the full value of the lot. *Held*, in a suit by her for admeasurement of dower, that these facts amounted to an estoppel *in pais* and precluded her recovery." *Reed v. Morrison*, 12 S. & R. (Pa.) 18, 24; *Bullock v. Griffin*, 1 Strobb. Eq. (S. Car.) 60, 65.

1. Case quoted in last note.

2. *Bullock v. Griffin*, 1 Strobb. (S. Car.) Eq. 60, 65.

3. *Stewart on H. & W.*, §§ 366, 402.

4. See article on HUSBAND AND WIFE, vol. 9, pp. 795, 822, 823, etc.

5. See reference in above note. See vol. 9, pp. 822, 823, 824, etc., for discussion of this subject.

6. *Nolan v. Traber*, 49 Md. 460, 468.

7. *Barnes v. Harris*, Busbee (N. Car.) L. 15, 16.

8. *Abbott v. Abbott*, 67 Me. 304, 307.

9. *Dailey v. Houston*, 58 Mo. 361; *Carter v. Jackson*, 56 N. H. 364; *Vanneman v. Powers*, 56 N. Y. 39; *Hawk v. Harman*, 5 Binn. (Pa.) 43.

10. *Heckle v. Lurvey*, 101 Mass. 344; *Kowing v. Manley*, 49 N. Y. 192, 198.

11. See note 6, vol. 9, p. 824.

12. *Baum v. Mullen*, 47 N. Y. 577.

13. *Ball v. Bennett*, 21 Ind. 427.

14. *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90, 91.

15. *Rawlings v. Bell*, 1 Com. B. 959.

16. *Ferguson v. Brooks*, 67 Me. 251, 258; *Vanneman v. Powers*, 56 N. Y. 39, 43.

17. *Nolan v. Traber*, 49 Md. 460, 468.

in the wrong, and in such case she is as fully responsible as if her husband had been absent.¹

1. *Carleton v. Haywood*, 49 N. H. 314, 318.

Recent Cases Under Statutes in Various States on Married Women's Torts.

Florida.—A married woman is personally liable for her civil torts, including such frauds as do not grow out of, or are not directly connected with, or a part of, a contract which she has undertaken to make. *Prentiss v. Paisley* (Fla.), 7 L. R. A. 640.

Connecticut.—A *qui tam* action, under Conn. Gen. Stat., p. 253, § 1, for placing obstruction in a highway, is maintainable against a wife without joinder of her husband, provided the tort was committed by her without actual coercion by him. *Blakeslee v. Tyler*, 55 Conn. 397.

Where bars obstructing a highway enclosed the lands of the wife, and after they had been taken down she and her husband started together to put them up, and he said to her, as she was running ahead of him, "put them up," it is not actual coercion by him. *Blakeslee v. Tyler*, 55 Conn. 397.

Indiana.—By Statute (Rev. Stat. 1881, § 5120), married women are made liable to action for damages for their torts. *Mayhew v. Burns*, 103 Ind. 328; *Blakeslee v. Tyler*, 55 Conn. 397.

They take right to their separate estates with all its incidents, and must use their property with due regard to the rights of others. *Blakeslee v. Tyler*, 55 Conn. 397.

The statute which provides that a married woman is jointly liable with her husband for torts relates to mere personal torts of the wife and not to trespasses on real estate resulting in injury to others. *Blakeslee v. Tyler*, 55 Conn. 397.

Massachusetts.—Husband liable for sale of liquor by wife if near enough to influence wife. *Com. v. Flaherty*, 140 Mass. 454.

Michigan.—In an action of trespass for forcible disposition of one claiming as tenant, it was held that personal assaults made by defendant's wife in his presence were admissible, while those made while he was not present should have been excluded. *Baumier v. Antiau*, 65 Mich. 31.

The wife is not chargeable with the fraudulent intent of her husband, notwithstanding he may have been her

agent in the management of her property and the conduct of her business. *Plinsky v. Germania, F. & M. Ins. Co.*, 32 Fed. Rep. 47.

New Jersey.—Since the enactment of the statutes empowering married women to transact business independently of their husbands, they will be held more amenable to the same rules as other persons in reference to what may amount to fraud. *Silverthorne v. Troxall*, 12 Atl. Rep. 614.

New York.—Under the statutes of New York, the husband must be joined as defendant in an action for the tort of the wife (having no relation to her separate property), and is liable for recovery had therein. *Mongam v. Peck*, 111 N. Y. 401; *Fitzgerald v. Quann*, 109 N. Y. 441. A wife who received property through the fraudulent acts of her husband acting as her agent is liable for the consequences of such acts to the persons injured. *Rush v. Dilks*, 43 Hun (N. Y.) 282.

A married woman may have such community of interest with her husband in relation to real estate as will render her liable for his frauds relating to it; and when he, professing to act as her agent, makes false representations although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud. *Noel v. Kinney*, 106 N. Y. 74.

Pennsylvania.—Since the passage of the Pennsylvania Married Persons Property act of June 3rd, 1887 (Pub. Laws, 333) a husband is no longer liable for torts committed by his wife alone. *Vocht v. Kuklence*, 119 Pa. St. 365.

That act does not deprive a married woman of her common law exemption from arrest on *capias ad respondendum* or *capias ad satisfaciendum* in a civil action for a tort committed by her. *Vocht v. Kuklence*, 119 Pa. St. 365, *supra*; *Whalen v. Gabell*, 120 Pa. St. 284.

A married woman is personally liable for a tort committed by her, unless her husband was personally present and directed the doing of it at the time. If directed by him, he alone is liable. *Franklin's Appeal*, 115 Pa. 534.

Where the evidence shows a wrongful conversion of trust funds by a married woman, her estate is liable in dam-

3. Torts Connected with Contracts.—For her torts so intimately connected with her invalid contracts that in order to hold her liable for them her invalid contract would have to be substantially enforced, a married woman is not responsible.¹ Thus, she cannot be sued for getting credit by false and fraudulent representations that she is unmarried,² or has property she can charge,³ or for misusing property of which she is a bailee,³ or for misappropriating money entrusted to her.⁴ But if her contract is valid, the rule does not apply; thus, she is liable for false and fraudulent representations made in effecting a valid sale of her separate property.⁵

VII. CRIMES OF MARRIED WOMEN—1. Liability of Married Women for Crime.—A married woman continues liable for any crime committed before her marriage,⁶ and during coverture may render herself liable to prosecution for any crime as if unmarried, with the following exceptions: (1) She cannot be guilty of conspiracy with her husband;⁷ (2) or of larceny for appropriating his goods;⁸ (3) she cannot be prosecuted for receiving goods her husband has stolen;⁹ (4) or for aiding him to escape detection in a crime he has committed.¹⁰

2. Proof and Presumption of Guilt.—To convict a married woman for an act which would be criminal were she unmarried when it was committed, it must affirmatively appear (1) that her husband was absent at the time, for from his presence his coercion is implied;¹¹ (2) or that being present he did not or could not coerce her;¹² (3) or that it is a crime *malum in se* (murder, robbery, treason, etc.);¹³ or peculiarly feminine (as keeping a bawdy house)¹⁴ or specially covered by a statute expressly referring to married women.¹⁵

ages although the trust funds be not identified as a part of her estate. There was no evidence of coercion by the husband. *Franklin's Appeal*, 115 Pa. 534. See also *Wheeler v. Heil*, 115 Pa. St. 487.

Virginia.—Where a wife is sued as a sole trader, under the Virginia Married Women's act, April 4th, 1877, in an action of unlawful detainer, the consent or nonconcurrence of her husband can have no effect whatever. *Farley v. Tillar*, 81 Va. 275.

Vermont.—Husband and wife jointly liable for her tort, but his liability terminates on her death. *Southworth v. Kimball*, 58 Vt. 337. See also *Lombard v. Batchelder*, 88 Vt. 558; *Doherty v. Madgett*, 58 Vt. 323.

1. See section 8 of division V, above, and *Stewart on H. & W.*, § 424.

2. *Liverpool v. Fairhurst*, 9 Ex. 422, 429.

3. *Patterson v. Frazer*, 5 La. An. 586; *Barnes v. Harris, Busbee* (N. Car.) L. 15, 16; *Barnes v. Harris, Busbee* (N. Car. Law) 15, 16.

4. *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320.

5. *Baum v. Mullen*, 47 N. Y. 577, 579.

6. This had never been questioned.

7. *People v. Mather*, 4 Wend. (N. Y.)

229.

8. *Com. v. Hartnett*, 3 Gray (Mass.)

450.

9. *Reg. v. Brooks, Dears. C. C.* 184;

Desty Crim. Law, § 17a.

10. *Desty Crim. Law*, §§ 15a-17a. For the discussion of this subject see Vol.

9, pp. 796, 826, 827.

11. See note 2, p. 827, vol. 9.

12. *Nolan v. Traber*, 49 Md. 469. It is the right and duty of the husband to prevent his wife from doing wrong and he may use force if necessary. See note 1, p. 828, vol. 9.

13. *Com. v. Neal*, 10 Mass. 152; 6 Am. Dec. 105; *Desty Crim. Law*, § 16a.

14. *Com. v. Cheney*, 114 Mass. 281; *Desty Crim. Law*, § 16a.

15. See Md. Rev. Code 1878, art 12, § 42. See vol. 9, pp. 796, 826, 827.

VIII. SUITS OF MARRIED WOMEN—1. Rights and Remedies, How Connected.—The remedies by and against married women are peculiarly connected with their rights, and in any discussion of married women's suits the nature of the rights involved must be kept constantly in mind.¹

2. Effect of Marriage on Pending Suits.—The marriage of a woman does not, at common law, destroy her liability on her antenuptial contracts,² or for her antenuptial torts,³ but simply renders her husband jointly liable with her;⁴ nor does she by marriage entirely lose her rights of action, for, though her husband may reduce them to possession, if not so reduced during coverture they survive to her;⁵ so that if a suit is pending at the time of marriage, after marriage the husband has interests to be affected, and the opposing party stands in a new position, and the suit abates.⁶ But at present the effect of marriage on pending suits is almost entirely controlled by local statutes. In Alabama, for instance, the suit does not abate, but the marriage is suggested, and the husband is joined;⁷ while in Tennessee the suit abates, may be revived against her husband, and in case of his death survives against her.⁸ It is said a defendant may plead in abatement, or by *scire facias* have the husband made a party;⁹ and if he omits to do this, cannot allege coverture after judgment;¹⁰ or, if the woman is a defendant, and no plea is entered, the suit may proceed to execution without noticing the marriage,¹¹ and she may be taken in execution as if *sole*.¹² Generally speaking, if the husband is a necessary party to a suit brought during coverture, he should be joined upon his marriage in all his wife's antenuptial suits.¹³

3. Married Women's Suits at Common Law.—At common law, speaking generally, a married woman could neither sue nor be sued unless her husband was joined with her,¹⁴ and this is still *prima facie* the rule, and the causes which enable her to sue or render her liable to be sued at all must be alleged and proved.¹⁵ At common law the suit was treated as the suit of the husband

1. For rights and liabilities see article on HUSBAND AND WIFE, vol. 9.

2. Discussed *ante*, III, § 7.

3. Discussed *ante*, VI, § 1.

4. Discussed vol. 9, p. 822.

5. Discussed vol. 9, p. 845.

6. See cases cited, *infra*.

7. Lamkin v. Dudley, 34 Ala. 116, 117.

8. Parker v. Steed, 1 Lea (Tenn.) 206.

9. James v. Tait, 8 Port. (Ala.) 476; Townshend v. Townshend, 10 Gill & J. (Md.) 373; Bates v. Stevens, 4 Vt. 545.

10. Bates v. Stevens, 4 Vt. 545.

11. Evans v. Lipscomb, 28 Ga. 71; Sacket v. Wilson, 2 Blackf. (Ind.) 85.

12. Haines v. Corliss, 4 Mass. 659.

13. Gibson v. Gibson, 43 Wis. 23, 28; 28 Am. Rep. 527.

14. Porter v. Bank of Rutland, 19 Vt. 410. "At law, as a general rule, a married woman can neither sue nor be sued, unless in connection with her husband. But in chancery, whenever the interests of the two are conflicting, the wife is allowed to bring a suit against her husband, and the husband against the wife, as if they were *sole* and unmarried." See page 798, vol. 9.

15. Smith v. New England Bank, 45 Conn. 416, 420; Durden v. McWilliams, 31 Ala. 438; Lewis v. Moore, 25 Ark. 63; Hyatt v. Cochran, 85 Ind. 231; Ridgely v. Crandall, 4 Md. 435; Gregory v. Paul, 15 Mass. 31.

and he could, as defendant, allow judgment to be entered,¹ or, as plaintiff, release the cause of action.² He employed the counsel³ and was liable for the costs.⁴

4. Married Women's Suits in Equity.—In equity, independently of statute, suits of married women, except those for enforcing her equity to a settlement and those concerning her equitable separate estate, are governed by the same rules which control suits at law.⁵ Still in equity, neither the husband's bill nor his answer is binding upon her.⁶ When applying for her settlement out of her *choses in action*, she sues by her next friend, generally making her husband one of the defendants.⁷ As to her equitable separate estate, she sues by her next friend and jointly with her trustee, if she has one, making her husband a defendant if his interests in any way conflict;⁸ and when she is sued, her trustee (if she has any) should be joined;⁹ and she may come in and give a separate answer by next friend.¹⁰

5. Married Women's Suits Under Statutes.—In the different States, statutes have so differently changed the procedure in suits of married women that no general statement can be given; the statutes of the State where the peculiar suit is brought must in each case be consulted.¹¹

6. Effect of Dissolution of Marriage on Pending Suits.—At common law, on the dissolution of marriage, the joint suit of husband and wife in her right abated;¹² at present, generally, the suit will either abate and have to be revived by her representatives, or may be amended and continued by her or her representatives.¹³ If the joinder of the husband is merely formal, there is usually no abatement.¹⁴ Thus, in case of her husband's death she has her right of action on her chose in action as survivor;¹⁵ and if she dies, he, at common law, prosecutes the suit as survivor or as administrator.¹⁶ Divorce has much the same effect as the husband's death.¹⁷

1. *Vick v. Pope*, 81 N. Car. 22, 26.

2. *Southworth v. Packard*, 7 Mass. 95, 96.

3. *Frazier v. Felton*, 1 Hawks (N. Car.) 231, 237.

4. Discussed in section 7 to VIII, below.

5. *Porter v. Bank of Rutland*, 19 Vt. 410; *Stewart on H. & W.*, §§ 210, 211, 431.

6. *Bein v. Heath*, 6 How. (U. S.) 228; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255, 257; *Bird v. Davis*, 14 N. J. Eq. 467, 479.

7. *Bradley v. Emerson*, 7 Vt. 369.

8. *Johnson v. Vail*, 14 N. J. Eq. 423.

9. *Palmer v. Rankins*, 30 Ark. 771.

10. *Wolf v. Banning*, 3 Minn. 202.

11. *Powers v. Totten*, 42 N. J. L. 442, 443.

12. *Pattee v. Harrington*, 11 Pick.

(Mass.) 221, 222. "By the common law the death of the wife would put an end to this suit."

13. Same case at 221. "If, pending an action brought by husband and wife to recover a debt due to the wife when *sole*, the wife dies and the husband takes out administration on her estate, he may come in and prosecute the suit as administrator." *Tallmadge v. Grannis*, 20 Conn. 296; *Wass v. Plummer*, 68 Me. 267; *Wood v. Griffin*, 46 N. H. 230; *Armstrong v. Colby*, 47 Vt. 360, 368; *Meese v. Fond Du Lac*, 48 Wis. 323.

14. *Calderwood v. Pyser*, 31 Cal. 333.

15. *Story v. Baird*, 14 N. J. L. 262, 268; *King v. Little*, 77 N. Car. 138; *Little v. Keyes*, 24 Vt. 118, 121.

16. *Palter v. Harrington*, 11 Pick. (Mass.) 221.

17. *Tuttle v. Fowler*, 22 Conn. 58, 63; *Stewart on M. & D.*, § 430.

7. Costs in Suits of Married Women.—(1) *Married Women Plaintiffs.* At common law a married woman suing as plaintiff (except in cases in which she could sue alone) was an inactive party, the control of the suit being in her husband, and was not liable for costs;¹ nor could costs incurred in a suit at law be charged on her equitable separate estate in equity.² Owing to this immunity of a married woman from costs, she could not sue alone in equity even, but had to proceed by next friend, that someone might be responsible in case of loss of the suit;³ and some modern enabling acts have required the next friend to be joined, presumably for the same reason.⁴ But if the married woman has separate property, and the right to sue with respect thereto, it must bear the costs of an unsuccessful suit relating to it.⁵ If she can sue alone, her privilege is accompanied with the usual burdens and she is liable for costs.⁶

(2) *Married Women Defendants.*—If a judgment can be obtained against a married woman which will be binding on her property, the judgment is equally binding, though it includes costs.⁷ But when her husband is or should be joined with her, a decree for costs against her alone cannot be passed.⁸

8. Modes in Which Married Women's Suits May be Brought.—Under different laws and circumstances, married women's suits have been properly brought in the following modes: (1) By husband and wife jointly;⁹

1. *Harper v. Whitehead*, 33 Ga. 138, 144. "In equity a *feme covert*, being entitled to property separate and distinct from her husband, may sue in her own name, and in that case a person, or *prochein ami*, is required to be joined with her, only that he may be responsible for the costs of the proceedings in case it should appear that the suit is improperly instituted or conducted." *Kimbro v. First Nat. Bank*, 1 McArth. (D. C.) 61, 65; *Musgrave v. Musgrave*, 54 Ill. 186; *Hubbard v. Barcus*, 38 Md. 166, 174.

2. *Kimbro v. First Nat. Bank*, 1 McArth. (D. C.) 61, 66.

3. *Harper v. Whitehead*, 33 Ga. 138, 144; *Baker v. Baker*, 1 Bail. (S. Car.) Eq. 165.

4. *Frazier v. White*, 49 Md. 1, 8.

5. *Musgrave v. Musgrave*, 54 Ill. 186, 188.

6. *Leonard v. Townsend*, 26 Cal. 435; *Moncrief v. Ward*, 16 Abb. Pr. (N. Y.) 354, n.

7. *Post*, § 17, part VIII.

8. *Hubbard v. Barcus*, 38 Md. 166. "A *feme covert* could not be decreed to pay the costs of the proceedings without joining her husband."

9. *Suits by Husband and Wife Jointly.*—At common law on all rights of action

in which the wife had any interest, the husband and wife sued jointly. *Howe's Parties to Actions*, §§ 63-66.

They so sued for all damages to her property and for all debts due her. *Berger v. Belsley*, 45 Ill. 72, 74. See also *Lignoski v. Bruce*, 8 Fla. 269; *Gee v. Lewis*, 20 Ind. 149; *Tribble v. Fryers*, 5 J. J. Marsh. (Ky.) 179; *Petty v. Malier*, 14 B. Mon. (Ky.) 246; *Wyatt v. Simpson*, 8 W. Va. 394.

The husband joined even in her suits as administratrix or guardian. *Brick v. Fisher*, 2 Colo. 709, 710; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Mitchell v. Wright*, 4 Tex. 283.

The suit was really the suit of the husband, as it was in his exclusive control—*Vick v. Pope*, 81 N. Car. 22, 26; and as he could employ the lawyers,—*Frazier v. Felton*, 1 Hawks (N. Car.) 231, 237; and was alone responsible for the costs. *Bellinger v. Thomson*, 2 Rich. (S. Car.) Eq. 30. All of which is separately discussed in this article.

In such suits the interest of the wife must affirmatively appear. *Lewis v. Moore*, 25 Ark. 63; *Ridgely v. Crandall*, 4 Md. 435; *Pickering v. De Roche-mont*, 45 N. H. 67. And the marriage must be alleged. *Milton v. Haden*, 32

(2) by the wife and her trustee;¹ (3) by the wife through her next friend,²

Ala. 30. If the wife sues alone, the declaration may be amended and the husband joined. *Glick v. Hartman*, 10 Iowa 410; *Sherron v. Hall*, 4 Lea (Tenn.) 498.

If she sued alone and no objection was made by plea, none could have been made afterward. *Quarrier v. Baltimore etc. R. Co.*, 20 W. Va. 424. Still a suit for partition brought by her alone would not pass a good title as her husband's estate would not be destroyed. *Spring v. Sandford*, 7 Paige (N. Y.) 550.

Husband need not be joined generally in suits respecting equitable separate property. *Bradley v. Emerson*, 7 Vt. 369, 371. Or statutory separate property. *Emerson v. Clayton*, 32 Ill. 493, 497.

Sometimes, however, husband's joinder is required "for conformity," but there is a question as to whether his joinder in suit respecting separate property would not be error. That it would be, see *Hayner v. Smith*, 63 Ill. 430, 432; *Harris v. Webster*, 58 N. H. 481. That it would not be, see *Keys v. Phelan*, 19 Cal. 128, 129; *Herzberg v. Sachse*, 60 Md. 426, 432; *Burns v. Lynde*, 6 Allen (Mass.) 305. Of course he should be joined whenever he has substantial rights. *Wing v. Goodman*, 75 Ill. 159; *Henry v. Gregory*, 29 Mich. 68; *Armstrong v. Colby*, 47 Vt. 360.

1. Suits of Married Women by Trustees.

—Where a suit affects separate property held by a trustee, the trustee should join with the married woman in the suit. See *Friend v. Oliver*, 27 Ala. 532, 534; *Smith v. Chapell*, 31 Conn. 589, 593; *Schenk v. Ellingwood*, 3 Edw. (N. Y.) Ch. 175. Very generally the husband is the trustee, and the suit is therefore brought by the husband and wife jointly, but in such cases the husband has not the full control of the suit which he has when joined simply as husband. *Riley v. Riley*, 25 Conn. 154, 161.

2. Suit Through Next Friend.—The usual mode in which married women proceed in equity is by next friend. *Bein v. Heath*, 6 How. (U. S.) 228, 240; *Harper v. Whitehead*, 33 Ga. 138, 144; *Kenley v. Kenley*, 3 Miss. 751, 753; *Srant v. Van Schoonhoven*, 9 Paige (N. Y.) 255, 257; 37 Am. Dec. 393; *Garlick v. Strong*, 3 Paige (N. Y.) 440; *Jordan v. Gray*, 19 Ala. 618; *Bel-*

linger v. Thomson, 2 Rich. (S. Car.) Eq. 30; *Baker v. Baker*, 1 Bail. (S. Car.) Eq. 165; *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310, 313; *Bradley v. Emerson*, 7 Vt. 369, 371.

The next friend is joined in order that the court may have a person *sui juris* subject to its orders. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310, 313. And in order that there may be some one responsible for costs. *Harper v. Whitehead*, 33 Ga. 138, 144; *ante*, § 7.

If wife has sued alone she may amend and join her next friend. *Garlick v. Strong*, 3 Paige (N. Y.) 440; *Willis v. Underhill*, 6 How. Pr. (N. Y.) 396.

Her husband is generally her next friend. *Bein v. Heath*, 6 How. (U. S.) 228, 240. And in one case this is said to be his right if he has no conflicting interests. *Bradley v. Emerson*, 7 Vt. 369, 371.

But anyone may be her next friend. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310, 313; *Garlick v. Strong*, 3 Paige (N. Y.) 440. And husband cannot be such when he has conflicting interests. *Bradley v. Emerson*, 7 Vt. 369, 371.

Wife in suing husband must proceed by next friend. *Hunt v. Booth*, 1 Freem. (Miss.) Ch. 215; *Kenley v. Kenley*, 3 Miss. 751, 753.

She may sue trustees of her separate estate by next friend. *Robert v. West*, 15 Ga. 122, 148. And in same mode may file a bill for discovery in aid of suit, which she is maintaining alone at law. *Bellinger v. Thomson*, 2 Rich. (S. Car.) Eq. 30.

A married woman is not bound by a bill filed by her husband, if filed for them jointly. *Blackwell v. Bragg*, 78 Va. 529. But she is if it was filed by him as next friend. *Bein v. Heath*, 6 How. (U. S.) 228, 239, 240.

The next friend may make affidavit to the bill. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310, 313.

The wife is the substantial party, and if she gives the next friend security for costs, may dismiss the bill against his wishes. *Brawner v. Bell*, 30 Ga. 334, 336.

Wife cannot sue at law by next friend. *Jordan v. Gray*, 19 Ala. 618. Except by statute. *Smith v. Smith*, 18 Fla. 789; *Frazier v. White*, 49 Md. 1, 8; *Fox v. Tooke*, 34 Mo. 509.

A statute enabling wife to sue by next

and (4) by the wife alone.¹ The first mode was the only one at common law, unless the wife had for some reason the capacity of a *feme sole*;² the second and third were the usual modes of procedure in equity respecting equitable separate property;³ and the fourth was the mode in which a wife who, on account of her husband's civil death, etc., had the capacities of a *feme sole*, brought suit at common law⁴ and is the usual way in which she sues under modern statutes.⁵ Although many statutes giving married women modes of suits unknown at common law have been construed to supersede the common law modes, and to make a suit brought as at common law improper,⁶ a statute which enables a married woman to sue by next friend does not necessarily deprive her of the privilege of proceeding jointly with him as at common law;⁷ and in other cases, the common law mode has been held not wholly superseded.⁸

friend does not by implication destroy her right to sue jointly with her husband. *Herzberg v. Sachse*, 60 Md. 426, 432.

1. **Suits by Wife Alone.**—(1) *At common law*, a married woman could sue in her own name alone, in all cases where she had the capacities of a *feme sole*. See *Clark v. Valentine*, 41 Ga. 143, 145; *Love v. Moynahan*, 16 Ill. 279, 282; *Berger v. Belsley*, 45 Ill. 72, 74; *Smith v. Silence*, 4 Iowa 322, 324; *Laughlin v. Eaton*, 54 Me. 156, 159; *Worthington v. Cooke*, 52 Md. 297, 308; *Gregory v. Pierce*, 4 Metc. (Mass.) 478, 479; *Gregory v. Paul*, 15 Mass. 31, 32; *Rose v. Bates*, 12 Mo. 30; *Osborn v. Nelson*, 59 Barb. (N. Y.) 375; *Benadum v. Pratt*, 1 Ohio St. 403, 405; *Fallwickle v. Keith*, 1 Heisk. (Tenn.) 360, 361; *Cole v. Seeley*, 25 Vt. 220; 60 Am. Dec. 258; *ante*, I, § 2.

She could do so when her husband was presumably dead. *Smith v. Silence*, 4 Iowa 321, 324. When he was civilly dead. *Bradley v. Emerson*, 7 Vt. 369, 370. When he was an alien residing abroad. *Gregory v. Paul*, 15 Mass. 31, 32. When he had permanently abandoned her and the country. *Love v. Moynahan*, 16 Ill. 279, 282. When he had been divorced *a vinculo matrimonii*. *Webster v. Webster*, 58 Me. 139, 145; 4 Am. Rep. 253; *Berry v. Teel*, 12 R. I. 267, 268. Or *a mensa et thoro*. *Benadum v. Pratt*, 1 Ohio St. 403, 405.

(2) *Under statutes* in many States married women are able to sue alone, and usually such statutes involve no great difficulties. The authority to sue alone in one class of cases does not, however, affect the procedure in other cases, the construction being strict.

Gerald v. McKenzie, 27 Ala. 166, 170. A statute authorizing suits alone as to "separate estate," has been held to refer only to statutory separate property. *Gerald v. McKenzie*, 27 Ala. 166, 170. There is more difficulty as to married women's capacity to sue alone derived by implication from statutes defining their rights. A statute enabling a wife to contract as if *sole* enables her to sue alone thereupon. *Reynard v. Memphis Ins. Co.*, 7 Baxt. (Tenn.) 279.

A statute enabling a wife to hold, etc., her separate property as a *feme sole* enables her to sue alone respecting it. *Emerson v. Clayton*, 32 Ill. 493, 497; *Gibson v. Gibson*, 43 Wis. 23, 26, 28; Am. Rep. 527. In replevin, for example. *Waterman v. Matteson*, 4 R. I. 539.

Many cases hold that when a married woman may sue alone it is error to join her husband in the suit. *Hayner v. Smith*, 63 Ill. 430, 432. To the contrary, *Windsor v. Bell*, 61 Ga. 671, 676.

If the husband has any interest he may of course join. *Hayner v. Smith*, 63 Ill. 430, 432 (to the contrary, *Windsor v. Bell*, 61 Ga. 671, 676); *Henry v. Gregory*, 29 Mich. 68, 69.

2. See *ante*, I, § 2.

3. See *ante*, I, §§ 3, 4.

4. *Worthington v. Cooke*, 52 Md. 297.

5. See *supra*, n. 1.

6. See *Rockwell v. Clark*, 44 Conn. 534; *Alexanders v. Goodwin*, 54 N. H. 423, 424; *Palmer v. Davis*, 28 N. Y. 242.

7. *Abraham v. Tappe*, 60 Md. 317, 323; *Herzberg v. Sachse*, 60 Md. 426, 432.

8. See *Keys v. Phelan*, 19 Cal. 128; *East Tenn. R. Co. v. Cox*, 57 Ga. 252;

9. Actions and Defences.—(1) *The Causes of Action on Which Married Women May Sue.*—The cause of action on which a suit of a married woman is brought may be an antenuptial or postnuptial injury to or contract with her, or a chose in action assigned to her before or after her marriage, and it may concern herself or her property; or the suit may be for relief respecting her property, general or separate. The mode of procedure in each case is elsewhere separately discussed; it depends very largely on the substantial rights of husband and wife, and therefore differs with circumstances and with respect to different kinds of property.¹

(2) *The Defences in Suits Brought by Married Women.*—The defence of the woman's coverture is, of course, a defence peculiar to married women's suits;² her disabilities to some extent affect the defence of limitations;³ and the fact of her husband's joinder to some degree complicates the principles relating to the defence of set off.⁴ As to other defences there seem to be no points peculiar to suits of married women.

10. The Plea of Coverture Against Married Women.—If the married woman has a right of action, but pursues the wrong remedy, as if she sues alone when her husband or her trustee or next friend should be joined, her coverture must be set up by a plea in abatement,⁵ likewise if her coverture appears on the face of the pleadings by demurrer;⁶ and in the absence of such plea or demurrer the objection is waived and cannot be made at all.⁷ If she sues jointly with a man who apparently has no interest, and does not allege their marriage, the declaration is demurrable;⁸ so if, though the marriage be alleged, the interest of the wife and her right to sue do not affirmatively appear, the declaration is demurrable;⁹ and in such cases the defect is not cured by verdict.¹⁰ But

Windsor v. Bell, 61 Ga. 671, 676; *supra*, n. 1, p. 644.

1. See notes to § 2, part VIII, above, and § 429, *Stewart on Husband and Wife*.

2. See n. 5-10, *infra*; n. 1-5, p. 656.

3. See n. 6-12, p. 656; n. 1-15, p. 657.

4. *McMahon v. Burchell*, 5 Hare 322; *Elibank v. Montohen*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574; *Carver v. Carver*, 53 Ind. 241, 244; *Lane v. Fallen*, 16 Md. 352, 357; *Carpenter v. Leonard*, 5 Minn. 119; *Pierce v. Dustin*, 24 N. H. 117; *Ferguson v. Lathrop*, 15 Wend. (N. Y.) 625; *Hulby v. Camplin*, 22 Tex. 582.

5. *Dutton v. Rice*, 53 N. H. 496, 499. "It is laid down as a general position, in Com. Dig., that coverture in a woman, when either plaintiff or defendant, must be pleaded in abatement. . . . Chitty says . . . her coverture can only be pleaded in abatement and cannot be given in evidence

under the general issue, or pleaded in bar; at least this rule obtains in actions for torts. 1 Chitty Pl. 449; and see the precedent in 3 Chitty Pl. 899." *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280, 303; *James v. Stewart*, 9 Ala. 855; *Young v. Ward*, 21 Ill. 223, 225; *Walker v. Gilman*, 45 Me. 28, 30; *Simmons v. Thomas*, 43 Miss. 31; *Quarrier v. Baltimore etc. R. Co.*, 20 W. Va. 424.

6. *Mott v. Smith*, 16 Cal. 533; *Tapley v. Tapley*, 10 Minn. 360; *Kenley v. Kenley*, 3 Miss. 751, 753.

7. *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280, 303; *Surtell v. Brailsford*, 2 Bay. (S. Car.) 333, 338; *Ross v. Linder*, 12 S. Car. 592.

8. See *Milton v. Hayden*, 32 Ala. 30; *Tanner v. White*, 15 Ala. 798; *Stewart on H. & W.*, § 439.

9. *Hyatt v. Cochran*, 85 Ind. 231; *Williams v. Brainard*, 52 Vt. 392.

10. *Smith v. Bank of New England*, 45 Conn. 416.

if the wife has no right of action at all, the defendant may have a nonsuit;¹ and if this is apparent on the pleadings, it is fatal on demurrer,² or in arrest of judgment,³ or on error.⁴ Of course, if the wife has the right to sue alone and so sues, a plea of coverture is bad.⁵

11. Plea of Limitations Against Married Women.—Although long delay may raise a *prima facie* presumption of payment independently of statute,⁶ the plea of limitations as an absolute bar depends entirely on statute;⁷ and statutes of limitation are of equal force in equity and at law.⁸ By the British statute of James, and most of the American statutes based upon it, a special saving is made in favor of married women, so that as a general rule a married woman is not barred from prosecuting a right which accrues during coverture, by any lapse of time occurring before the dissolution of her marriage.⁹ Thus, when a party acquires property from a husband during coverture, the wife of such husband is not barred from claiming the property as hers by any lapse of time before his death;¹⁰ and against a wife who lends money to her husband, limitations begin to run only from the date of his death or divorce.¹¹ In the statutes of Iowa, Missouri, New York and Wisconsin, there seem to be no saving clauses in favor of married women; in Massachusetts the saving clause operates only if the wife is "under disability"; in California, Indiana and Kentucky, only if she cannot sue alone; and in West Virginia, cases in which she can sue alone are excepted from the saving operation of the clause. But whether statutes enabling married women to sue alone, by implication repeal the saving clause in the statute of limitation, is disputed; on the one hand, it is held that when a wife can sue as if unmarried, the reason for the exception is gone, and therefore the exception can no longer exist;¹² while it is, on the other hand, maintained that the privileges of married women can be removed only by express legislation, and that their safety from limitations secured by the general statute must continue to

1. Dutton v. Rice, 53 N. H. 496, 499; James v. Stewart, 9 Ala. 855; Kimbro v. First Nat. Bank, 1 McArthur (D. C.) 61, 66; Newton v. Robinson, 1 Tayl. (N. Car.) 72, 76.

2. Kenley v. Kenley, 3 Miss. 751, 753.

3. Kimbro v. First Nat. Bank, 1 McArthur (D. C.) 61.

4. Same case.

5. Farman v. Chamberlain, 74 Ind. 82, 83.

6. Plea of Limitations Against Married Women.—Piatt v. Smith, 12 Ohio St. 561; Meanor v. Hamilton, 27 Pa. St. 137, 143.

7. Hodges v. Darden, 51 Miss. 199. "This section protects the rights of married women as plaintiffs, if at the time the right accrued the disability ex-

isted; but there is no saving in behalf of a creditor of a married woman on account of her disability of coverture, and there is no power in the courts to make one."

8. Kutz's Appeal, 40 Pa. St. 90, 94.

9. Meegan v. Boyle, 19 How. 130, 135; Sledge v. Clopton, 6 Ala. 580, 606; Drenner v. Walker, 21 Ark. 539, 545; Flynt v. Hatchett, 9 Ga. 328; Burke v. Beveridge, 11 Minn. 205, 211.

10. Jones v. Reeves, 6 Rich. (S. Car.) 132, 137.

11. Towers v. Hagner, 3 Whart. (Pa.) 48, 60; Bradley v. Sadler, 54 Ga. 681, 686; Oswald v. Hoover, 43 Md. 360, 368.

12. Geisen v. Heiderich, 104 Ill. 537. "The acts of 1861 and 1874, enlarging the rights and legal capacities of mar-

exist until expressly taken away.¹ In coming to a determination on this point, the language of the particular statutes is of course of great importance. A statute which excepts persons "under legal disabilities," excepts married women so far as they are under disabilities only.² Coverture is not, however, the only ground for exception under the statutes; infancy is another common one; and a married woman cannot tack one of these disabilities to another.³ Thus, if an infant with a right of action marries, the statute begins to run in spite of her coverture, when she comes of full age,⁴ and so when limitations have not run against a married woman on account of her coverture, and she dies, her heirs cannot set up their infancy as a further reason why the statute should not run.⁵ But if, when the right accrues, the woman is both married and an infant, the statute begins to run only when both of the disabilities are removed.⁶ If the statute once begins to run, no subsequently incurred disability can stop it; therefore a wife is not saved from the operation of the statute if she had the right of action at the time of her marriage;⁷ and so, if her right accrues during coverture, and her husband dies, the statute begins to run on the day of his death, and does not stop when she marries again.⁸ The plea of limitations can be set up only by the parties or those claiming under them.⁹ The saving in favor of a married woman does not prevent limitations from running against her husband¹⁰ or her assignees;¹¹ the husband's delay may bar his right to the estate during coverture,¹² and to curtesy,¹³ and in case of her death, if he has curtesy, the statute does not run against her heirs until the estate of curtesy has terminated.¹⁴ Limitations do not run in favor of a husband's heirs against his widow's claim for dower.¹⁵

12. The Modes in Which Married Women May be Sued.—Under different laws and circumstances suits have been brought properly against married women in the following modes: (1) Jointly with husband;¹⁶

ried women, have, by implication, repealed all savings in their favor in existing limitation laws, including the one relating to the prosecution of writs of error." *Brown v. Cousens*, 51 Me. 301, 306; *Dunham v. Sage*, 52 N. Y. 230.

1. *Morrison v. Norman*, 47 Ill. 477, 481; *Ball v. Bullard*, 52 Barb. (N. Y.) 141, 146; *Westcott v. Miller*, 42 Wis. 454, 464.

2. *Bauman v. Grubbs*, 26 Ind. 419, 421.

3. *Blackwell v. Bragg*, 78 Va. 529, 536; *Carter v. Cantrell*, 16 Ark. 154, 164; *Henry v. Carson*, 59 Pa. St. 297, 308.

4. *Carter v. Cantrell*, 16 Ark. 154, 164.

5. *Henry v. Carson*, 59 Pa. St. 297, 308.

6. *Blackwell v. Bragg*, 78 Va. 529, 536.

7. *Welborn v. Weaver*, 17 Ga. 267, 270.

8. *McDonald v. McGuire*, 8 Tex. 361, 365.

9. *State v. Layton*, 4 Har. (Del.) 8, 19; *Watson v. Kelly*, 16 N. J. L. 517, 524.

10. *Neal v. Robertson*, 2 Dana (Ky.) 86, 88; *McDowell v. Potter*, 8 Pa. St. 189, 194.

11. *Thompson v. Peebles*, 6 Dana (Ky.) 387, 390.

12. *Murdoch v. Johnson*, 7 Cold. (Tenn.) 605, 609.

13. See preceding note.

14. *Marple v. Myers*, 12 Pa. St. 122, 127.

15. *Webb v. Smith*, 40 Ark. 17, 24.

16. **Married Women Sued Jointly with Husband.**—As a rule, independently of

(2) jointly with trustee,¹ and (3) alone.² The first was the invariable mode at common law, not only because the husband was jointly liable with the wife on all her contracts and torts, but because he had present substantial interests in all her property which might be affected by the suit.³ The second was the mode when the wife had a trustee of equitable separate property.⁴ The third was the mode in which a wife with the capacities of a *feme sole* was sued,⁵ and is the usual mode under the statutes.⁶

13. The Service of Process on Married Women.—At common law, a married woman sued jointly with her husband did not have to be summoned personally—service on her husband was sufficient,⁷ unless the proceeding was one affecting her separate property.⁸ If the husband has complete control of the suit he can admit summons for her, otherwise not.⁹ It has been held that one copy

statute, a husband must be joined in all suits against his wife, at law or equity. *Marshall v. Oakes*, 51 Me. 308; *Porter v. Bank of Rutland*, 19 Vt. 410, 417.

As to his joint liability see article HUSBAND AND WIFE, vol. 9.

Under the statute he is usually joined when he is liable. *Robinson v. Trofitter*, 109 Mass. 478. But not when he is not. *Hagebrush v. Ragland*, 78 Ill. 40; *Carothers v. McWese*, 43 Tex. 221. Sometimes the husband is joined for conformity only. *Cook v. Lyon*, 54 Miss. 368, 372; *Hamlin v. Bridge*, 24 Me. 145. He should be joined in possessory actions against the wife, as her possession is his possession. *Howard v. Valentine*, 20 Cal. 282.

1. Suits Against Wife Jointly with Trustee.—Wherever there is a trustee he should be joined in suits affecting the trust property. *Palmer v. Rankins*, 30 Ark. 771. If no trustee is named the husband is joined as such. See *Sears v. Brooks*, 12 Ga. 195, 197. When the wife answers separately she does so by next friend. *Wolf v. Barning*, 3 Minn. 202; *Phillips v. Burr*, 4 Duer (N. Y.) 113. If an infant, a guardian *ad litem* should be appointed. *Nicholson v. Wilborn*, 13 Ga. 467.

2. Suits Against Married Women Alone.—Independently of statute, a married woman could be sued alone only in cases in which, by the common law, she enjoyed the status of a *feme sole*. *Worthington v. Cooke*, 52 Md. 297, 308; *Gregory v. Paul*, 15 Mass. 31, 34. Compare cases cited under VIII, § 8, showing she can be sued when her husband is dead, or civilly dead, or an alien residing abroad, or has abjured the realm, or is divorced. Even in

equity her husband had to be joined unless there was a trustee. *Porter v. Bank of Rutland*, 19 Vt. 410, 417. Statutes authorizing suits against her alone are common. Statutes which destroy her husband's common law liability on her torts and contracts, or enable her to incur liabilities unknown at common law, impliedly authorize suits against her alone. *Morrell v. Cawley*, 17 Abb. Pr. (N. Y.) 76.

3. See *infra*, VIII, 3.

4. See *infra*, VIII, 4.

5. See *infra*, VIII, 3, 5, etc.; IX.

6. See *infra*, VIII, 5.

7. *Hollinger v. Bank of Mobile*, 8 Ala. 605; *Lord v. Strong*, 1 Root (Conn.) 475; *King v. McCampbell*, 6 Blackf. (Ind.) 435; *Nicholson v. Cox*, 83 N. Car. 44, 47.

8. *Piggott v. Snell*, 59 Ill. 106. "The common law rule, that service of summons against husband and wife, on the husband alone, is good against both, is so far changed by the legislation in this State in respect to the right of property of married women, that whenever it is sought by a judicial proceeding to affect the rights of property of a married woman, she must be served with process, and even at common law it has been held necessary, where the plaintiff is seeking relief out of the separate estate of the wife, that the wife should be served." *Smith v. Taylor*, 11 Ga. 20; *Moore v. Wade*, 8 Kan. 380, 385; *Kerchner v. Kempton*, 47 Md. 568, 590; *Foot v. Lathrop*, 53 Barb. (N. Y.) 183, 185; *Vick v. Pope*, 81 N. Car. 22, 25; *Shelby v. Perrin*, 18 Tex. 515, 517.

9. *Moore v. Wade*, 8 Kan. 380, 385; *Nicholson v. Cox*, 83 N. Car. 44, 47.

of the summons left at the family residence is sufficient summons for both husband and wife,¹ and that they are presumed to have the same residence.² As personal service is necessary only to give personal jurisdiction,³ it has been held that service on a married woman is not necessary when the proceeding is one *in rem* against her separate property—a case of attachment.⁴ Service on a wife is not, however, service on her husband.⁵

14. Actions and Defences—(1) *The Causes of Action on Which Married Women May be Sued*.—At common law, a married woman was liable to be sued only on her antenuptial contracts or torts, and on her postnuptial torts which she voluntarily committed; on such causes of action judgment could be obtained against her jointly with her husband, and any property of hers could be seized in execution.⁶ In equity, her equitable separate estate could be made liable by a proceeding *in rem* against it for all sums of money which she had properly, in accordance with the rule prevailing in the particular State, charged upon it.⁷ Under statutes, she may render herself and her property liable on her contracts, and the only difficulty as to the procedure in such cases is whether the suit shall be brought at law or in equity, and whether the proceeding shall be *in personam* or *in rem*. When the contract is binding on statutory separate estate only because such property is treated as if it were secured to the woman by deed instead of by statute, the proceeding must be in equity and *in rem*, just as if it were equitable separate property.⁸ But when the contract is made under the express or implied powers given by the terms of the statute, the proceeding should be at law as if she were *sole*;⁹ except that when the contract is valid only by virtue of a power attached to an ownership of property, the operation of the judgment must be limited to such property.¹⁰

(2) *The Defences of Married Women*.—The peculiar defence of married women is, of course, the defence of coverture. The fact of coverture in some cases affects the defence of limitations; and the fact that the husband is joined sometimes raises the question as to how far a defence of one will be available to

1. Lord *v.* Strong, 1 Root (Conn.) 475.

2. Prieto *v.* Duncan, 22 Ill. 26.

3. Moore *v.* Wade, 8 Kan. 380, 385.

4. Brent *v.* Taylor, 6 Md. 58, 69.

5. Hess *v.* Cole, 23 N. J. L. 116, 123.

6. Zachary *v.* Cadenhead, 40 Ala. 236, 238. "To hold otherwise would be to allow her to change her relation and liability to her creditors by her own act, and to lessen their security; while at common law the act of marriage did change that relation and liability, but it increased the security of the creditor by making the husband also liable for the debt during marriage."

7. See § 4, part III, above.

8. Grissell, L. R., 12 Ch. D. 484; Stillwell *v.* Adams, 29 Ark. 346, 351; Carpenter *v.* Mitchell, 50 Ill. 470, 474; Worthington *v.* Cooke, 52 Md. 297, 308; Devries *v.* Conklin, 22 Mich. 255; Walker *v.* Deaver, 79 Mo. 664, 674; Dougherty *v.* Sprinkle, 88 N. Car. 300, 302; Phillips *v.* Graves, 20 Ohio St. 371, 382.

9. Leonard *v.* Rogan, 20 Wis. 540; Richmond *v.* Tibbles, 26 Iowa 474, 476; Miner *v.* Pearson, 16 Kan. 28; Smith *v.* Dunning, 61 N. Y. 249, 251.

10. Baldwin *v.* Kimmel, 16 Abb. Pr. (N. Y.) 353, 361.

the other.¹ The wife's bankruptcy, for example, discharges both her husband and herself from liability for her debts,² while his bankruptcy discharges him alone.³ As to other defences, there are no special points relating to married women, except so far as the management of the suit is concerned.

15. The Plea of Coverture by Married Women.—If a married woman is sued on an obligation on which she is not liable at all, she may, if the defect is apparent on the pleadings, demur;⁴ or she may plead her coverture in bar,⁵ or prove it under the general issue,⁶ or set it up after judgment on a writ of error,⁷ or a motion to set the judgment aside;⁸ and it has been even held that a judgment obtained in such a case against a married woman is a mere nullity, and may be so treated in collateral proceedings.⁹ The plaintiff cannot cure the defect in his proceedings by entering a *nolle prosequi* against the wife, except in the case of torts, because in a suit in contract recovery must be had against all or none.¹⁰ If she is liable on the obligation, but is improperly sued, her husband, next friend, or trustee not being joined, she must set up her coverture by a plea in abatement¹¹ (which, of course, must be put in before any plea in bar),¹² or, if the defect is apparent on the pleadings, by demurrer,¹³ and in the absence of such plea or demurrer the defence is waived and cannot be made at all.¹⁴ It is, perhaps, from a failure to recognize the distinction between the cases where the married woman is liable and is improperly sued, and the cases where she is not liable at all, that the great difference of opinion as to the effect of a judgment against her has arisen. When husband and wife are jointly sued for her tort, a plea of coverture is not sufficient, she must plead coverture, and the duress of her husband.¹⁵ In cases where the plea is good at all, it may be made generally, for the complaint must set out the grounds of her liability, and she need not negative them.¹⁶ In

1. See §§ 15, 16, below; Floore v. Steigelmayer, 76 Ind. 479, 481; State v. Layton, Har. (Del.) 8, 19; McDowell v. Potter, 8 Pa. St. 189, 194.

2. Chadwick v. Starrett, 27 Me. 138, 141.

3. Jones v. Glass, 48 Iowa 345, 346; Allers v. Forbes, 59 Md. 374, 376.

4. Leslie v. Harlow, 18 N. H. 518. "A declaration which shows upon its face that the action is against husband and wife, and founded upon their joint promise during the coverture, is bad upon demurrer."

5. Kennard v. Sax, 3 Oreg. 263.

6. Thomas v. Lowry, 60 Ill. 512, 515; Painter v. Weatherford, 1 Greene (Iowa) 97, 103.

7. Kennard v. Sax, 3 Oreg. 263, 266.

8. Kennard v. Sax, 3 Oreg. 263, 266.

9. Griffith v. Clarke, 18 Md. 457, 463.

10. McLean v. Griswold, 22 Ill. 218, 220; Thomas v. Lowry, 60 Ill. 512, 514.

11. McLean v. Griswold, 22 Ill. 218; Painter v. Weatherford, 1 Greene (Iowa) 97, 103; Tracy v. Keith, 11 Allen (Mass.) 214; Powers v. Totten, 42 N. J. L. 442.

12. Thomas v. Lowry, 60 Ill. 512, 514.

13. Long v. Dixon, 55 Ind. 352; Gardner v. Moore, 2 Edw. (N. Y.) Ch. 313; Hastings v. McKinley, 1 E. D. Smith (N. Y.) 273.

14. Work v. Cowhick, 81 Ill. 317; Emmett v. Yandes, 60 Ind. 548; Van Shrader v. Taylor, 7 Mo. App. 361, 365; Caldwell v. Brown, 43 Tex. 216, 217.

15. Stockwell v. Thomas, 76 Ind. 506, 508; Burnett v. Nicholson, 86 N. Car. 99, 106; Clark v. Bayer, 32 Ohio St. 299, 311.

16. Tracey v. Keith, 11 Allen (Mass.) 214; Huff v. Wright, 39 Ga. 41.

some States she must sign her plea of coverture herself.¹ For at common law she could not appear by attorney, but only in person.²

16. The Plea of Limitations by Married Women.—When a married woman is sued, whether alone or not, limitations can in general be pleaded just as if the suit were against a person under disability; for statutes of limitation do not usually make any exception as to claim against married women.³ And when a married woman is sued after coverture on an antenuptial debt, she can plead limitations, and neither her promise nor that of her husband made during coverture can be set up against her.⁴ But as to family supplies, where she and her husband are jointly liable by statute, he is her agent in law, and his promise may take the debt out of the statute.⁵

17. Effect of Judgment Against a Married Woman.—If the record in the case of a judgment against a married woman disclose the fact of her coverture, a cause of action on which a married woman might be liable, the joinder of all proper parties, and that the married woman has been duly summoned, and if the subject matter of the suit be one within the jurisdiction of the court, the married woman is bound thereby as if unmarried.⁶ If the record disclose the fact of coverture, but not grounds on which a married woman might be liable, the judgment is void, for the court has no jurisdiction to enter it;⁷ if though it appears that the grounds of action were such as might render a married woman liable, but that the suit was not properly brought, the defect is cured, and the judgment is valid.⁸ If the record do not disclose the fact of coverture, the married woman may in any proceeding show that owing to her coverture she was not liable at all,⁹ but she cannot show that she was liable but was improperly sued.¹⁰ Some cases hold more broadly that in any case where the court had jurisdiction of the parties (by summons or appearance¹¹), and of the subject matter,

1. *Kidderlin v. Meyer*, 2 Miles (Pa.) 292, 295.

2. *Patton v. Stewart*, 19 Ind. 233, 237.

3. *Hodges v. Darden*, 51 Miss. 199, 201. "The preceding section (2156) protects and saves the right of a *feme covert*, as plaintiff, if at the time the right accrued the disability existed. But there is no saving in behalf of a creditor of a *feme covert*, so long as the disability exists, and there is no power in the courts to make one."

4. *Farrar v. Bessey*, 24 Vt. 89, 92.

5. *Lawrence v. Sinnamon*, 24 Iowa 80, 84; *Polly v. Walker*, 60 Iowa 86; *Clopton v. Mathews*, 48 Miss. 285, 298.

6. *Lewis v. Gunn*, 63 Ga. 542, 545. "But when property which she claims

is levied upon as his, and she has her day in court and it is adjudged his, with or without her consent, under circumstances which would conclude any other suitor, why is she not concluded?" And see *Emmett v. Yandes*, 60 Ind. 548, 550; *Carey v. Dixon*, 51 Miss. 593, 599; *Baxter v. Dear*, 24 Tex. 17, 21..

7. *Emmett v. Yandes*, 60 Ind. 548; *Higgins v. Pellzer*, 49 Mo. 152, 157; *Hecker v. Haak*, 88 Pa. St. 238, 242.

8. *Kennard v. Sax*, 3 Oreg. 263.

9. *Griffith v. Clarke*, 18 Md. 457, 463; *Morse v. Toppan*, 3 Gray (Mass.) 411. *Contra*, *Burk v. Hill*, 55 Ind. 419, 423.

10. *Long v. Dixon*, 55 Ind. 352.

11. *Childress v. Taylor*, 33 Ala. 185, 187; *Vick v. Pope*, 81 N. Car. 22, 25; *Hecker v. Haak*, 88 Pa. St. 238, 242.

the judgment is valid, and the wife estopped;¹ but the better rule is that a married woman is estopped only when the judgment is valid, and that a judgment on a contract is itself but a contract and not binding on a party not bound by the contract.² A void judgment may be enjoined in equity.³ For example, a personal judgment against a married woman alone is valid, if the cause of action were a contract made by her as a *feme sole trader*;⁴ but a personal judgment against a wife for the balance of a mortgage debt is not valid where she was not personally bound on the mortgage notes;⁵ so a judgment on a void note was held absolutely void⁶ by the same court which recognized the binding force of a judgment against a married woman by default on a tort committed by her.⁷ The cases cited in this paragraph, and those cited in the paragraph on estoppel by record of married women, process against married women, and the plea of coverture by married women, all of which bear on this subject, will be found to be irreconcilable. This paragraph attempts to give credit to the different authorities for the truth which they respectively contain.

On any valid general judgment against husband and wife jointly, *execution* could formerly be issued against the bodies of them both,⁸ and now can be issued against the property of them both,⁹ except in such cases as those where the property of the wife is exempt by the terms of some statute or deed,¹⁰ or where a statute expressly provides that a husband shall be only a formal party.¹¹ If the judgment is against the wife alone, her property alone is liable;¹² if the wife is not a party to the suit, her property is not liable at all.¹³ The judgment may be by its terms a lien only on her statutory separate estate.¹⁴

18. The Power of a Husband Over His Wife's Suit.—(1) *At Common Law.*—It must be remembered, a husband had the absolute right to reduce his wife's choses in action to possession, and was

1. *Gambetta v. Brock*, 41 Cal. 78, 82; *Wagner v. Ewing*, 44 Ind. 441; *Goothrie v. Howard*, 32 Iowa 54, 56.

2. *Griffith v. Clarke*, 18 Md. 457, 463; *Morse v. Toppan*, 3 Gray (Mass.) 411; *Griffin v. Ragan*, 52 Miss. 78, 81; *Higgins v. Pellzer*, 49 Mo. 152, 157; *Freeman on Judgments*, § 149.

3. *Griffin v. Ragan*, 52 Miss. 78; *Bowman v. Kaufman*, 30 La. An. 10, 21. And land sold under it may be recovered in ejectment. *Caldwell v. Walters*, 18 Pa. St. 79, 83.

4. *Vosburgh v. Brown*, 66 Barb. (N. Y.) 421, 422.

5. *Anderson v. Reed*, 11 Iowa 177; *Kirby v. Childs*, 10 Kan. 630, 644. *Aliter* if her property is liable. *McGlaughlin v. O'Rourke*, 12 Iowa 459, 461; *Rogers v. Weil*, 12 Wis. 664.

6. *Griffith v. Clarke*, 18 Md. 457, 463.

7. *Brown v. Kemper*, 27 Md. 666, 672.

8. *Hall v. White*, 27 Conn. 488.

9. *Gray v. Thacker*, 4 Ala. 136; *Ellis v. Clark*, 19 Ark. 420; *Bostic v. Love*, 16 Cal. 69; *Howard v. North*, 5 Tex. 290, 299; *Cole v. Hurt*, 75 Va. 380; *Platner v. Patchin*, 19 Wis. 333.

10. *Clark v. Valentine*, 41 Ga. 143, 147.

11. See Md. Act 1880, ch. 253, §§ 31, 32.

12. This is self evident.

13. *Phelps v. Morrison*, 24 N. J. Eq. 195, 199; *Read v. Allen*, 56 Tex. 182, 194.

14. *Baldwin v. Kimmel*, 16 Abb. Pr. (N. Y.) 353, 361.

liable with her on all her contracts and for all her torts; and as her legal existence was merged in his, he was the active party in all suits in which they were both joined. She could not appoint an attorney,¹ or release errors,² or confess judgment;³ she could only appear in person and plead her coverture, if that would do her any good.⁴ So that in all cases in which the common law procedure has not been superseded, the husband employs counsel and pleads and manages the case for himself and his wife.⁵ If they are plaintiffs, he can settle or dismiss the suit,⁶ and is alone liable for the costs;⁷ if they are defendants, he may allow the suit to go by default,⁸ or suffer judgment to be entered in favor of the plaintiff;⁹ and so long as there is no collusion between him and the plaintiff, the wife will be bound by his acts.¹⁰ But his right to act for his wife in this way has been questioned in cases where she was insane.¹¹ At common law, if a husband neglected to prosecute his wife's rights of action, or released them, his loss was even greater than hers, for he had the immediate right to the enjoyment of them, and if he allowed judgment to be obtained on her antenuptial contract or tort, or on her postnuptial tort (the only causes of action on which a judgment binding on her property could be obtained), the judgment was against himself as well; so that the control of the suit could be safely trusted to his charge. But as his said control of his wife's suit grows out of his substantial ownership of her rights of action, and his equal liability on her obligations, it does not exist where his said rights and obligations do not exist, and disappears as they are removed.¹² He could never, for example, through any suit of his, estop her from claiming property in which he had no rights by making her a co-complainant,¹³ nor could he, by allowing a judgment to be entered against them on a cause of action on which she was not liable, deprive her of her inheritance.¹⁴ He cannot control her suits respecting her equitable or statutory separate estate, unless by her consent and as her agent in fact;¹⁵ nor in such cases can he admit service for her.¹⁶ When he is a mere nominal party, he is entitled to all her defences.¹⁷

1. *Hubbard v. Barcus*, 38 Md. 166, 174.

2. *Breckenridge v. Coleman*, 7 B. Mon. (Ky.) 331, 334.

3. *Patton v. Stewart*, 19 Ind. 233, 237; *Fox v. Tooke*, 34 Mo. 509, 510; *Phillips v. Burr*, 4 Duer (N. Y.) 113.

4. Discussed § 15, above.

5. *Foxwist v. Tremaine*, 2 Saund. 212; *Hayner v. Smith*, 63 Ill. 430, 432; *Ballard v. Russell*, 33 Me. 196, 197; *Southworth v. Packard*, 7 Mass. 95; *Wolf v. Banning*, 3 Minn. 202, 204; *Vick v. Pope*, 81 N. Car. 22, 26.

6. *Ballard v. Russell*, 33 Me. 196; *Southworth v. Packard*, 7 Mass. 95, 96.

7. *Bellinger v. Thomson*, 2 Rich. (S. Car.) Eq. 30.

8. *Green v. Branton*, 1 Dev. (N. Car.) Eq. 500.

9. *Vick v. Pope*, 81 N. Car. 22, 26.

10. *Beach v. Beach*, 2 Hill 260; *Green v. Branton*, 1 Dev. (N. Car.) Eq. 500, 504.

11. *Stephens v. Porter*, 11 Heisk. (Tenn.) 341, 347.

12. *Brown v. Kemper*, 27 Md. 666, 672; and §§ 66, 67 *Stewart on Husband and Wife*.

13. *Danner v. Berthold*, 11 Mo. App. 351, 360; *Work v. Doyle*, 3 Ind. 436.

14. *Work v. Doyle*, 3 Ind. 436.

15. *Keith v. Keith*, 26 Kan. 26, 36.

16. *Rhodes v. Delaney*, 50 Ind. 468, 471.

17. *Floore v. Steigelmayer*, 76 Ind. 479, 481.

(2) *Wife's Separate Suit, Defence, etc.*—Courts of equity have always recognized the separate existence of wives, and in all suits in which husband and wife are co-complainants or co-defendants, if they have separate and distinct interests, the bill or answer filed by the husband for both is regarded as *prima facie* the bill or answer of the husband alone, and the wife, if she requests it, is allowed to proceed separately.¹ As equitable separate estate is out of the control of the husband, so are suits relating thereto; and the wife sues by her next friend, if she does not desire to join her husband, simply because the question of her liability for costs might arise if she sued alone.² If she does sue by her husband and allows him to act for her, she is bound,³ but she is otherwise not bound by his declarations, nor are his statements evidence against her.⁴ If she files her separate answer by permission of court, she is bound by it;⁵ her answer filed without permission may be taken from the files, unless the court allows it *nunc pro tunc*.⁶ As a general rule, under the statutes she has the right to sue and be sued, independently of her husband; and just so far as her choses in action are made her statutory separate property can she control the reduction of them to possession;⁷ and just so far as his liability for her torts and contracts has been removed can she control suits against her.⁸

19. Appointment of Attorney at Law by Married Women.—At common law, a married woman could not appoint an attorney at law;⁹ her antenuptial appointment was revoked by marriage;¹⁰ she could not appear in a suit by attorney;¹¹ her plea or answer filed by an attorney was worthless;¹² a judgment entered against her on her warrant of attorney was a nullity;¹³ her agreement for alimony made by her attorney was void.¹⁴ In equity and under statutes, speaking generally, she may appoint an attorney at law whenever she has interests separate from her husband, with respect to which she needs legal assistance and advice, or

1. Kerchner v. Kempton, 47 Md. 568, 588; Wolf v. Banning, 3 Minn. 202, 204; Travis v. Willis, 55 Miss. 557, 566; Fox v. Tooke, 34 Mo. 509, 510; Collard v. Smith, 13 N. J. Eq. 43, 45; Blackwell v. Bragg, 78 Va. 529.

2. Harper v. Whitehead, 33 Ga. 138, 144.

3. Keith v. Keith, 26 Kan. 26, 36.

4. Work v. Doyle, 3 Ind. 436; Kerchner v. Kempton, 47 Md. 568, 589; Bird v. Davis, 14 N. J. Eq. 467.

5. Krone v. Linville, 31 Md. 138, 147; Wolf v. Banning, 3 Minn. 202, 204.

6. Krone v. Linville, 31 Md. 138, 147.

7. Beckton v. Selleck, 48 Ala. 226, 229; Alderson v. Bell, 9 Cal. 315; Travis v. Willis, 55 Miss. 557; Dolloff v. Curran, 59 Wis. 332, 335.

8. Lowe v. Redgate, 42 Ohio St. 329.

9. Griffith v. Clark, 18 Md. 464, 467; Whitmore v. Delano, 6 N. H. 543, 546; First Nat. Bank of Canandaigua v. Garlinghouse, 53 Barb. (N. Y.) 615; Phillips v. Burr, 4 Duer (N. Y.) 113, 114.

10. Wright v. Wright, 2 Harr. (Del.) 350; Templeton v. Crain, 5 Me. 417, 418.

11. Fox v. Tooke, 34 Mo. 509.

12. Phillips v. Burr, 4 Duer (N. Y.) 113; Kidderlin v. Meyer, 2 Miles (Pa.) 292.

13. Henchman v. Roberts, 2 Harr. (Del.) 74; Patton v. Stewart, 19 Ind. 233, 237; Buttin v. Wilder, 6 Hill 242; Shallcross v. Smith, 81 Pa. St. 132, 133; Stevens v. Dubarry, Minor (Ala.) 379.

14. Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485, 489.

with respect to which she can act by agent generally.¹ She can appoint an attorney to take care of litigation respecting her equitable separate property.² Under statutes expressly authorizing her to make an attorney or to contract generally, she can of course appoint an attorney.³ And statutes authorizing her to sue independently of her husband, or to contract with respect to her property, or securing to her the separate enjoyment of her property, by implication, give her the power to appoint an attorney to take charge of such suit or such property.⁴ It is necessary to the enjoyment of rights that one should be able to prosecute and defend them.⁵ In all cases where she can appoint an attorney, she is bound by his acts as an unmarried woman would be;⁶ by his laches;⁷ his withdrawal of pleas;⁸ his settlement or dismissal of suit, in *North Carolina*;⁹ and she is also bound to compensate him.¹⁰ A statute, however, which gives a married woman the power to appoint an attorney does not of itself destroy the husband's substantial rights in her choses in action.¹¹

20. Compensation of Married Women's Attorneys.—An attorney who has acted on behalf of a married woman may look for his fees, (1) to her husband, or (2) to her trustee or next friend, or (3) to her property or herself.

(1) *Her Husband's Liability.*—Since a wife always sued and was sued jointly with her husband at common law, and since he employed counsel for them both, the payment of the fees naturally fell upon him.¹² But when he by his conduct made it necessary for her to take proceedings against him, the question arose whether he was not liable for the expenses of the suit as necessities.¹³ It has been held that when a wife sues out a peace warrant against her husband,¹⁴ or defends herself against a similar proceeding by him,¹⁵ or when she sues for a separate maintenance,¹⁶ her legal expenses are necessities for which her husband is liable.

1. See article on HUSBAND AND WIFE, vol. 9, of this work.

2. *Major v. Symmes*, 19 Ind. 117; *Porter v. Haley*, 55 Miss. 66, 69; *King v. Mittelberger*, 50 Mo. 182, 185.

3. *Myers v. Griffiths*, 11 Rich. (S. Car.) 560, 564.

4. *Stevens v. Reed*, 112 Mass. 515, 517; *Porter v. Haley*, 55 Miss. 66, 70; *Powers v. Totten*, 42 N. J. L. 442, 445; *Owen v. Cawley*, 36 N. Y. 600, 605; *Leonard v. Rogan*, 20 Wis. 540, 542.

5. *Powers v. Totten*, 42 N. J. L. 442, 445.

6. *Glover v. Moore*, 60 Ga. 189, 192; *Keith v. Keith*, 26 Kan. 26, 36; *Hollingsworth v. Harman*, 83 N. Car. 153; *Cayce v. Powell*, 20 Tex. 767, 771.

7. *Cayce v. Powell*, 20 Tex. 767.

8. *Glover v. Moore*, 60 Ga. 189, 192.

9. *Hollingsworth v. Harman*, 83 N.

Car. 153, 155. But see ATTORNEY AND CLIENT, vol. 1 hereof, page 956.

10. Discussed in next section below and in foot notes.

11. *Myers v. Griffiths*, 11 Rich. (S. Car.) 560, 564.

12. *Porter v. Bank of Rutland*, 19 Vt. 410, 417; *Frazier v. Felton*, 1 Hawks (S. Car.) 231, 237.

13. See articles on DIVORCE, HUSBAND AND WIFE, and MARRIAGE; §§ 81, 95 *Stewart on H. & W.*; §§ 180, 389, 455 *Stewart on M. & D.*

14. *Shepard v. MacKoul*, 3 Camp. 326. Or for restitution of conjugal rights. *Wilson v. Ford*, L. R., 3 Ex. 63.

15. *Warner v. Heiden*, 28 Wis. 517, 519; 9 Am. Rep. 515; *Stewart on M. & D.*, § 389.

16. *Williams v. Monroe*, 18 B. Mon. (Ky.) 514, 518.

So her expenses in bringing or defending a divorce suit are held to be necessities in England, Georgia, Iowa, Kansas, and Maryland,¹ while the contrary is the rule in Alabama, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, New Hampshire, Ohio, Tennessee, and Vermont.² Even where such expenses may be necessities they are not necessarily so; there must be a reasonable ground for bringing the suit, or some real defence in resisting it.³ Besides, the courts provide for counsel fees in divorce cases under their jurisdiction to award alimony, etc.⁴

(2) *Her Trustee's or Next Friend's Liability*.—The trustee of a married woman's separate property may employ an attorney; and though himself personally bound to compensate him, he may repay himself out of the estate.⁵ So the reason for the existence of a next friend is that there may be a person responsible for the expenses of the suit,⁶ and in those cases where a married woman sues by next friend he is liable for the counsel fees.⁷

(3) *Her Liability, Personal and as to Her Property*.—At common law, as a general rule, a married woman could make no contract at all, and could not appear by attorney in a suit, unless he were appointed by her husband; and therefore her contract to pay counsel fees was absolutely void, and she could not even, according to the better settled rule, ratify such a contract after the dissolution of her marriage.⁸ But if an attorney collected money belonging to her, he could keep a reasonable amount thereof as compensation for his services, though he could not have recovered anything in any kind of suit against her.⁹ She could, however, charge her equitable separate estate in equity for fees, just as she could charge it for any other debt of hers, provided she complied with the rule prevailing in the particular State as to the mode in which the charge had to be made; for example, that the contract was made with express reference to her said estate or was for its benefit, and provided that the property sought to be charged was property over which she had the power of disposition.¹⁰ Under a statute authorizing a married woman to contract generally, there is no reason why she should not contract for counsel fees; and

1. *Ottaway v. Hamilton*, L. R., 3 C. P. D.; *Wilson v. Ford*, L. R., 3 Ex. 63; *Brown v. Ackroyd*, 5 El. & B. 819, 827; *Glen v. Hill*, 50 Ga. 94, 96; *Sprayberry v. Merk*, 30 Ga. 81, 82; *Porter v. Briggs*, 38 Iowa 166. Compare *Johnson v. Williams*, 3 Greene (Iowa) 97, 99; *Gossett v. Patten*, 23 Kan. 340, 342; *Handy v. McCurley*, 62 Md. 422.

2. *Pearsons v. Darrington*, 32 Ala. 227, 255; *Shelton v. Pendleton*, 18 Conn. 417, 433; *Dow v. Eyster*, 79 Ill. 254, 256; *McCullough v. Robinson*, 2 Ind. 630; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514, 517; *Coffin v. Durham*, 8 Cush. (Mass.) 404, 405; *Morrison v. Holt*, 42 N. H. 478; *Ray v.*

Raden, 50 N. H. 82, 85; *Dorsey v. Goodenow*, *Wright* (Ohio) 120; *Thompson v. Thompson*, 3 Head (Tenn.) 527, 529; *Wing v. Hurlburt*, 15 Vt. 607, 615.

3. *Handy v. McCurley*, 62 Md. 422.

4. *Dow v. Eyster*, 79 Ill. 254.

5. *Noyes v. Blakeman*, 3 Sand. (N. Y.) 531, 544.

6. *Harper v. Whitehead*, 33 Ga. 138, 144.

7. See preceding case.

8. *Musick v. Dodson*, 76 Mo. 624.

9. *Davis v. Burnham*, 27 Vt. 562, 568.

10. *Cozzens v. Whitney*, 3 R. I. 79, 83; *Pfirshing v. Osman*, 75 Ind. 259.

when she is authorized to contract with respect to her property, a contract for legal services respecting the same would be valid.¹ So would a similar contract be authorized by implication by a statute securing her property to her separate use and control.² So by implication a statute authorizing her to sue and be sued alone, empowers her to employ counsel to represent her.³ Whether when she may employ counsel she binds herself personally or binds only her property, and whether her obligation is to be enforced in equity or at law, are unsettled questions, contracts for counsel fees being governed in this respect by the same rules as other contracts.⁴ When a wife is liable for family expenses, how far counsel fees are a family expense must depend on the particular circumstances of the case.⁵

IX. MARRIED WOMEN TRADERS—1. *Sources of Capacity to Trade*.—The use of the words "trade" and "married woman trader" has been vague, and it is necessary, in a discussion of this subject, to bear in mind the different elements which may be involved in the capacity of a married woman to trade.

(1) *At Common Law, Generally*.—A married woman could make no contract whatever; all her time and labor belonged to her husband, as did all the present enjoyment of her property; she had, in fact, no legal existence apart from her husband; therefore she could not trade at all.⁶ If a female trader married, the trade became her husband's,⁷ and if she had been trading as partner, the partnership was dissolved by her marriage.⁸

(2) *Her Earnings*.—As a married woman could not contract at all by the common law, she could not enter into any kind of engagement or employment on her own account, but all her time, services, wages and earnings of every kind belonged to her husband.⁹ Still her husband could agree that she should have her earnings, just as he could invest her with any property of his, and his agreement would be enforced in equity;¹⁰ his agreement, however, gave her no personal capacity, but only the right to collect and keep the wages and rewards of her labors.¹¹ So by statute, in most States, the wife's earnings are secured to her separate use.¹² These statutes were passed to protect wives from shiftless, im-

1. *Pfirshing v. Falsh*, 87 Ill. 260; *Owen v. Cawley*, 36 N. Y. 600, 605.

2. *Major v. Symmes*, 19 Ind. 117; *Porter v. Haley*, 55 Miss. 66; *Leonard v. Rogan*, 20 Wis. 540, 542.

3. *Stevens v. Reed*, 112 Mass. 515; *Glover v. Moore*, 60 Ga. 189, 192; *Powers v. Totten*, 42 N. J. L. 442, 445.

4. *Major v. Symmes*, 19 Ind. 117, 120; *Leonard v. Rogan*, 20 Wis. 540, 542.

5. *Fitzgerald v. Mcy, Cart* 55 Iowa 702, 705.

6. *Carey v. Burruss*, 20 W. Va. 571, 575; 43 Am. Rep. 790; *Bradstreet v. Baer*, 41 Md. 19, 23; *Netterville v. Bar-*

ber, 52 Miss. 168, 171; *McKinnon v. McDonald*, 4 Jones (N. Car.) Eq. 1. See *CONTRACTS OF MARRIED WOMEN*, § 2, in this article.

7. This was a logical result of the common law doctrine of the merger of the wife's existence in that of her husband. See *Ashworth v. Outram*, L. R., 5 Ch. D. 923, 929.

8. *Alexander v. Morgan*, 31 Ohio St. 546, 550.

9. See vol. 9, pp. 789, 817.

10. See vol. 9, p. 818.

11. *Uhrig v. Horstman*, 8 Bush (Ky.) 172, 177.

12. See vol. 9, pp. 819, 820.

provident, and dissipated husbands, and were in form the earliest of the statutes relating to the trade of married women.

(3) *The Increase of Her Separate Property*.—Although at common law all the interest, profits, rents and increase of a married woman's property vested in the husband just as the property itself did,¹ except that the rents and profits of real estate vested in him as personalty,² she had her separate estate first in equity and then by statute, and the increase of such estate was also separate property;³ and therefore the products of all investments or uses of her separate property were her separate property, though such products were partly due to her efforts, and to the labor, skill and knowledge of her husband.⁴ In a sense, therefore, she could trade with her separate property.

(4) *Resulting Capacities*.—Although when a married woman's earnings or property are secured to her separate use, as above stated, the profits of her business or trade may be her separate property also, her personal incapacity to enter into trade is not necessarily removed;⁵ for equity recognizes her capacities only in connection with her property,⁶ and mere property acts do not affect personal status.⁷ So that to trade in the wider sense, a married woman must either have the capacities of a *feme sole* or be expressly authorized to enter into business.

2. *Definitions—Trade, Business, etc.*—Although the difference between earnings and increase of property is clear, and for this reason married women's separate property acts do not destroy a husband's rights to his wife's personal services,⁸ it is very hard to draw any line between earnings and the profits of trade. The terms used in the books dealing with the subject of married women traders are not sharply defined, but a few definitions may be given.

(1) *Earnings*.—Earnings means what is earned, gained or merited

1. See Stewart on Husband and Wife, §§ 137, 141-183.

2. See above references.

3. Stewart on Husband and Wife, §§ 209, 227.

4. Wheeler v. Raymond, 130 Mass. 247, 249. "In the case at bar, the jury have found, under instructions not excepted to, that the husband, and not the wife, was carrying on the livery stable. . . . The case presented, then, is one where a wife, owning separate property, permits her husband to use it in carrying on his business. . . . If it was done with the fraudulent purpose of deceiving the public and giving the husband a fictitious credit, perhaps she might be estopped by the fraud from claiming the property."

5. Tuttle v. Hoag, 46 Mo. 38, 41.

6. See Stewart on Husband and Wife, §§ 206, 207, 211.

7. Stewart on Husband and Wife, § 15. "Statutes relating to estates or property rights of husband and wife do not affect their personal status or relation." Sone v. Gazzam, 46 Ala. 275; Huff v. Wright, 39 Ga. 41.

8. Glover v. Alcott, 11 Mich. 470, 471. "The statute of this State, which provides that 'the real and personal estate of every married woman shall be and remain the estate and property of such married woman, and shall not be liable for the debts, obligations and engagements of her husband,' etc., does not empower a married woman to carry on, on credit, a general trade or business—like that of the purchase of wheat and the manufacture and sale of flour—so as to make the proceeds of the business her own."

by labor, services or performances; wages or reward;¹ and the earnings secured to a married woman by a statute are not confined to the results of manual labor, to wages for washing or sewing, but include the products of her trade also, if it is carried on with her separate property as capital;² and the stock in trade of a married woman owned at the time of her marriage, or afterwards bought with her earnings, is included in the term "earnings."³

(2) *Trade and Business.*—Trade or business means an employment to the carrying on of which the party devotes a considerable portion of her time, skill and means, a business that is continuing in its nature and embraces many transactions.⁴ Engaging in trade and business means not only trading in a commercial sense, but also being engaged in other employments which require time, labor and skill—time, attention, and labor.⁵ Trading means engaging in a business pursuit, mechanical, manufacturing or commercial.⁶ Thus, though a single transaction may be a business one, it does not make the party a trader;⁷ horse dealing may be a business, but a woman who buys or sells a single horse is not necessarily in that business;⁸ so farming may be a business, but employing a man to work on one's farm does not make one a farmer by trade;⁹ renting a house may be a business transaction and for the purpose of a business, but a lease of rooms is not necessarily a contract by a trader;¹⁰ so a married woman's receipt and disbursement of her rents and profits, though done in a business way does not constitute her a trader;¹¹ nor is she a trader when she is not acting generally with the public, but is simply taking care of her own property, or collecting or investing her income.¹² When she may trade she is not confined to any particular trade: she may not only engage in washing,¹³ sewing,¹⁴

1. *Dayton v. Walsh*, 47 Wis. 113, 120.

2. *Duress v. Horneffer*, 15 Wis. 195, 197.

3. *Lovell v. Newton*, L. R., 4 C. P. D. 7, 11, 12.

4. *Holmes v. Holmes*, 40 Conn. 117. "An act of 1869 provides that 'when ever any married woman shall carry on business, and shall incur any debt on account of the same,' she shall be liable therefor. *Held*, that the business must be pursued as a continuing and substantial employment, and that the mere renting of a few rooms by a married woman in the house in which she lived with her husband, was not a carrying on business within the meaning of the statute."

5. *Netterville v. Barber*, 52 Miss. 168, 171.

6. *Nash v. Mitchell*, 71 N. Y. 199, 203.

7. See note 4, above.

8. *Holmes v. Holmes*, 40 Conn. 117; *Proper v. Cobb*, 104 Mass. 589, 590.

9. See preceding note.

10. See note 7.

11. *Proper v. Cobb*, 104 Mass. 589, 590. "The use of a horse and carriage by herself, or the purchase of food and stabling for the horse, or the procuring of repairs for the carriage, or the raising and gathering of crops for her own use on her land, or the repair or erection of a dwelling on her land and the purchase of materials for it, or of materials and furniture for the use of herself and family, are not uses of property which come within the contemplation of the statute, and which require the designated certificate for the protection of the property."

12. Above note and *Nash v. Mitchell*, 71 N. Y. 199, 203.

13. *Haight v. McVeagh*, 69 Ill. 624, 628.

14. See preceding note.

dressmaking,¹ millinery,² in keeping a dairy,³ a boarding house,⁴ a grocery or provision store,⁵ and in other pursuits specially adapted to her sex,⁶ but she may be a farmer,⁷ a miller,² an army sutler,³ a saloon keeper or tavern keeper,⁴ a clothier,⁵ an ironmonger,⁶ she may work a mine or quarry,⁷ or may go into the lumber business,⁸ though if her trade is unsuited to her, this is a fact to be considered, if her husband's creditors are trying to show that the business is really his.⁹ So she may engage in the professions—may devote her talents to literature, acting, singing,¹⁰ and in fact, under a general power to trade, may follow any legitimate calling.¹¹

(3) *Separate Trade*.—The trade of a married woman is usually spoken of as her *separate trade*; the word "*separate*" refers rather to her status than to the mode in which she shall trade,¹² and it does not mean that she shall trade alone,¹³ or prevent her living with her husband while trading,¹⁴ or allowing him to join in the business.¹⁵ In Massachusetts and Indiana it has, however, been held that she must keep her business separate from her husband, and that their joint earnings are his property.¹⁶ The effect of the mingling of the wife's with the husband's property has already been discussed.

3. Capacity to Trade at Common Law.—When a married woman's husband is civilly dead, has finally abandoned her, etc., she has by

1. Tuttle v. Hoag, 46 Mo. 38, 40; Jassoy v. Delins, 65 Ill. 469, 471.

2. Tuttle v. Hoag, 46 Mo. 38, 40; Jassoy v. Delins, 65 Ill. 469, 471.

3. Krouskop v. Shontz, 51 Wis. 204.

4. Chapman v. Briggs, 11 Allen (Mass.) 546; Dawes v. Rodier, 125 Mass. 421, 423; Harnden v. Gould, 126 Mass. 411, 412.

5. Abbey v. Deyo, 44 Barb. (N. Y.) 374; Haight v. McVeagh, 69 Ill. 624, 628.

6. Guttman v. Scannell, 7 Cal. 455, 459.

7. Netterville v. Barber, 52 Miss. 168, 172.

8. Netterville v. Barber, 52 Miss. 168, 172.

9. Guttman v. Scannell, 7 Cal. 455, 459. See note 11, below.

10. Dayton v. Walsh, 47 Wis. 113, 120.

11. Guttman v. Scannell, 7 Cal. 455. "The act does not confine sole traders to any particular trade or occupation, nor prohibit the husband from being employed by, or acting for, his wife in the business. The fact that the business was unsuited to the sex of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but

not conclusive evidence of it." At p. 461 "The public prints have teemed with notices, on the part of married women, that they intend to carry on business in their own names; and the different kinds of business specified have included stock-raising, farming, blacksmithing, carpentering, brick-making, and almost all other kinds of business that are carried on most generally by men."

12. Zimmerman v. Ehrard, 58 How. Pr. (N. Y.) 11, 14. "The words of the statute, 'on her sole and separate account,' refer to her marital status and are not intended to restrict her business ventures to those in which she shall alone be interested."

13. See *post*, § 10 of art. 9.

14. Lovell v. Newton, L. R., 4 C. P. D. 7, 12; Newbrick v. Dugan, 61 Ala. 251, 253; Parker v. Simonds, 1 Allen (Mass.) 258, 260.

15. Guttman v. Scannell, 7 Cal. 455, 459.

16. Hawkins v. Providence etc. R. Co., 119 Mass. 596. "Personal apparel furnished by a husband to his wife, or purchased by the wife with the consent of her husband, with money given her by him from a fund, formed by their joint earnings, remains the property of

the common law the capacities of a *feme sole*, and may trade as such.¹ In some States there are statutes to the same effect.² How far her husband's absence enables her to trade in his place has already been discussed.³

Custom of London.—By the custom of London a married woman who carried on a trade separate and apart from her husband had to the extent of such trade all the capacities of a *feme sole*.⁴ Such custom has never existed in the United States, except to some extent in South Carolina.⁵ The law recognized this custom not for the sake of wives, but to encourage trade and commerce, and therefore the custom did not apply, for example, to farming.⁶ When trading under such a custom the wife could be a bankrupt;⁷ but her suits were generally conducted jointly with her husband, for conformity.⁸

4. Capacity to Trade, in Equity.—In those States where a married woman is a *feme sole* as to her equitable separate estate, she may use the same in trade, and the profits of such trade are equitable separate property likewise;⁹ but in such trade she has no personal capacities; equity recognizes her separate existence only with respect to her property, and her contracts made in the course of her trade can be collected only if they have been properly charged on said property.¹⁰

Effect of Husband's Consent.—A husband cannot, by his consent, change the personal status of his wife, or enable her to trade with the capacities, rights and liabilities of a *feme sole*;¹¹ but he may allow her as his agent to engage in business and give her the profits,¹² or he may agree before or after marriage that she shall keep her earnings or carry on business for her own use, and give her, if he choose, the necessary capital to start with.¹³ Any such

the husband, and the wife cannot maintain an action against a carrier for the loss thereof."

1. *Carey v. Burruss*, 20 W. Va. 571. For a married woman then is regarded very much as a *feme sole*.

2. *Hannon v. Madden*, 10 Bush (Ky.) 664, 667; *Woodcock v. Reed*, 5 Allen (Mass.) 207, 208.

3. See vol. 9, pp. 839, 840.

4. *Petty v. Anderson*, 2 Car & P. 38; *Beard v. Webb*, 2 Bos. & P. 93, 97; *Lavie v. Phillips*, 3 Burr 1776, 1783; *Netterville v. Barber*, 52 Miss. 168, 171; *Carey v. Burruss*, 20 W. Va. 571, 575; 2 Bright H. & W. 77.

5. *M'Daniel v. Cornwell*, 1 Hill (S. Car.) 428; *Newbiggin v. Pillans*, 2 Bay. (S. Car.) 162, 165.

6. *M'Daniel v. Cornwell*, 1 Hill (S. Car.) 428, 431.

7. *Lavie v. Phillips*, 3 Burr 1776, 1783.

8. *Beard v. Webb*, 2 Bos. & P. 93, 97.

9. *Conkling v. Doull*, 67 Ill 355, 357.

"In the absence of an estate created

through the intervention of trustees, or derived from persons other than the husband so as to bring it within the act of 1861, the rights of husband and wife are precisely as at common law. If he consents that she may hold personal property and carry on business in her own name, or receive the rents and profits of her land, and that is all the record shows, still, if that consent is not based upon a sufficient consideration, it may be at any time withdrawn and his rights at common law asserted." *Jenkins v. Flinn*, 37 Ind. 349; *Stevens v. Reed*, 112 Mass. 515; *Partridge v. Stocker*, 36 Vt. 108.

10. *Todd v. Lee*, 16 Wis. 480.

11. That would be giving to the husband the power of the legislature. See *Stewart on M. & D.*, § 181, and *Uhrig v. Horstman*, 8 Bush. 172, 177.

12. *Ashworth v. Outram*, Law R., 5 Ch. 923, 931.

13. *Lockwood v. Cullin*, 4 Robt. (N. Y.) 129, 136.

gift of earnings, profits or property to her is good against himself, and his heirs, voluntary assigns, etc., but not as against his creditors, unless on valuable consideration.¹ When a wife thus trades under a settlement from her husband, she trades in equity as with equitable separate property; the business, profits, etc., are the husband's absolutely at law.² But if the business is really hers and not carried on by her as his agent, he is not bound for the debts.³ If his consent to her carrying on business is by mere oral assent and without consideration, though he cannot ask back profits already made and collected by her, he can revoke his consent, and claim the business as his own.⁴ In all cases where she carries on business by his mere consent, the business is his, and he is liable for its debts, and may claim its profits.⁵ Whether the business is his or hers is a question of fact.⁶ Her agency for him may be proved directly or indirectly.⁷ But if a wife has engaged in business without authority of law, and without her husband's assent, he cannot be held liable for its debts,⁸ nor can she on her mere personal contracts;⁹ so if all the credit is given to her, her husband is not liable, whether she or her property is liable or not.¹⁰ Under the statutes usually, the husband's consent is not necessary to enable a wife to trade;¹¹ nor does his mere consent involve him in the liabilities of the business.¹²

5. Capacity Under Statutes.—Married women's separate property acts do not, by implication, destroy the husband's common law right to his wife's earnings,¹³ but they do usually, expressly or by implication, secure to the wife the natural increase of her prop-

1. *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 512; *Uhrig v. Horstman*, 8 Bush (Ky.) 172, 176; *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47, 57.

2. *Stimson v. White*, 20 Wis. 562, 563.

3. *Tuttle v. Hoag*, 46 Mo. 38.

"In an action for goods sold and delivered to a married woman, it appearing in evidence that she was carrying on business in her own name; that plaintiff trusted her solely and that the husband had no connection with the business, and in the absence of proof that he ever in any manner gave his consent to her management of the business; held, that the husband would not be chargeable for the debt."

4. *Conkling v. Doull*, 67 Ill. 355, 357; *Stimson v. White*, 20 Wis. 262, 263.

5. *Switzer v. Valentine*, 4 Duer (N. Y.) 96, 99; *Barlow v. Bishop*, 1 East 432, 434; *Partridge v. Stocker*, 36 Vt. 108, 114.

6. *Jarman v. Woolloton*, 3 Term 618, 622; *Glover v. Alcott*, 11 Mich. 471, 479; *Albey v. Devo*, 44 N. Y. 343.

7. *Godfred v. Brooks*, 5 Har. (Del.) 396, 397.

8. *Happek v. Hartly*, 7 Baxt. (Tenn.) 411, 414.

9. *Tuttle v. Hoag*, 46 Mo. 38, 41; 2 Am. Rep. 481; *Conkling v. Doull*, 67 Ill. 355, 358.

10. *Jenkins v. Flinn*, 37 Ind. 349, 352.

11. See, however, *Uhrig v. Horstman*, 8 Bush (Ky.) 172, 177.

12. *Haight v. McVeagh*, 69 Ill. 624, 628.

13. *Seitz v. Mitchell*, 94 U.S. 580, 584.

"Section 727 of the Revised Statutes relating to the *District of Columbia* is as follows: 'In the district the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried and shall not be subject to the disposal of her husband, nor be liable for his debts.' Section 729 gives a married woman power to contract, to sue and be sued in her own name in all matters having relation to her sole and separate property. No other power to contract is given to her. Her earnings while cohabiting with her husband are not made

erty;¹ and since such increase belongs to her, even when largely due to her husband's efforts, there seems to be no reason why her own services to it, though these belonged to her husband, should injuriously affect her rights.² When a married woman has no powers by statute independent of her property, her dealings with her statutory separate property in the way of trade must be subject to limitations of the same character as those which control her trading with her equitable separate estate.³ She cannot, for example, under such a statute, carry on a business on her personal credit.⁴ Her right to manage her separate estate and her right to trade are quite distinct. A contract for furniture to be used in a boarding house which is her separate property, or for horses for her livery stable, may not be valid as the contracts of a trader, but valid as contracts with relation to her separate property.⁵

(1) *Under Express Statutes.*—A statute securing to a married woman her earnings, or the products of her skill and industry, by implication enables her to earn money and to trade, just as statutes securing to married women property acquired by purchase enable them to purchase on credit; thus alone are such statutes given a reasonable meaning.⁶ A statute enabling married women to trade, unless it contains restricting provisions, enables them to trade just as if they were *sole*, to use any of the usual means of trade, and to engage in any legitimate calling.⁷ A married woman may also trade under statutes giving her the capacities of a *feme sole* as to contracts.⁸

(2) *Married Women's Capacities to Trade Under Statutes Containing Limitations.*—Under a statute enabling married women to trade with a capital of one thousand dollars or less, and creating a special remedy against her property for her trade debts, it was held that she had no powers not expressly given; that the naming of one mode of trade was a negation of all other modes; and that she could not trade as a partner because not expressly authorized.⁹ In many States the statutes require a wife who wishes to

her property. She can have them only by the gift of her husband, and such a gift is not protected against his creditors."

1. *Stout v. Perry*, 70 Ind. 501, 504.
2. *Mitchell v. Sawyer*, 21 Iowa 582, 583.

3. *O'Daily v. Morris*, 31 Ind. 111, 112; *Todd v. Lee*, 16 Wis. 480, 483.
4. *Glover v. Alcott*, 11 Mich. 470, 480, 485; *Robinson v. Wallace*, 39 Pa. St. 129, 133.

5. See *Stewart on H. & W.*, §§ 239, 272.

6. *Under Express Statutes.*—Height v. *McVeagh*, 69 Ill. 624.
"Under the acts of 1861 and 1869, no reason is perceived why a married woman may not, at least with the consent

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of her husband, earn money in trade as well as by manual labor, or carry on the business of a grocery store, contract debts for goods to be used in trade as well as for animals and farming implements, or for lands and farm labor."

7. Preceding note and *Adams v. Honness*, 62 Barb. (N. Y.) 326, 336; *Krauskop v. Shontz*, 51 Wis. 204, 215.

8. See *Stewart on H. & W.*, § 372.

9. *Broadstreet v. Baer*, 41 Md. 19, 23. "Section 7 of article 45 of the Code empowers a married woman to carry on trade as a *feme sole*, with a capital not exceeding one thousand dollars, and makes her money and property to that extent liable to attachment for any claim or debt incurred by her. The grant of the power to carry on trade or

engage in trade to comply with certain prerequisites, such as making a declaration of record, obtaining a licence, or decree of court, and such requirements must, it seems, be complied with to give her any new capacity.¹ But a statute providing that her husband shall not manage her business has for its sole object the protection of the husband's creditors, and when no question in which they are concerned is involved she has the same capacities to trade with as without her husband;² and the same would seem to apply to a statute requiring her to trade in her own name.³ When she can be declared a trader only when her husband cannot or refuses to support her, his mere temporary sickness will not suffice.⁴ Nor will a court of equity with a discretion decree her a trader when she would thus be enabled to commit a fraud.⁵ When a statute requires "a married woman doing business on her separate account" to file a certificate, this does not apply to married women making investments of their separate property.⁶ A married woman need file no inventory of her business unless this is required by statute;⁷ nor need she have separate property to start with.⁸

6. Incidents of Capacity to Trade.—The status, rights and liabilities of a married woman trader depend very largely on the source of her capacity to trade. Generally speaking, when she can trade only by virtue of her ownership of equitable or statutory separate estate, she cannot trade on her personal credit or act as a *feme sole*, but can only deal with the property so that the profits will enure to her own benefit, and can only render it liable for her debts by charging it, contracting with reference to it, etc., her contracts being valid not on account of her being a trader, but because made in such a way or for such a purpose as the law allows.⁹ So when she trades simply as her husband's agent, though she binds him she does not bind herself personally—she may have the profits if he chooses to let her keep them, but he and the business are liable for the debt contracted by her on its behalf.¹⁰ When, how-

business in that mode and to that extent is by implication a denial of the power to carry on business in any other mode or to any greater extent. Married women have no power, under our laws, to enter into contracts of copartnership, nor as members thereof would their contracts be binding upon them, and consequently would not bind the other parties to them."

1. *Uhrig v. Horstman*, 8 Bush (Ky.) 172, 177; *Elsley v. McDaniel*, 95 Pa. St. 472, 474.

2. *Porter v. Gamba*, 43 Cal. 105, 109. See *Youngworth v. Jewell*, 15 Nev. 45.

3. But see *Christensen v. Stumpf*, 16 La. An. 50.

4. *King v. Thompson*, 87 Pa. St. 365, 368.

5. *Moran v. Moran*, 12 Bush (Ky.) 301.

6. *Wheeler v. Raymond*, 130 Mass. 247, 248.

7. *Jarman v. Woolloton*, 3 Term 618, 622.

8. *Tallman v. Jones*, 13 Kan. 438, 445.

9. *Tillman v. Shackleton*, 15 Mich. 447; *Chapman v. Briggs*, 11 Allen (Mass.) 546; *Manderback v. Mock*, 29 Pa. St. 43, 47; *Todd v. Lee*, 16 Wis. 480, 483.

10. *Partridge v. Stocker*, 36 Vt. 108, 114.

"He knew that his wife began this business without capital and must have known that she was procuring goods on credit. For the debt due to the

ever, she may trade personally, by virtue of her husband's abandonment, by custom, or by statute, she can trade just as if she were unmarried, unless, of course, the statute limits her capacity.¹ In such case she, for the purposes connected with her business, has the status of a *feme sole*, the fullest rights to the enjoyment of the profits of the business, and the fullest liabilities for its debts.²

7. Express and Implied Powers of Married Women Traders.—Most of the statutes as to married women traders expressly provide that they shall trade as if *sole*, and under such statutes no special questions seem to have arisen; the main questions are as to the implied powers of married women traders. In one case it was held that the naming of certain powers of trade was a negation of all other powers,³ but the weight of authority seems to be to the contrary.⁴

Under statutes enabling a married woman to trade and not limiting her capacities, she may trade precisely as if unmarried; she is, as to her business, a *feme sole*, and may do all things incidental to trading in general, and all things usual and proper in the particular trade in which she is engaged.⁵ The object of these statutes is not only to do justice to wives, but also to encourage trade.⁶ Thus she may engage in any legitimate calling.⁷ She may conduct the business personally or by agent;⁸ she may have her salesmen and clerks;⁹ she may be a partner, silent or active;⁹ and she may, unless this is prohibited by statute, have her husband as her agent,¹⁰ or be a partner with him;¹¹ though this is in some States denied.¹² She need not, unless the statute so provides, have separate property to begin with;¹³ she may start out on credit,¹⁴ or use property given her by her husband,¹⁵ though in the lat-

orators they have no remedy against either him or her at law, and by his acquiescence and consent they have been placed in a situation in which they can enforce no claim for the debt due to them except against the stock and proceeds of the business. He allowed this course of dealing, and this is sufficient to prevent him from holding the property against the claims of the creditors of the business."

1. *Young v. Gori*, 13 Abb. Pr. (N. Y.) 13, 14 n.

2. *Wallace v. Rowley*, 91 Ind. 586.

3. *Bradstreet v. Baer*, 41 Md. 19, 23; *Cruzen v. McKaig*, 57 Md. 454, 462.

4. Inference from cases cited in following notes.

5. *Trieber v. Stover*, 30 Ark. 727, 730; *Camden v. Mullen*, 29 Cal. 564; *Rockwell v. Clark*, 44 Conn. 534, 536; *Wallace v. Rowley*, 91 Ind. 586; *Tallman v. Jones*, 13 Kan. 438, 445; *Mitchell v. Sawyer*, 21 Iowa 582; *Snow v. Sheldon*, 126 Mass. 332, 334; *Rankin v.*

West, 25 Mich. 195, 201; *Netterville v. Barber*, 52 Miss. 168, 172; *Wheaton v. Phillips*, 12 N. J. Eq. 221; *Nash v. Mitchell*, 71 N. Y. 199, 203; *Morgan v. Perhamus*, 36 Ohio St. 517; *Silvens v. Porter*, 74 Pa. St. 448, 451.

6. *M'Daniel v. Cornwell*, 1 Hill (S. Car.) 428, 429.

7. *Guttman v. Scannell*, 7 Cal. 455, 459.

8. Same case and *Abbey v. Deyo*, 44 Barb. (N. Y.) 374, 381.

9. Above note.

10. *Parshall v. Fisher*, 43 Mich. 529, 534; *Guttman v. Scannell*, 7 Cal. 455, 459; *Bellows v. Rosenthal*, 31 Ind. 116; *Rankin v. West*, 25 Mich. 195, 200.

11. See note 1.

12. *Zimmerman v. Ehrhard*, 58 How. Pr. (N. Y.) 11, 13.

13. *Tallman v. Jones*, 13 Kan. 438, 445; *Dayton v. Walsh*, 47 Wis. 113, 120.

14. *Young v. Gori*, 13 Abb. Pr. (N. Y.) 13, 14, n.

15. *Lockwood v. Cullin*, 4 Robt. (N. Y.) 129, 136.

ter case his creditors may have rights.¹ The capital and stock in trade of her business, as well as the profits, are entirely hers;² for instance, the bills due her as a boarding house keeper;³ and such property, though in the possession of her and her husband, is in her possession, the possession relating to the title.⁴ She may on credit purchase goods for her trade;⁵ or buy land or seed for farming purposes;⁶ or rent a store;⁷ or contract for her services; or contract for working a quarry—for the labor and mules;⁸ she may transfer a note received in the course of trade;⁹ she may even sell out her business;¹⁰ and agree not to use the same name again.¹¹ She is personally liable on all contracts which she executes in the conduct of her business, even as endorser of a note;¹² she is liable for the frauds of her employes,¹³ and is estopped as if *sole* from denying their right to represent her;¹⁴ she is liable for goods consigned to her.¹⁵ She may sue and be sued alone and at law,¹⁶ except, perhaps, as to suits with her husband;¹⁷ and a general judgment may be obtained against her.¹⁸ The question whether a particular transaction of hers was in the course of her business is one of fact.¹⁹ In suing, she must allege and prove this;²⁰ and when she is sued, the plaintiff must allege the grounds of the liability, must allege and prove affirmatively that she was engaged in business, and that the particular transaction was connected with such business.²¹ She may make a deed for the benefit of creditors,²² and take the benefit of the insolvent laws.²³

8. Rights of Creditors.—The business creditors of a married woman trader have, under the statutes generally, the same rights as if she were *sole*; they may sue her alone, and

1. *Penn v. Whiteheads*, 12 Gratt. (Va.) 74.

2. *James v. Taylor*, 43 Barb. (N. Y.) 530, 531; *Lovell v. Newton*, L. R., 4 C. P. D. 7, 12; *Mitchell v. Sawyer*, 21 Iowa 582; *Sammis v. McLaughlin*, 35 N. Y. 647, 650; *Silvens v. Porter*, 74 Pa. St. 448, 451.

3. *Dawes v. Rodier*, 125 Mass. 421, 423.

4. *Newbrick v. Dugan*, 61 Ala. 251, 253.

5. *Nispel v. Leparle*, 74 Ill. 306, 308; *Frecking v. Rolland*, 53 N. Y. 422, 425.

6. *Camden v. Mullen*, 29 Cal. 564, 566; *Chapman v. Foster*, 6 Allen (Mass.) 136, 138.

7. *Knowles v. Hall*, 99 Mass. 562, 564.

8. *Netterville v. Barber*, 52 Miss. 168, 172.

9. *Rockwell v. Clark*, 44 Conn. 534, 536.

10. *Morgan v. Perhamus*, 36 Ohio St. 517.

11. See preceding case.

12. *Wilthaus v. Ludecus*, 5 Rich. (S. Car.) Eq. 326, 327.

13. *Baum v. Mullen*, 47 N. Y. 577.

14. *Bodine v. Killeen*, 53 N. Y. 93, 96.

15. *Newbiggin v. Pillans*, 2 Bay (S. Car.) 162, 165.

16. *Trieber v. Stover*, 30 Ark. 727, 730; *Rockwell v. Clark*, 44 Conn. 534, 536;

Wheaton v. Phillips, 12 N. J. Eq. 221, 223; *Nash v. Mitchell*, 71 N. Y. 199,

203; *Meyers v. Rahte*, 45 Wis. 655, 659.

17. *Trieber v. Stover*, 30 Ark. 727, 730.

18. *Porter v. Gamba*, 43 Cal. 105, 109.

19. *Camden v. Mullen*, 29 Cal. 564, 567.

20. *Smith v. Bank of New England*; 45 Conn. 416, 420.

21. *Baum v. Mullen*, 47 N. Y. 577, 579; *Wood v. Sanchey*, 3 Daly (N. Y.) 197,

198; *Nash v. Mitchell*, 71 N. Y. 199, 203.

22. *Shumann v. Peddicord*, 50 Md. 560.

23. *Holland v. Holland*, Law R., 9 Ch. 307, 311. *In re Kinkead*, 3 Biss. (U. S.)

405, 410. But the law in Maryland is different. See *Relief Build. Asso. v. Schmidt*, 55 Md. 97.

obtain a general judgment against her.¹ If she is a partner, all the partners must be joined.² The husband cannot set up against them any rights that he might have against her in property he has suffered her to use in the business.³ If she is not trading with a personal capacity, but simply by virtue of her ownership of separate property, such creditors have generally no rights *in personam* against her.⁴ In some States her creditors are given special remedies.⁵ When she acts simply as her husband's agent, her creditors are really his creditors, and the business is really his business.⁶ Her creditors other than those of her business can proceed against her business only as they could against her other separate property.⁷

If the wife labors in her husband's business, or allows her property to be used therein, the profits are nevertheless subject to the rights of his creditors;⁸ but she is not personally liable to the creditors of the business if she has acted only as his agent, and has no capacity to contract.⁹ His creditors have the right to go against her separate business for any sums put into it by her husband in fraud of their rights;¹⁰ but it is doubtful whether this applies to a *bona fide* gift by him to her of his services;¹¹ in some cases an apportionment has been made, and this would of course be done if he and she were partners.¹² His creditors have no rights in the profits of her separate business, in cases where he has provided neither property nor services.¹³ Still, they have the right to treat the business as his when she has not complied with the requirements as to filing a declaration of record, etc.¹⁴ When

1. Nispel v. Laparle, 74 Ill. 306, 308. "The right of appellant to engage in business in her own name with her separate property necessarily implies the right to purchase goods, to bind herself by contract for the payment of such purchases, and it necessarily follows that the same law . . . will compel her to abide by and perform these contracts."

See Porter v. Gamba, 43 Cal. 105, 109, as to the right of getting general judgment against her.

2. Westphal v. Henney, 49 Iowa 542, 543.

3. Green v. Pallas, 12 N. J. Eq. 267; Partridge v. Stocker, 36 Vt. 108, 114.

4. O'Daly v. Morris, 31 Ind. 111; Glover v. Alcott, 11 Mich. 470, 485; Robinson v. Wallace, 39 Pa. St. 129, 133.

5. Brent v. Taylor, 6 Md. 58.

6. Conkling v. Doull, 67 Ill. 355, 359; Switzer v. Valentine, 4 Duer. (N. Y.) 96, 99; Swasey v. Antram, 24 Ohio St. 87, 95; Jacobs v. Featherstone, 6 W. & S. (Pa.) 346, 349.

7. Wood v. Sanchey, 3 Daly. (N. Y.) 197, 198; Nash v. Mitchell, 71 N. Y. 199, 203.

8. Clinton etc. Mfg. Co. v. Hummell, 25 N. J. Eq. 45. "The avails of a wife's labor in her husband's business belong to him, and property purchased therewith, in the name of the wife, cannot be held by her against her husband's creditors." See Dumas v. Neal, 51 Ga. 563, 566.

9. Conkling v. Doull, 67 Ill. 355, 358; O'Daly v. Morris, 31 Ind. 111; Glover v. Alcott, 11 Mich. 470, 485; Tuttle v. Hoag, 46 Mo. 38, 41.

10. Thomas v. Desmond, 63 Cal. 426. "Separate property of the husband, though appropriated and used by the wife in carrying on business as a sole trader, is liable for his debts, and may be seized under process against him in favor of his creditors."

11. See note 7, p. 839, vol. 9.

12. See section 10, below.

13. Bellows v. Rosenthal, 31 Ind. 116, 117.

14. Porter v. Gamba, 43 Cal. 105, 109.

she cannot be his partner she incurs no liability by holding herself out as such.¹

9. Rights and Liabilities of Husband.—When a man married a woman engaged in trade, he at common law took the business with its assets and liabilities;² now he is liable only where he is still liable for her antenuptial debts,³ and has the right to the business only when such property is secured to her neither by settlement nor by statute.⁴ So at common law, all the profits of her business during coverture vested with her other earnings and the other increase of her property in him;⁵ but this, too, is generally changed. It is his business and he is fully liable, and need not give her any part of the profits if she is trading simply by his consent and has no other authority;⁶ she may even be a partner in his place.⁷ When all the credit is given to her he is not liable.⁸ Nor is he liable when she is trading independently of him under the statutes, unless he is a partner,⁹ or actually joins in the transaction.¹⁰

10. Married Women as Partners.—It has been held that a married woman trading in equity with her equitable separate property may enter into partnership;¹¹ but this statement must be taken with limitations. For the normal contract of partnership is a personal contract, involving a personal capacity, which a married woman does not have either in equity or under mere separate property acts. And therefore it is settled that statutes securing to married women their property with rents, profits, increase, etc., thereof, although they enable her to trade in a limited way, do not enable her to enter into partnership.¹² At common law, when a female partner married the partnership was dissolved,¹³ and now she cannot be a partner if she has no capacity to trade personally, or if she is expressly prohibited by the statute enabling her to

1. *Montgomery v. Sprankle*, 51 Ind. 113, 115; *Lord v. Parker*, 3 Allen (Mass.) 127.

2. *Alexander v. Morgan*, 31 Ohio St. 546, 550. "It is further contended by plaintiff in error that the husband is not liable for the partnership debts of the wife contracted before marriage. It is said that the husband by marrying one member of a firm does not thereby become liable for the partnership debts. No authorities are cited in support of this proposition, and we think it cannot be maintained on principle."

3. See page 821, vol. 9.

4. *Rockwell v. Clark*, 44 Conn. 534, 536.

5. *Stimson v. White*, 20 Wis. 562, 568.

6. See p. 839, vol. 9.

7. *Swasey v. Antram*, 24 Ohio St. 87, 95.

8. *Jenkins v. Flinn*, 37 Ind. 349, 352; *Tuttle v. Hoag*, 46 Mo. 38, 42.

9. See *post*, section 10, Married Women as Partners.

10. *Krouskop v. Shontz*, 51 Wis. 204, 217.

11. *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 512. "A married woman may engage in trade on her separate account and enter into a partnership for that purpose, by the consent of her husband, and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary, and against his creditors (at least to some extent) if the agreement be founded on valuable consideration paid by or for the wife."

12. *Bradstreet v. Baer*, 41 Md. 19, 23;

Howard v. Stephens, 52 Miss. 239, 244;

Bradford v. Johnson, 44 Tex. 381, 383;

Carey v. Burruss, 20 W. Va. 571, 576.

13. *Bassett v. Shepardson*, 52 Mich. 3,

trade, or so far as she is partially prohibited, as she is in some States.¹ But as she has, under the statutes giving her the capacity to trade generally, the personal capacity to trade as if *sole*, and the power to pursue all the usual methods of trade, she may, under such acts, trade in partnership;² she may even be held responsible as a secret partner.³ Still in a few cases, and on different grounds, this has been denied.⁴ So, as she is a *feme sole* in her trade, and may employ an agent, general or special, and may employ her husband as such, there seems to be no reason why she should not be able to form a partnership with her husband; and many cases hold, while others assume, that she may.⁵ But this is also strenuously denied, on the ground that even where a married woman may contract, she cannot, without express authority, contract with her husband,⁶ and that the particular statute enables her to trade on her *separate* account.⁷ To this it is replied, that if she may employ her husband as her agent, as all admit she can, it is not consistent to say that she cannot contract with him; and that the word "separate" in the statutes does not refer to the mode in which a married woman shall trade, but to her status as independent of her husband's marital control and marriage rights.⁸ In such cases, as she cannot be a partner or be liable on a partnership note signed by one of the other partners,⁹ she can, nevertheless, be liable on her individual acts;¹⁰ nor does she, in such cases, lose her property put into a firm business.¹¹ Though she may not join a firm of which her husband is a member, she may, after his retirement, go in, and on a new consideration become liable for the pre-existing partnership debts.¹² So, although she cannot be a partner, she may jointly lease and share the profits of joint property, and be bound by her husband's acts as her agent with respect thereto.¹³ If the husband has furnished part of her capital, her business may *pro tanto* be liable for his debts,¹⁴ and the courts have sometimes, without speaking of husband and wife as partners, ordered an apportionment of the profits of a business jointly carried on by them.¹⁵

7; Alexander v. Morgan, 31 Ohio St. 546, 550.

1. Porter v. Gamba, 43 Cal. 105, 109; Todd v. Clapp, 118 Mass. 495, 496.

2. *In re* Kinkead, 3 Biss. (U. S.) 405, 410; Camden v. Mullen, 29 Cal. 564; Francis v. Dickel, 68 Ga. 255, 258; Preusser v. Henshaw, 49 Iowa 41, 44; Plumer v. Lord, 5 Allen (Mass.) 460; Parshall v. Fisher, 43 Mich. 529; Newman v. Morris, 52 Miss. 402, 406; Bitter v. Rathman, 61 N. Y. 512.

3. Parshall v. Fisher, 43 Mich. 529, 534; Bitter v. Rathman, 61 N. Y. 512.

4. Haas v. Shaw, 91 Ind. 384; Bradstreet v. Baer, 41 Md. 19, 23; Carey v. Burruss, 20 W. Va. 571, 576.

5. See cases in note 2, above.

6. Pages 791, 792, 793, 794, vol. 9 of this work for a full discussion.

7. See preceding note.

8. Zimmerman v. Erhard, 58 How. Pr. (N. Y.) 11, 13.

9. Carey v. Burruss, 20 W. Va. 571, 582; Plumer v. Lord, 7 Allen (Mass.) 481, 485.

10. Cruzeu v. McKaig, 57 Md. 454, 462.

11. Maghee v. Baker, 15 Ind. 254, 257.

12. Prensaur v. Henshaw, 49 Iowa 41,

44.

13. Reiman v. Hamilton, 111 Mass. 245, 247.

14. Horneffer v. Duress, 13 Wis. 603, 605.

15. Glidden v. Taylor, 16 Ohio St.

11. Married Women as Incorporators, Stockholders, etc.—Very nearly the same questions arise in considering a married woman's capacity to be an incorporator as those which are involved in her right to be a partner.¹ Corporators enter into a mutual and personal contract, which is concluded by the act of incorporation;² and therefore, without personal capacity to contract, a married woman could not be an incorporator. But as business is very commonly carried on by corporations, a married woman with capacity to trade would, it seems, have capacity to be an incorporator.³ The fact that the corporation laws provide that "any person" may be an incorporator would not affect a married woman under incapacity, by virtue of a rule already discussed.⁴ But a married woman may be a stockholder, holding her stock as any other chose in action;⁵ and it has been held that when she can hold stock as if *sole*, she is liable, as any other stockholder, for example, for assessments.⁶

A married woman's subscription to stock is an executory agreement, and, as such, void at common law;⁷ but a note given for stock has been held beneficial to her separate estate, and therefore a charge thereupon,⁸ and by statute. in some States, she may be a subscriber.⁹

X. MARRIED WOMEN IN REPRESENTATIVE CAPACITIES. 1. The Questions Involved.—Whether married women may act in representative capacities, whether they may be agents, trustees, administrators, executors, guardians, etc., and how far their acts in such capacities have the same effect as the acts of persons *sui juris* in similar capacities, are questions which are nowhere fully discussed; and much confusion is likely to result in such a discussion, unless the different points of view from which the subject may be approached be borne in mind. For example, a married woman may be an agent, in the sense that she may, just as if she were *sole*, bind a party who has authorized her to act for her, but not neces-

509, 522; *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 513.

1. *Plumer v. Lord*, 9 Allen (Mass.) 460, 462. "The fact that this contract (partnership) might make her liable for the acts and dealings of other persons constitutes no serious objection; for this fact would exist in regard to many ordinary kinds of investment, such as part ownership in ships, or in shares of corporations."

2. *Taylor on Corporations*, § 31.

3. In accordance with the spirit of § 7 of part IX, above.

4. *Stewart on H. & W.*, § 369. "General statutes relating to contracts but not expressly referring to married women, do not affect the validity of married women's contracts, but apply to these only so far as they are valid under other statutes."

5. See *Stewart on H. & W.*, § 173; *Brown v. Bokee*, 53 Md. 155, 164; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373, 376.

6. *In re Reciprocity Book*, 22 N. Y. 9. "A married woman holding stock in a bank is within the act (ch. 226 of 1849) to enforce the liability of stockholders, and is liable, as such, to assessments for its debts."

7. *Stewart on H. & W.*, §§ 206, 380, 407.

8. At common law the promissory note of a married woman was void. *Vance v. Wells*, 6 Ala. 737; *Taylor v. Boardman*, 92 Ill. 566. For proposition in text see principles laid down in *Hord v. Taubman*, 79 Mo. 101, 103.

9. Cal. Civ. Code 1881, §§ 285-325; W. Va. Code 1878, ch. 122, § 9.

sarily at the same time, in the sense that she may recover compensation for her services, or be liable for money received to her principal's use, or be personally liable to third parties with whom she has dealt in her own name.¹ So she may be a trustee, in the sense that her husband cannot claim substantial rights in property of which she holds only the bare legal title, and that she may dispose of such property in accordance with the powers vested in her by the trust; and yet she would not therefore be liable personally for work done at her request, as a person *sui juris* would be, or be able to bind herself personally to execute the power of her trust.² And so she may be an administratrix, in the sense that once appointed she may act as such, and yet her appointment may depend on the consent of her husband.³ So as to

1. Married Women as Agents.—A married woman may be an agent in the sense that her principal and the party with whom she deals for him are bound by any transaction conducted by her just as if she were *sole*. Story Agency, § 7.

She may execute any power, whether appendant or in gross, without any reference to her coverture. Schley v. McCeney, 36 Md. 266, 273; Bouldin v. Reynolds, 58 Md. 491, 495.

She may act as her husband's agent. See title HUSBAND AND WIFE. She may thus dispose of his property *inter vivos*. Trestwick v. Marshall, 7 Bing. 555, 567. Or by will. Cutter v. Butler, 25 N. H. 343; 57 Am. Dec. 330. She may trade in his place. Tuttle v. Hoag, 46 Mo. 38, 42; 2 Am. Rep. 481. She may even be a partner for him. Swasey v. Antram, 24 Ohio St. 87, 95. And may bind him by her acts, omissions etc., Emerson v. Blonden, 1 Esp. 42, 143; Hopkins v. Mollineux, 4 Vend. (N. Y.) 465, 467.

But she is not personally liable for her acts except as a married woman. Tucker v. Cocke, 32 Miss. 184, 189; Andrews v. Ormsbee, 11 Mo. 400, 402; Carleton v. Haywood, 49 N. H. 314, 320. And only as a married woman can she acquire personal rights. See Ankerstein v. Clarke, 4 Term 616; Yard v. Ellard, Salk. 117; Jenkins v. Plombe, 6 Mod. 3, 94.

When she is agent before marriage her husband by marriage does not become jointly agent with her. Marder v. Lee, 3 Burr. 1469, 1471.

2. Married Women as Trustees.—Married women may become trustees by deed, gift, bequest, appointment, or by operation of law. Perry Trusts, § 48; Trust Co. v. Sedgwick, 96 U. S. 304,

309; Springer v. Berry, 47 Me. 330, 335; Bouldin v. Reynolds, 58 Md. 491, 494; Still v. Ruby, 35 Pa. St. 373, 374.

One may, for example, be trustee under a mortgage. Bouldin v. Reynolds, 58 Md. 491, 495. A wife cannot, however, at law, be trustee for her husband. Mutual Ins. Co. v. Deale, 18 Md. 26, 46; Woodbeck v. Havens, 42 Barb. (N. Y.) 66, 70. But in equity she can. Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 541; 1 Perry Trusts, § 48, 51.

Resulting trusts between husband and wife are discussed separately under title MARRIAGE SETTLEMENTS.

If an estate comes to a married woman in any way charged with a trust, her coverture cannot be pleaded in bar of the trust. Clarke v. Saxon, 1 Hill Ch. 60; Berry v. Morris, 1 Duval 302. She may be compelled to perform the duties of her trust. Dundas v. Biddle, 2 Pa. St. 160, 161.

Her husband has no estate in property of which she has the bare legal title. Claussen v. La Franz, 1 Iowa 226, 234.

She cannot, however, bind herself personally in dealing with her trust estate. Avery v. Griffin, Law R., 6 Eq. 606, 608; Still v. Ruby, 35 Pa. St. 373, 374.

She and her husband are both liable at common law for her breaches of trust. United States Trust Co. v. Sedgwick, 97 U. S. 304, 309. See *ante*, part VI.

Still a court will not readily appoint a married woman trustee. Kaye v. Kaye, Law R., 1 Ch. 387; 1 Perry Trusts, § 51.

3. Married Women as Executrix, etc.—The law on this subject is complex and confused and depends greatly on local statutes.

At common law a married woman

guardianships,¹ it thus plainly appears that a married woman who may act in a representative capacity does not, while so acting, have the same rights and liabilities as a *feme sole* and that the following questions may arise, namely: (1) How far do her conjugal obligations conflict with her right to act in a representative capacity—how far has her husband the right to control her in this respect? (2) How far do her personal disabilities—her coverture—affect her capacity to so act? (3) How far do her acts in a representative capacity affect her personally? (4) or her husband? (5) or her principal or estate? (6) or the third parties with whom she deals?

could be appointed executrix or administratrix. *English v. McNair*, 24 Ala. 40, 48; *Stewart v. Stewart*, 56 Me. 300, 301; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 466; 47 Am. Dec. 41; 1 Wms. Exec. 233.

But on account of the liabilities with which she might thereby invest her husband, she could not be appointed without his consent. *Dye v. Dye*, 2 Robt. Ec. 342, 344; *Buffers v. Harby*, 3 Curt. Ec. 50; *Pemberton v. Chapman*, 7 El. & Bl. 210, 218; *El. B. & E.* 1056, 1060; *Clarke v. Clarke*, Law R., 6 P. D. 103, 104; *Adair v. Shaw*, 1 Schoales & L. 243, 266; *Hinds v. Jones*, 48 Me. 348, 350; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153, 155.

His consent could be given before or after the granting of letters. *Pemberton v. Chapman*, 7 El. & B. 210, 219. And it would be presumed in the absence of evidence. *English v. McNair*, 34 Ala. 40, 48. By the ecclesiastical law it was not necessary. *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 466; 47 Am. Dec. 41.

By statutes in many States a married woman may be appointed administratrix, but usually her husband must go on her bond. In *Rhode Island*, married women cannot be appointed. *Hammond v. Wood*, 15 R. I. 566.

By the common law a husband by marrying an executrix consented that she should act as such. *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153, 154. And probably independently of statute the marriage of a woman acting in such a capacity in no way affects her authority. *Yates v. Clark*, 56 Miss. 212, 216.

It has, however, been said that by marriage the husband becomes co-executor with his wife. *Murphree v. Singleton*, 37 Ala. 412, 416; *Stewart v. Stewart*, 56 Me. 300, 301; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153, 155. That he administers in her right for his own pro-

tection. *Kavanaugh v. Thompson*, 16 Ala. 817, 823. That the rights of administration vest in him just as if he had been himself appointed. *Wood v. Chetwood*, 27 N. J. Eq. 311, 313; *Gates v. Whetstone*, 8 S. Car. 244; *Airhart v. Murphy*, 32 Tex. 131, 134. Also that marriage does not revoke letters, but is only a cause for revocation, even under a statute which requires a new bond when an administratrix marries. *Gates v. Clark*, 56 Miss. 212, 216; *Cassidy v. Jackson*, 45 Miss. 397, 401.

By statutes in many States the authority of a female administratrix ceases with her marriage, but such statutes are not retrospectively construed. *Frye v. Kimball*, 16 Mo. 9, 20.

When acting as administratrix a married woman has, as far as the estate is concerned, the capacities of a *feme sole*, but no additional personal rights or liabilities. *Russel v. Russel*, 5 Coke 27b; *Pemberton v. Chapman*, El. B. & El. 1056, 1068.

Her husband has no rights over the estates funds. *Roberts v. Place*, 18 N. H. 183, 184. If he takes possession of property of the estate it is a *devastavit*. *Workford v. Workford*, 1 Salk. 306.

For all defaults, *devastavits*, etc., the husband and wife are jointly liable by the common law as they are for all torts in which a wife takes part. *Ante*, VI; *Smith v. Smith*, 21 Beav. 385, 387; *Bingham v. Lee*, 15 Sim. 396, 401; *Kearsley v. Okley*, 2 Hurl. & C. 806, 900; *Loody v. Turnbull*, Law R., 1 Ch. App. 494, 498; *Derbyshire v. Horne*, 5 DeGex & S. 702, 709; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153, 154.

A wife may renounce her right to administer without her husband's consent. 1 Wms. Exec. 234.

1. Married Women as Guardians.—The questions involved under this head are much the same as those just discussed. When the husband's common

2. General Rules.—With regard to the questions already stated, certain general rules may be formulated, to wit.

(1) *As to Husband's Consent.*—At common law, a husband not only took his wife with all her accrued obligations, but he was also jointly liable with her for her torts, whether committed with his consent or not,¹ and was therefore liable for all her breaches of trust, devastavits, etc.;² so that for his own protection he had the right to say whether she should act in a representative capacity, and subject him to such additional risks.³ But his consent was necessary only so far as his liabilities were concerned,⁴—he could not, for example, object to her executing a power to convey property,⁵ and for this reason, it would seem that his right to object at all is removed by statutes destroying his marital liability for the acts of his wife.⁶

(2) *As to Wife's Coverture.*—The fact that a wife has no personal capacities, but is under the disabilities of coverture, does not prevent her acting in a representative capacity;⁷ she may be an agent, administratrix or executrix, trustee, or guardian; it only affects her personal rights and obligations while acting in such capacities.⁸ A married woman is not in this respect like an idiot; she has as much discretion after as before marriage.⁹

(3) *As to Personal Rights and Obligations of Wife.*—The fact

law liabilities exist she cannot be appointed without his consent. *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 469; 47 Am. Dec. 41. But once appointed her husband's consent is presumed. *English v. McNair*, 34 Ala. 40, 51; *Fields v. Torrey*, 7 Vt. 372, 387. And though her letters may therefore be revocable; until they have been revoked her authority is complete. *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 460, 469; 47 Am. Dec. 41. Her common law incapacities do not affect her right to be appointed. *Jarrett v. State*, 5 Gill & J. (Md.) 27, 28.

There seems to be no good reason for saying that the marriage of a female guardian revokes her appointment or works a substitution of her husband in her place. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 193; 5 Am. Rep. 27.

1. *Ferguson v. Collins*, 8 Ark. 241, 252; *ante*, VI.

2. "A *feme covert* may be a trustee, but her husband is personally liable for any breach of trust she may commit, and hence she cannot act in the administration of the trust without his concurrence or consent. *Hill Tr.* 464; *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212; *United States Trust Co. v. Sedgwick*, 97 U. S. 304, 309. On the same point see *McWilliams v. McWilliams*, 1 Schoales & L. 169, 173; *Adair v.*

Shaw, 1 Schoales & L. 243, 263, 266, 272; *Loody v. Turnbull*, Law R., 1 Ch. App. 494, 498; *Bohe v. Frowner*, 18 Ala. 89, 95; *Kavanaugh v. Thompson*, 16 Ala. 817, 823; *Carlisle v. Tuttle*, 30 Ala. 613, 624; *Maffit v. Commonwealth*, 5 Pa. St. 359, 366; *Tabb v. Boyd*, 4 Call' (Va.) 453, 457; *Moone v. Henderson*, 4 Dessaus. (S. Car.) Eq. 459, 461; *Knox v. Pickett*, 4 Dessaus. (S. Car.) Eq. 92, 93; *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 193; 5 Am. Rep. 27.

McCready's Case, 1 Tuck. (N. Y.) 374, 376.

3. Cases last cited; *Dye v. Dye*, 2 Robt. 342, 344; *Pemberton v. Chapman*, 7 El. & B. 210, 218; *English v. McNair*, 34 Ala. 40, 48; *Stewart v. Stewart*, 56 Me. 300, 301; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 468.

4. *Pemberton v. Chapman*, El. B. & E. 1056, 1067.

5. See *Claussen v. La Franz*, 1 Iowa 226, 234.

6. Consult *ante*, VI.

7. 1 *Perry Trusts*, § 48; *Story Agency*, § 7; 2 *Wms. Exec.* 965.

8. See *Pemberton v. Chapman*, El. B. & E. 1056, 1068; *Avery v. Griffin*, Law R., 6 Eq. 606, 608; *Tucker v. Cocke*, 32 Miss. 184, 189; notes under last preceding section.

9. *Bell v. Hyde*, Prec. Ch. 350.

that a married woman may act in a representative capacity, and is so acting, does not enlarge her personal capacities, or remove, as far as she is herself concerned, her marriage disabilities, or affect her personal status.¹ Her contracts, though made in her own name, do not bind her personally, unless she has the capacity to contract personally;² so she may be unable to stipulate for any compensation.³ For her torts she is, of course, personally liable, for a married woman is not, even at common law, under disability to commit wrongs.⁴

(4) *As to Her Husband's Rights and Obligations.*—A husband has no property or estate in funds held by a married woman in a representative capacity.⁵ He generally sues and is sued with her for conformity,⁶ and on contracts on which if *sole* she could have declared in her own name, he could at common law sue alone.⁷ For all her devastavits and acts in the nature of tort he is jointly liable with her, in accordance with the rules already discussed relating to a husband's liability for his wife's torts.⁸ He is liable for her contracts only if she acted as his agent.⁹ He must account for any money which passes into his possession.¹⁰

(5) *As to the Estate or Principal.*—The estate or person whom the wife represents is bound, and receives the benefit of her acts just as if she were *sole*;¹¹ her conveyance in accordance with her powers,¹² or her receipt for funds,¹³ is binding as if by him.

(6) *As to Third Parties.*—The rights and obligations of the persons with whom she deals as representative are the same, as far as the person or estate which she represents is concerned, as if she were *sole*;¹⁴ but as far as she herself is concerned, they are simply such as may exist against any married woman.¹⁵

MARSHAL.—(a) An officer of the United States whose duty it is to execute the process of the courts of the United States. His duties within the district for which he is appointed are very similar to those of a sheriff.¹⁶ See title SHERIFF, MARSHAL AND CONSTABLE.

(b) In the western and southwestern States, a marshal is an

1. See *Russel v. Russel*, 5 Coke 27b; *Pemberton v. Chapman*, *supra*; *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *Abbey v. Deyo*, 44 Barb. (N. Y.) 374, 380; *Tucker v. Cocke*, 32 Miss. 184, 189; *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320; *Still v. Ruby*, 35 Pa. St. 373, 374.

2. *Tuttle v. Hoag*, 46 Mo. 38, 42; 2 Am. Rep. 481.

3. *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *ante*, VIII, § 20.

4. Discussed *ante*, VI.

5. *Workford v. Workford*, 1 Salk. 306; *Claussen v. La Franz*, 1 Iowa 226, 234; *Roberts v. Place*, 18 N. H. 183, 184.

6. *Still v. Ruby*, 35 Pa. St. 373, 374; *ante*, VIII.

7. *Ankerstein v. Clarke*, 4 Term 616, 617; *Yard v. Ellard*, 1 Salk. 117; *Jenkins v. Plombe*, 6 Mod. 93, 94.

8. Cases *supra*; *ante*, VI.

9. *Tuttle v. Hoag*, 46 Mo. 38, 42; 2 Am. Rep. 481; *ante*, III; title HUSBAND AND WIFE.

10. *Keister v. Howe*, 3 Ind. 268, 269.

11. See *Russel v. Russel*, 5 Coke 276.

12. *Bouldin v. Reynolds*, 58 Md. 491, 495.

13. *Pemberton v. Chapman*, 7 El. & B. 210, 218.

14. See *Russel v. Russel*, 5 Coke 27b.

15. See *Still v. Ruby*, 35 Pa. St. 373, 374.

16. *Bouv. Law Dict.* See U. S. statutes at large; *Serg. Const. Law*, ch. 25;

officer of the peace, appointed by authority of a city or borough, who holds himself in readiness to answer such calls as fall within the general duties of a constable or sheriff.¹

(c) To arrange; put in proper order.²

MARSHALLING ASSETS—(See also DEBTS OF DECEDENTS; EQUITY; LEGACIES; SUBROGATION).

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I. DEFINITION.—Marshalling assets is such an arrangement of different funds as will enable all the parties having equities there- to receive their due proportions, notwithstanding the interven- g interests of particular persons to prior satisfaction out of a portion of the funds.³

II. GROUNDS OF EQUITABLE INTERFERENCE.—The doctrine of mar- alling depends upon the principle that a person having a right resort to two funds, in one of which alone another person has junior lien, shall be compelled to exhaust the fund to which the her cannot resort, before coming upon the one in which they th have an interest. The rule is said by CHANCELLOR KENT to st “on the basis of mere equity and benevolence,” and “is ognized in every cultivated system of jurisprudence.”⁴

rr's Trial 365; Anonymous Gall, 2. In the leading case of *Aldrich v. Cooper*, 8 Ves. 308; 2 White & Tudor, Lead. Cases in Eq. 228, LORD ELDON defines marshalling to be a case where “a person having two funds shall not, by his election, disappoint the party having only one fund.”
4. *Cheesborough v. Millard*, 1 Johns.

1. Nature of the Equity.—The equity of the junior creditor is not against the paramount creditor, but against the debtor himself. By its exercise the junior creditor prevents the debtor from retaining the singly charged estate free from both debts.¹

(N. Y.) Ch. 409, 412. JUDGE STORY, in Eq. Juris., § 633, says: "The general principle is, that if one party has a lien on, or interest in, two funds for a debt, and another party has a lien on, or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund. . . . If A has a mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has a right to throw A in the first instance, for satisfaction upon the security, which he, B, cannot touch, at least where it will not prejudice A's rights, or improperly control his remedies. . . . The reason is obvious, and has been already stated; for by compelling A, under such circumstances, to take satisfaction out of one of the funds, no injustice is done to him in point of security or payment. But it is the only way by which B can receive payment. And natural justice requires that one man should not be permitted, from wantonness, caprice or rashness, to do an injury to another. In short, we may here apply the common maxim, *sic utere tuo ut alienum non ledas*; and still more emphatically the christian maxim, 'Do unto others as you would they should do unto you.'" Kyner v. Kyner, 6 Watts (Pa.) 221; Hastings' Case, 10 Watts (Pa.) 303; National Savings Bank v. Creswell, 100 U. S. 641; Gilliam v. McCormack, 85 Tenn. 597; Turner v. Flinn, 67 Ala. 529.

Examples.—A gave two promissory notes dated alike and secured by a mortgage. One of the notes was also secured by a surety. On foreclosure, it was held that the one secured by mortgage only must be first satisfied before the proceeds of a sale of the land could be applied to the payment of the other. Hanford v. Robertson, 47 Mich. 100.

Were an estate is subject to a mortgage and is sold by the mortgagor in

parcels at different times, as between the grantee and mortgagee, the latter being a creditor with two funds, is required to proceed primarily against the fund upon which the grantee has no claim. See Fasset v. Mulock, 5 Colo. 466.

A judgment creditor of a copartnership had a lien on the separate estate of the surviving partner and on that of the deceased partner. A certain unsecured creditor could go only against the estates of the latter, there being no partnership assets. It was held that equity would require the judgment creditor first to exhaust the estate of the survivor. Pitts v. Spotts (Va.), 9 S. E. Rep. 501.

In a foreclosure suit by a building association holding as security a mortgage and shares of its own stock, it was held that a second mortgagee of the same property was entitled to have plaintiff realize first upon the stock. Bishop Bailey B. & L. Assoc. v. Kennedy (N. J.), 12 Atl. Rep. 141.

1. Nature of the Equity.—The equity being against the debtor, it is equally against his judgment creditors whose liens were obtained subsequently to the lien of the junior creditor in whose favor the equity is enforced. Thus in Robeson's Appeal, 117 Pa. St. 628, the owner of a tract of land gave a judgment to A and then a mortgage to B. Subsequently the owner acquired a second tract, on which A by a revival of his judgment obtained a first lien. Subsequently the owner mortgaged this second tract to C. Upon a distribution of the proceeds of both tracts it was held that C, having had record notice of the other liens, B, under his superior equity, could require that the proceeds of the second tract should be applied to A's judgment in relief of his own lien upon the first. The court said: "This equity, we have said, was against the debtor, and it is equally such against his subsequent mortgage creditors with notice, who can have no greater rights than the debtor had at the time the mortgage was given. This equity existed in favor of the appellants before the appellees acquired their lien; *prior in tempore potior in jure*. The appellees must be considered to have

taken their mortgage subject to the prior equity of the appellants."

In *Delaware & Hudson Canal Co.'s Appeal*, 38 Pa. St. 512, a mortgagor had other lands than those mortgaged, which, including the mortgaged premises, were bound by four earlier judgments. Subsequent to the mortgage were other judgments which were liens upon all the lands. Upon a distribution of the proceeds of a sale of all the lands the court subrogated the mortgagee to the rights of the senior judgment creditors in the lands not covered by the mortgage. It was distinctly held that the judgment creditors subsequent to the mortgage had no rights superior to those of their debtor. The same principle is recognized in *Hastings' Case*, 10 Watts (Pa.) 303. These cases and *Robeson's Appeal*, 117 Pa. St. 628, overrule *Miller v. Jacobs*, 3 Watts (Pa.) 477, where it was held that a creditor who has a lien on two funds may throw the whole burden on one of them, to the exclusion of a junior encumbrancer, if the other fund is subject to encumbrances, which, though posterior in date, are sufficient to absorb the whole, because the effect of such a course is merely to postpone one creditor to another, and it does not enable the debtor to get back the estate discharged of the lien. In *Hoff's Appeal*, 84 Pa. St. 40, it was held that a *bona fide* purchaser may be unaffected by an equity of which he had no notice in fact.

The general principle is explained by JUDGE HARE in a note to *Aldrich v. Cooper*, 2 Lead. Cases in Eq. 266, as follows: "The equity has its root in the obligation of the debtor, but is also an equity among the creditors, that each shall, when it can be done without loss or inconvenience, so use his right that all may, as far as the circumstances admit, be satisfied in the order in which their liens severally accrued. A has a paramount lien on two tracts of land, B a lien on one of them, and C a subsequent lien on both. If A exhausts the tract which is the subject of B's lien, B will be subrogated to A's lien on the other tract, although C is thereby excluded from the fund."

A writer in the *American Law Register*, vol. 27, p. 738, states the rule concisely as follows: "If a paramount encumbrancer of two funds, by his election of remedies, disappoints a junior creditor, who has a lien upon one of them only, the latter shall, to that ex-

tent, be substituted to the lien of the paramount encumbrance upon the other fund bound by it, as against the debtor and all claiming under him, by lien or title, subsequent in time." See *Young v. Morgan*, 89 Ill. 199; *Crawford v. Richeson*, 101 Ill. 351; *Lyman v. Lyman*, 32 Vt. 79; *Fassett v. Mulock*, 5 Colo. 466.

In *England* the rule is different. Thus in *Averall v. Wade*, L. & G. t. Sugd. 252, where a person who was seised of several estates, and, indebted by judgments, settled one of the estates for a valuable consideration with a covenant against encumbrances, and subsequently acknowledged other judgments, it was held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates.

In *Barnes v. Racster*, 1 Y. & C. C. 401, *Racster* was seised of *Foxhall Coppice* and a piece of land known as No. 32. In 1792 he mortgaged *Foxhall* to *Barnes*; in 1795 *Foxhall* to *Hartwright*; in 1800 *Foxhall* and No. 32 to *Barnes*; and in 1804 *Foxhall* and No. 32 to *Williams*. The subsequent encumbrancers took with notice. The court held that as against *Williams* the securities ought not to be marshalled. *Barnes v. Racster* was approved in *Gibson v. Seagrim*, 20 Beav. 618, and *In re Mower's Trusts*, 8 L. R. Eq. 110.

In *Wellesley v. Mornington*, 17 W. R. 355, a mortgagor having two funds mortgaged, both to A, then one to B, then both to C. B claimed that A should pay himself first out of the one on which he, B, had no charge. C objected to B's claim, and it was refused.

In *Gibson v. Seagrim*, 24 L. J. Ch. 782, the court marshalled the proceeds arising from several mortgaged premises so as to prevent the first and second mortgagees of different estates from exhausting the proceeds of one estate upon which alone a third mortgagee had taken security.

The rule followed by most of the American cases is recognized in *Ireland*. In *re Lynch's Case*, 1 I. R. Eq. 396. In this case there was first a mortgage by deed of lands A and B; secondly, in 1856, two judgments registered as mortgages against the A lands; and thirdly, in 1857, a judgment registered as a mortgage against the entirety of the lands A and B. The mortgagees having sold applied in payment of their debt the whole of the lands A. It was held that the two judg-

III. NATURE OF THE FUNDS TO WHICH THE DOCTRINE IS APPLIED.

—In general the nature of the property which constitutes the funds is immaterial;¹ but the doctrine does not apply unless

ment creditors of 1856 had a right to marshal as against the judgment creditor of 1857. See also *Hamilton v. Royce*, 2 Sch. & Lef. 315; *Hartly v. O'Flaherty*, D. & G. 208; *Re Ford*, 5 Ir. Ch. 541; *Re Jones*, 2 Ir. Ch. 544; *Rorke's Estate*, 15 Ir. Ch. 316. But see *Lawder's Estate*, 11 Ir. Ch. 346.

In *Tennessee*, the English rule is followed. In the recent case of *Gilliam v. McCormack*, 85 Tenn. 597, McCormack owned three town lots and gave six mortgages thereon at different dates, the first covering the entire property, and the others parcels thereof, less than the whole. All the lots were subsequently sold and their proceeds proved insufficient to pay all the mortgage debts. Upon a controversy among the junior mortgagees as to the application of the remaining proceeds of the lots after payment of the senior mortgagees, the court held that the several mortgages should be paid *pro rata*, in order of their priority, out of the proceeds of the parcel or parcels covered by each. The court laid it down as a rule that the equity to marshal does not fasten itself upon the situation as it existed at the date of the execution of the respective mortgages, but upon the situation existing at the time its enforcement is invoked; and that this equity becomes a fixed right only from the time proper steps are taken to enforce it, remaining until then subject to defeat or displacement by the creation of subsequent liens on the property or funds. This case, although very recently decided, does not seem to be in accord with the current of decision in America. But see *Green v. Ramage*, 18 Ohio 428; *Leib v. Stribling*, 51 Md. 285; *Marr v. Lewis*, 31 Ark. 203; *McArthur v. Martin*, 23 Minn. 74.

In *Canada*, it is held that the record of a paramount encumbrance is notice to a subsequent part purchaser of equities existing in favor of the intervening liens. *Boucher v. Smith*, 9 Grant (Can.) 347; *Trust Co. v. Shaw*, 16 Grant (Can.) 446.

Where the Equities Are Equal the Law Prevails.—In *Ritter v. Cost*, 99 Ind. 80, it was held that the equity of the purchaser for value of a judgment constituting a lien is equal to the equitable claim of the owner of the land to be

subrogated to the rights of the mortgagee of a satisfied mortgage, of which the purchaser of the judgment had no actual knowledge; and this, on the ground that the equities being equal, the law must prevail.

A commissioner appointed to sell land under an order of court for the payment of the debts of a deceased person, made the sale and received one-third of the purchase money, but failed to give the required bond. He was ordered, upon confirmation of the sale, to pay from the funds reported in his hands certain debts of the deceased. This he failed to do, and, after the docketing of the decree against him, he conveyed his own land in trust for a creditor of his own. The court held that the rights of the parties to the decree were paramount to those of such creditor, and that the latter, moreover, had no claim to be subrogated to the rights of the creditors of the deceased against the purchaser at the sale, he having no equity superior to theirs. *Lee v. Swepson*, 76 Va. 173.

In *Butler v. Stamback*, 87 N. Car. 216, it was held that the doctrine of marshalling securities does not apply where one security is given and expressly declared to be in exoneration of another, though other interests are involved in the latter security, and it is insufficient to protect all of them.

1. In *Aldrich v. Cooper*, 8 Ves. 308; 2 *White & Tudor's Lead. Cas.* in Eq. 228 (Am. ed.), LORD ELDON gives a number of illustrations showing the character of the funds that may be affected by the doctrine of marshalling. He instances mortgaged estates, copyhold estates bound by mortgages, legacies, land specifically devised and made subject to debts, and paraphernalia. In *England*, the equity of marshalling is frequently invoked in contests between legatees and devisees; in *America*, more frequently between mortgagees and judgment creditors, or between judgment creditors.

Homestead Land.—In most of the States marshalling may take place where homestead land is involved. Thus in *Parr v. Fumbanks*, 11 Lea (Tenn.) 391, A conveyed two tracts of land to secure his debts to B and C. He afterwards conveyed one of these

tracts—releasing his right of homestead therein—and personal property besides, to secure the debt due B. In a suit instituted by C it was held that B should be compelled, first, to look to the personalty, and next to the land first conveyed, leaving C to avail himself of B's rights in A's homestead exemption. See *Hall v. Fulgham*, 2 Pickle (Tenn.) 451.

In *Virginia*, where homestead has been set apart, and there is not sufficient property unexempt to pay the debts, all creditors must share ratably in such property, and then those creditors as to whom homestead is waived are entitled to satisfaction out of the homestead of the balance of their debts unpaid. *Scott v. Cheatham*, 78 Va. 82.

In *Wisconsin*, in a foreclosure sale under a mortgage which covered the mortgagor's homestead and other lands, the sheriff, contrary to the mortgagor's request, neglected to offer first the other land, and sold the homestead alone for the amount of the judgment. The court held that in view of the fact that there were judgment creditors, not parties to the suit, who had a lien on the unsold land, it was not an abuse of discretion to confirm the sale. CHIEF JUSTICE DIXON said: "However just and reasonable it might be for the court to compel a sale of the business lot first, and thus save the homestead, if that were the only question, yet we think the mortgagor's equity to hold his homestead fully countervailed by the equities of his creditors, who must look to the business lot for their satisfaction, and who have no lien upon the homestead. Until the legislature shall have declared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." *Ones v. Dow*, 18 Wis. 241. See also *White v. Polleys*, 20 Wis. 503.

The same rule was applied in the United States court in the western district of Wisconsin, where it was held that the fact that a part of the property is a homestead does not change the rule requiring a party having security on two funds to first exhaust his remedy upon the fund he once was secured upon, where there is another party having security on the other alone. *In re Santhoff*, 7 Biss. (J. S.) 167. The legislature of Wisconsin subsequently passed an act pro-

tecting the equity of the homestead claimant.

In *South Carolina*, where a debtor mortgages his entire real estate, and subsequently a judgment is recovered against him, the judgment creditor has the equitable right to compel the mortgagor to first exhaust so much of the debtor's land as embraces the homestead. *State Savings Bank v. Harbin*, 18 S. Car. 425. See also *Webster v. Bronston*, 5 Bush (Ky.) 521.

In *Hall v. Morgan*, 79 Mo. 47, one of two parcels of land mortgaged by a husband and wife was conveyed by the husband by warranty to one who, during the pendency of foreclosure, sold the parcel with the understanding that it was to bear its proportion of the mortgage. This parcel alone was sold. It was held that the other was subject to its proportion of the mortgage even though it had been set aside as homestead. *Hall v. Morgan*, 79 Mo. 47.

Where a mortgage was made on two pieces of real estate, and a subsequent mortgage was made on one of them, and thereafter a homestead was declared in respect of the land not embraced in the second mortgage, it was held that the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he had an exclusive claim, could not be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. *Abbott v. Powell*, 6 Sawy. (U. S.) 91.

The fact that a mortgage covers a homestead and also other property which is subject to a subsequent judgment, does not give the debtor the right to have the latter property first applied to the payment of the mortgage, so that he may have his homestead. In *Searle v. Chapman*, 121 Mass. 19, CHIEF JUSTICE GRAY said: "The powers of a court of chancery to compel a mortgagee to resort in the first instance to one of several estates mortgaged, is exercised only for protection of the equities of different creditors, or encumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities."

The same rule was applied in *White*

v. Polleys, 20 Wis. 503, where it was held that where a mortgage covers the homestead and also other property, which is subject to the lien of a subsequent judgment, the debtor has no right to have the latter exhausted to satisfy the mortgage in order to preserve his homestead.

Where a creditor had two mortgages, the first covering only store property, the second, in which there was a waiver of homestead, covering both store and homestead, and also a junior judgment; *held*, that he was entitled to have the homestead property first sold, the principle of marshalling assets not applying as between debtor and creditor. *Plain v. Roth*, 107 Ill. 588.

The reason of the rule is explained by BREWER, J., in *Chapman v. Lester*, 12 Kan. 592, 595, as follows: "It is claimed that it was the mortgagee's duty to exhaust the other property before proceeding against the homestead, and inasmuch as the property released and received was ample to pay the debt, he cannot now be allowed to enforce any lien upon the homestead. It is said that the homestead belongs to and is designed by the law for the family, and that their rights are paramount to the rights of creditors. We cannot assent to the claim as thus broadly stated. It means that when a creditor takes a mortgage on the homestead and other property, though nothing is expressed, there is an implied agreement to consider the homestead as a sort of secondary security, a security for security; that the other property mortgaged is the primary security, and that, if that proves insufficient, and only when that proves insufficient, can the lien on the homestead be enforced. That partners may make such a contract is unquestionable; that the legislature may establish such a rule is probable. Such seems to have been done in Iowa. Code, original § 1249; § 2281 of the revision of 1860, cited in *Dickson v. Chorn*, 6 Iowa 19, and *Twogood v. Stephens*, 19 Iowa 405. But in the absence of legislation, and of express contract, we do not think the courts are warranted in interpolating such a stipulation. The creditor takes such security for his debt, and with such contract as the parties may agree upon."

In *California* it is held that the mortgagor can insist upon the property other than the homestead being sold first. *McLaughlin v. Hart*, 46 Cal.

638. The same rule prevails in *Iowa*. *Equitable Life Ins. Co. v. Gleason*, 62 Iowa 277.

In *Grant v. Parsons*, 67 Iowa 31, a senior mortgage embraced a homestead; a junior mortgage did not. It was held that while a literal construction of the Iowa statute would justify the junior mortgagee's right to an assignment that would cut off the homestead, such a construction should not be given.

In *Armitage v. Toll*, 64 Mich. 412, the facts were as follows: D owned a farm of one hundred acres divided by a road leaving about forty acres upon one side, upon which the buildings were erected, and which constituted his homestead, and sixty acres on the other. D and his wife executed a mortgage on the entire one hundred acres. Subsequently D, his wife not signing, executed a second mortgage on the same property which contained a clause to the effect that D selected the forty acres as his homestead. In a suit to foreclose the first mortgage the court held that the sixty acres must be first sold to satisfy the mortgage, and that the second mortgagee could not force the first mortgagee to sell the homestead for his claim.

In *North Carolina*, the doctrine of marshalling is not applied in cases where the homestead is involved. *Wilson v. Patton*, 87 N. Car. 318.

Exemption in Pennsylvania.—In the recent case of *Hallman v. Hallman*, 124 Pa. St. 347, the whole question of marshalling in cases where exemption has been waived, is carefully considered by JUDGE MITCHELL. In that case the facts were as follows: On February 23rd, 1888, the real estate of James T. Hallman was sold at sheriff's sale for \$700. All of Hallman's personal property amounting to only \$6, had been previously appraised to him on account of his claim under the exemption act. At the time of the sale there were two judgments against the property; the first, for \$70, containing a waiver of exemption; the second, for \$660 without a waiver of exemption. Hallman claimed out of the proceeds a balance of \$294 under the \$300 exemption act. On a case stated between Hallman and the second judgment creditor, the court below entered judgment for the judgment creditor. On a writ of error the supreme court reversed the judgment. After a consideration of the authorities in *Pennsylvania* JUDGE MITCHELL

stated the following propositions as being established. First, a waiver as to any lien will enure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law. Secondly, a waiver as to any lien will enure to the benefit of subsequent creditors, so far as to compel the waiver-creditor to resort first to the exempted fund, on the principle of the equity of creditors having one and two funds, respectively, under their control. Thirdly, a waiver will not enure to the benefit of subsequent liens beyond its own amount; so that if the waiver-judgment is less than \$300, the balance will go to the debtor claiming his exemption, and this on the broad ground that men may do what they will with their own, provided they do not contravene the settled rules of law, or impair the rights of others. The case of *Johnston & Sutton's Appeal*, 25 Pa. St. 116, was approved and followed. The following cases were cited: *Bowyer's Appeal*, 21 Pa. St. 210; *Garrett's Appeal*, 32 Pa. St. 160; *McAfoose's Appeal*, 32 Pa. St. 276; *Shelly's Appeal*, 36 Pa. St. 373; *Pittman's Appeal*, 48 Pa. St. 315; and *Jimmison's Appeal*, 13 W. N. C. (Pa.) 25.

In *New York*, if a debtor waive the privilege in favor of a mortgagee, such waiver will render the premises liable to execution at the suit of a prior judgment-creditor, whose judgment is a lien. *Smith v. Brackett*, 36 Barb. (N. Y.) 571.

Partnership and Separate Property.—By the doctrine of marshalling a joint creditor of a firm may be entitled to collect his claim from the separate estate of a partner. In *ex parte Salting*, L. R., 25 Ch. D. 148, a firm wrongtully pledged the goods of a customer to their bankers for an advance to the firm. One of the partners gave to the bankers a separate guarantee for the advance. The firm became bankrupt and the bankers sold the goods and applied the proceeds to their debt. They then proved for the residue against the separate estate of the partner who had given the guarantee. His separate estate was more than sufficient to pay the whole debt. It was held that the owner of the goods was entitled to have the banker's securities marshalled, and to have the benefit of the guarantee to the extent of the value of the goods which had been sold, and prove for that value against the separate estate of the partner who had given the guarantee.

In *ex parte Alston* the facts were as follows: A firm in Ceylon employed a firm in England as their agents and factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee were made in this manner, and bills accepted by the English firm against them. The English firm then pledged the coffee, together with certain securities of their own, with a broker, to secure a debt due from them to him. The English firm became insolvent, and executed a creditor's deed under the Bankruptcy act, and then the broker sold the coffee (which produced more than sufficient to cover the bills drawn against it) and enough of the other securities to satisfy the debt. The court held that the Ceylon firm were entitled as against the English firm in liquidation, to have the remaining securities in the broker's hands marshalled, and to have a lien thereon for the balance due to them upon the coffee transaction.

Where a partner who gives a mortgage on land which belongs to him individually, for a partnership debt, and the mortgaged premises are taken for the debt, the mortgagor and his separate creditors may be subrogated to the remedy of the joint creditor against the assets of the partnership. *Averill v. Loucks*, 6 Barb. Ch. (N. Y.) 470. See also *Frow's Estate*, 73 Pa. St. 459; *Morris v. Oakford*, 9 Pa. St. 498; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 168; *McCormick v. Irwin*, 35 Pa. St. 111.

Dower.—In *Platt v. Brick*, 35 Hun (N. Y.) 121, a curious case arose as to an inchoate dower interest. A purchased from B's assignee in bankruptcy an equity of redemption. There was also an outstanding mortgage of the land in which B's wife had joined. The court held that A could compel an assignment of the outstanding mortgage for the purpose of protecting himself against the inchoate right of dower of B's wife, she not having released her dower by the mortgage purchased by A.

Funds in Different Jurisdictions.—Where a judgment has been entered in two counties, it will not be enforced to the prejudice of a subsequent judgment creditor who has a lien in only one. Thus D owned land in Philadelphia and Chester county, Pennsylvania. C entered a judgment against him in Philadelphia on September 21st, which

there are two funds already in existence before the question of marshalling is raised.¹

IV. HOW THE EQUITY OF MARSHALLING IS ENFORCED.—There are several remedies by which the equitable right of marshalling may be enforced.

1. Injunction.—If no delay or inconvenience will result to the senior creditor, a court of equity may restrain him by injunction from proceeding upon the doubly charged fund.²

by transfer became a lien in Chester county on September 22d, 1868. H entered a judgment in Philadelphia on December 26th, 1868. S recorded a mortgage in Chester county on December 9th, 1869. T entered a judgment in Philadelphia on December 15th, 1869, which on the following day by transfer became a lien in Chester county. On April 9th, 1870, C assigned his judgment with its liens to H. On June 6th, 1870, the sheriff sold D's land in Philadelphia for enough to pay C's judgment. On October 22d, 1870, the sheriff sold D's land in Chester county for enough to pay C's judgment. The proceeds of the sale in Philadelphia being in the sheriff's hands, the proceeds in Chester county were awarded to C's judgment assigned to H. *McDevitt & Hay's Appeal*, 70 Pa. St. 373. See also *McGinnis' Appeal*, 16 Pa. St. 445.

A creditor may even be required to proceed upon property without the State. *The Y. & J. Steamboat Co. v. The Jersey Co.*, 1 Hopkins 461. In such a case the court will not ordinarily go further than to grant a decree of subrogation on the payment of the debt. *Woolcocks v. Hart*, 1 Paige (N. Y.) 185.

1. In the case of *In re Professional Life Assurance Company*, 3 L. R., Eq. 668, the necessity of the actual existence of the two funds was enforced. By the deed of settlement of the company, and by the terms of the policies issued by the company, it was provided that the capital stock and funds of the company should alone be liable to claims in respect of the policies, and that no shareholder should be liable to such claims beyond the amount of the unpaid part of his share in the capital of the company. The company became insolvent, was wound up, and calls to the full amount of the unpaid capital were made, and the proceeds of such calls, together with the other assets of the company, were applied in paying part of the costs of the winding up, and in paying dividends on the debts due to policy holders and general creditors *pari*

passu. It was held that the doctrine of marshalling did not apply, and that no further call could be made upon the share holders for the purpose of recouping to the policy holders the amount of the capital which had been paid to the general creditors, but that the costs of the winding up must be borne by the share holders, and not be paid out of the capital of the company, and consequently a further call must be made, not only to pay the balance of the debts of the general creditors, but also to replace the capital which had been applied in the payment of costs. *LORD ROMILLY, M. R.*, said: "It is a settled principle of law that where there are two classes of creditors and two funds, and one class of creditors can only go against one fund, while the other class of creditors can go against both, the court will marshal the assets and restrict the creditors what have a double security from touching the fund applicable to payment of the first class of creditors, until they are paid in full. . . . The contest here is, whether that principle has any application to this case. The contributories deny that there are two funds; they argue that the contention of the policy holders, if successful, would be to create two funds in order to raise the question, or . . . it is admitted that there cannot be any marshalling of assets until the two funds exist, but you raise the question of marshalling, and claim a right to marshal in order to create a fund for that purpose which does not now exist. . . . If the question of marshalling could have arisen at all, it must have arisen at the moment of what I may call the death of the company, on the 11th day of May, 1861, but there were no two funds to marshal at that time; the fund then existing was applicable indiscriminately to pay all, and those who contracted that they would receive payment out of that fund and no other must go to that extent unpaid."

2. Thus where a creditor in New Jersey, in which State all the parties

2. Decree of Subrogation.—The more usual remedy, however, is a decree of subrogation, by which the junior creditor is given the benefit of another security in place of the one of which he has been disappointed.¹

resided, took from B, the holder of a promissory note endorsed by the plaintiff, on a loan of money alleged to be usurious, a bond and mortgage, which was ample security for the debt, and instead of resorting to the bond and mortgage, or to the principal debtor, sued the plaintiff at law in New York, the court granted an injunction to stay the suit at law until the creditor had pursued his remedy on the mortgage in New Jersey. *Hayes v. Ward*, 4 Johns. (N. Y.) Ch. 123. See also *Irick v. Black*, 2 C. E. Green (N. J.) 189.

An injunction, however, is seldom granted, and then only under peculiar circumstances. Mr. Bispham, in his treatise on Equity, § 341, says: "It is true that there are many dicta to the effect that a creditor will be restrained from resorting to one of two sources of payment, and compelled to look to the other; but in practice the rule has been seldom applied (except under peculiar circumstances) because it would appear to be unjust that a creditor, who had taken pains to obtain ample security, should be limited in his rights of enforcement, and exposed to delay; more especially as the ends of justice can be completely attained by the application of the doctrine of subrogation. A paramount encumbrancer ought to be allowed to choose the method of collecting his debt, and all that a junior creditor can fairly ask is that he shall have liberty to resort to another source of payment in place of the one of which he has been deprived."

In *Evertson v. Booth*, 19 John. (N. Y.) 496, the court said: "But a court of equity will take care not to give the junior creditor this relief, if it will endanger thereby the prior creditor, or in the least impair his prior right to raise his debt out of both funds. The utmost that equity enjoins, in such a case, is that the creditor who has a prior right to two funds shall first exhaust that to which the junior creditor cannot resort; but, where there exists any doubt of the sufficiency of that fund, or even where the prior creditor is not willing to run the hazard of getting payment out of that fund, I know of no principle in equity which can take from him any

part of his security until he is completely satisfied."

In *Woolcocks v. Hart*, 1 Paige (N. Y.) 185, a bill in equity was filed by a junior creditor against a prior judgment creditor, who had also an assignment of certain real and personal property of the debtor situated in New Jersey. The defendant filed an answer in which he averred that the New Jersey land was subject to a prior mortgage and that its title was defective. He offered to assign his judgment and the collateral to the junior creditor if he would pay the amount due on the senior judgment. This was declined, the bill was filed and an injunction obtained. The court subsequently ordered a decree dissolving the injunction, unless the complainant should pay to the defendant the amount of the defendant's execution on the terms of the offer contained in the answer. See also *Arna's Appeal*, 65 Pa. St. 72.

In *Missouri*, it was held that a judgment creditor could not, pending his appeal from an order setting aside the judgment, maintain a suit in equity to compel a mortgagee to sell that portion of the mortgaged premises to which he could not resort before proceeding to sell the remainder. *Burgess v. Hitt*, 21 Mo. App. 313.

In *Illinois*, it was held that the purchaser of a part of certain land, upon which there was a judgment against his vendor for purchase money, might enjoin the sale of his portion to satisfy the judgment until the land retained by his vendor was exhausted.

1. In *Neff's Appeal*, 9 W. & S. (Pa.) 36, Mrs. Wilcox held a joint judgment against Miller and Neff, Neff being surety for Miller. On other judgments against Neff his land was sold and the proceeds brought into court. The junior encumbrancers claimed that Mrs. Wilcox should not be permitted to come in on the fund until she had exhausted her remedies against Miller, whom they averred was entirely responsible. The claim was refused and an appeal taken; the supreme court sustained the decision of the lower court, KENNEDY, J., saying, "the argument of the appellants would be irresistible, perhaps, if the real estate of the Millers

had been converted into money and brought into court for appropriation as Isaac Neff's was. But this was not the case, and could not be effected without considerable delay, a delay most probably of six months at least, which might be very injurious to Mrs. Wilcox, who had an undoubted right to receive the amount of her judgment immediately out of the moneys in court arising from the sale of Isaac Neff's estate. Her right in this respect was not only legal and perfect, but likewise consistent with every principle of equity. It would therefore have been wrong to compel her to give up her right to receive the amount of her judgment out of the money in court, or to have postponed the payment of it a single day after it was judicially ascertained that she was clearly entitled to have it paid out of money in court. If the Messrs. Neffs [the junior encumbrancers] had any claim or right to have the appropriation made of the money in court which they requested it was purely equitable, and such as they could not ask to have carried into effect at the expense, or more properly, as it may be said, the sacrifice, of either the legal or equitable rights due to others. To entitle themselves to relief or any benefit on the ground of equity, it was incumbent upon them to do equity by placing Mrs. Wilcox immediately in the possession of the money due and coming to her on her judgment, that is by paying it, instead of asking that she should be delayed for some uncertain period of time in the receipt of it. Had they paid or tendered her the amount of her judgment, and in case of her refusal to accept have brought it into court, they might then have been said to stand on ground that would most probably have entitled them to an order or decree of the court giving them the benefit and control of Mrs. Wilcox's judgment."

In *South Carolina*, a creditor was secured by a mortgage of land and slaves, and the land was afterwards sold by the mortgagor, and one of the slaves was sold by the sheriff under executions issued part before and part after the mortgage. The sum received by the sheriff was sufficient to satisfy the senior executions, and the balance of the mortgage debt. The mortgagee, however, was not compelled to resort to this fund, because he might thereby incur the expense and risk of litigation. He was permitted to foreclose the mortgage, and the court held that the

remedy of the purchaser of the land was to pay the mortgage debt and be subrogated to the rights of the mortgage creditor. *Walker v. Covar*, 2 S. Car. 16.

In *Millsaps v. Bond*, 64 Miss. 453. A filed a bill to foreclose a mortgage on two lots. M, who held a junior mortgage on one of the lots answered and insisted that the lot not covered by his mortgage should be first sold. A then moved to dismiss his bill as to the lot not covered by M's mortgage. The motion was not sustained, but a final decree was entered ordering that the lot covered by both mortgages be sold without any directions as to the other lot. M then appealed and the supreme court reversed the decree, holding that the land not included in the junior mortgage should be decreed to be sold first. See also *Sternberg v. Valentine*, 6 Mo. App. 176; *Russell v. Howard*, 2 McLean (U. S.) 489; *Kendall v. New England Carpet Co.*, 13 Conn. 383, 394; *Andreas v. Hubbard*, 50 Conn. 351; *Sibley v. Baker*, 23 Mich. 312; *Warner v. DeWitt Co.*, 4 Bradw. (Ill.) 305; *Turner v. Flinn*, 67 Ala. 529; *Ramsey's Appeal*, 2 Watts (Pa.) 228; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Nelson v. Dunn*, 15 Ala. 501; *Fassett v. Traber*, 20 Ohio 540; *Hannegan v. Hannah*, 7 Blackf. (Ind.) 353; *Pallen v. The Agricultural Bank*, 1 Freeman (Miss.) Ch. 419; *Goss v. Lester*, 1 Wis. 43; *Thompson v. Murray*, 2 Hill (S. Car.) Ch. 10; *Williams v. Washington*, 1 Dev. (N. Car.) Eq. 137; *Briggs v. The Planters Bank*, 1 Freeman (Miss.) Ch. 575; *Bruner's Appeal*, 7 W. & S. (Pa.) 269; *Hastings' Case*, 10 Watts (Pa.) 303.

In *Sims v. Albee*, 72 Ga. 751, a creditor had by suit and a compromise verdict subjected a part of the debtor's property to his judgment, relinquishing the rest as a part of the compromise. It was held that the other creditors were bound to look first to the part relinquished, it being equally accessible to them.

In *Milmine v. Bass*, 29 Fed. Rep. 632, an owner of land subject to the lien of a judgment, mortgaged a part of the land to one person and thereafter mortgaged the remainder, the value of which was more than the amount of the judgment. Afterwards the land conveyed by the first mortgage was levied on and sold under execution issued on the judgment, and was purchased at the execution sale by the mortgagee of the remainder of the land. It was held

3. Decree of Distribution.—Where both funds have been brought into court they will be distributed according to equity.¹

that the mortgagee of the land so sold might have compelled the sale of the land to satisfy the execution before the property covered by his mortgage was resorted to; and although, having failed to assert such right, he was not entitled to have the sale annulled, he might compel the purchaser to compensate him to the extent of the value of the property so sold, not exceeding the amount due upon his mortgage.

Notice.—The prior encumbrancer is entitled to notice of the junior claim, and of the intention of the junior creditor to compel him to make his election. *Ross v. Duggan*, 5 Colo. 85.

In *Hosmer v. Campbell*, 98 Ill. 572. it was held that a purchaser of one of several tracts mortgaged must give actual notice of his interest to a prior mortgagee if he intends to insist that the property shall be sold in the reverse order of alienation. Such mortgagee is not bound to examine the records to ascertain if anyone will be affected by his action.

Horning's Appeal, 90 Pa. St. 388, turned on the question of notice. In that case the executors of A had a judgment which was a first lien upon several tracts of land belonging to B. The latter mortgaged one of these tracts to C, and under a judgment obtained upon the mortgage, the tract was sold. In the distribution of the proceeds, the executors declined to take their money and allowed it to be applied to the mortgage. Subsequently B conveyed another of his tracts to D, who gave a mortgage for the purchase money. The mortgage was accompanied by eleven bonds, upon one of which the mortgaged premises were subsequently sold, and the fund brought into court for distribution. The holders of the bonds contended that the executors of A having declined to take the fund on the previous distribution, must now be postponed to them. The supreme court held that the executors should have been allowed to participate in the fund; that if the interests of junior lien creditors require that a prior lien creditor shall do or omit to do a particular thing, they should give him notice thereof before they seek to hold him responsible for any such acts or omissions. JUDGE PAXSON in his opinion said: "I have discussed the point made by the appel-

lees as though they were entitled to raise it. I seriously doubt their right to do so. There is nothing in this record to show that they gave notice to Horning's executors to take their money out of the fund created by the sale on the Moore, McWilliams & Co. mortgage or that the executors even knew of the existence of the appellee's mortgage. A lien creditor is not bound to search for subsequent encumbrances and is not affected with record notice of them. It was held in *Taylor's Executor v. Morris*, 5 Rawle 50, that 'the holder of a judgment, a lien on land, a portion of which is covered by a subsequent mortgage, does not, by releasing a part of the land bound by the judgment, impair his right to be paid out of the remainder, including the portion embraced in the mortgage, unless the mortgagee has distinctly notified him of his mortgage before the release, and cautioned him against doing an act by which the mortgagee's security may be diminished; and the recording the mortgage is not such notice.' This is a sound and reasonable rule." See also *Uniontown Building & Loan Assoc. Appeal*, 92 Pa. St. 200; *Quakertown B. & L. Assoc. v. Server*, 11 Phila. (Pa.) 532. In the latter case A, who had a judgment in Montgomery and also in Bucks county, agreed that the lien of his judgment in the former county should be postponed to the extent of \$800 to B's judgment. The court held that this did not postpone or affect the lien of his judgment in Bucks county as against a subsequent judgment creditor in that county who did not notify A of his position.

1. In *Hastings' Case*, 10 Watts (Pa.) 303, H being the owner of lot No. 68, a judgment was obtained against him by E for \$347.25. This judgment was afterwards revived, before which time H became the owner of lot No. 30. During this interval H mortgaged the first mentioned lot, No. 68, to S for \$2,500. Afterwards H acquired a third tract, and then A obtained a judgment against him for \$1,107.51. The three pieces of land were sold on an execution, and lot No. 68 brought \$400, lot No. 30 \$180, and the third tract \$50—total \$630. This money being brought into court, it was decreed that the price of lot No. 30 should be first applied to E's judgment, and the residue of that judgment should

4. **Case Stated.**—Subrogation may be effected by proceedings at law as by a judgment on a case stated.¹

5. **Foreclosure.**—Marshalling in case of mortgages is often effected through a decree of foreclosure.²

V. RIGHTS OF THE PARAMOUNT CREDITOR.—Marshalling will not be enforced if the paramount creditor is materially delayed or hindered thereby in the collection of his debt; nor will it be enforced if any part of the paramount debt remains unsatisfied.³

be satisfied out of lot No. 68; that the remainder of the price of lot No. 68 should be applied to S's mortgage; and lastly, that the price of the third tract should be applied to A's judgment.

In *Anger's Succession*, 36 La. An. 252, it was held that where two distinct immovables in a succession are subject to the same first mortgage and each subject to different second mortgages, the administrator cannot, by provoking a sale of one before the other, benefit the second mortgages on the immovable unsold, to the prejudice of those on that sold, by the distribution of the entire price of the latter to the extinguishment of the first mortgage. The court held that the proceeds of both should be marshalled for simultaneous distribution. See *Robeson's Appeal*, 117 Pa. St. 628.

In *Thomas v. Moravia Foundry & Machine Co.*, 43 Hun (N. Y.) 487, there was a decree of distribution of a fund in court. In that case L and R gave to plaintiff two mortgages on four separate parcels of land, two of which parcels belonged to R, the others belonging to both. Subsequently L and R mortgaged one of the last named parcels to defendant; and afterwards they mortgaged the other to plaintiff. The court held that from the fund realized from the sale of R's land and from the sale of the lot carried by plaintiff's last mortgage should be satisfied plaintiff's two first mortgages, and that the balance of the fund should be applied to the payment of the mortgage given to defendant rather than to the payment of plaintiff's third mortgage.

1. *Dunn v. Olney*, 14 Pa. St. 219.

2. Thus in an action to foreclose a mortgage upon a city lot of 100 feet front, it appeared that a subsequent mortgage was executed covering the whole premises, but that the holders released from its lien the northerly 40 feet upon which a third mortgage was executed. The mortgagor died seized of the whole premises, leaving a will by

which she devised the 60 feet and the 40 feet separately, in trust for different beneficiaries. The amount due upon the three mortgages exceeded the value of the whole lot. If the forty feet were first sold, and for full value, after payment of plaintiff's mortgage, only sufficient would be left to pay about one-third of the last mortgage, while the devisees of the sixty feet which were of value sufficient to pay the mortgage thereon, and leave a surplus of about \$3,000, would hold the equity of redemption relieved of the lien of plaintiff's mortgage. The court decreed a sale of the whole lot and that the mortgages should be paid according to their priority out of the proceeds. *Bernhardt v. Lymburner*, 85 N. Y. 172.

3. A possible wrong that might be done to a creditor by an enforcement of this equity is noticed by JUDGE KENNEDY, in *Kyner v. Kyner*, 6 Watts (Pa.) 221, where he says: "A creditor having acquired by his judgment, a lien upon two tracts of land, it may be very material to him, whether he shall proceed by execution against the one or the other, in order to collect his debt, notwithstanding either may be of sufficient value to satisfy it; for if the rents, issues and profits beyond all reprises of the one be sufficient, within the space of seven years, to satisfy his debt, he cannot have it paid at once by a sale of the land, but must wait and take it out of the rents, issues and profits, which may prolong the payment thereof, for the space of seven years, but by proceeding against the other tract, which may bring as much money on a sale thereof being made as the first, but being wild and unimproved land, will yield no annual profit, and must, therefore, be sold, he is thus enabled to receive the whole of his claim in the course of seven or eight months. In such a case, therefore, it is not likely that the court would interfere on behalf of the younger judgment creditor, who had a lien only on the unimproved

tract, though not of more value than sufficient to satisfy his claim, and compel the elder judgment creditor to proceed against the improved tract to make his claim out of it, because under such circumstances it would be doing great injustice to him, by hindering and delaying him in the collection of his debt, which he in justice had a right to receive as early as he could possibly obtain it from that portion of the debtor's estate within his reach, and most likely to produce it."

In *Woolcocks v. Hart*, 1 Paige (N. Y.) 185, the complainant was a judgment and execution creditor of one Dreamer. The defendant, Hart, had also an older judgment and execution against Dreamer, who had not sufficient property in the State to satisfy both judgments. Hart had also an assignment of certain real and personal property, in New Jersey as collateral security for his debt, which in his answer he alleged was subject to a prior mortgage, and that the title thereto was doubtful. The complainant applied to him to delay a sale under his execution, and apply the Jersey security in the first place in satisfaction of his debt. This was declined by Hart, but he offered to assign his judgment and all the collateral security which he held over to the complainant, if he would pay the amount due to him on the judgment. The complainant declined this offer, filed his bill and obtained an injunction. On a motion to dissolve the injunction, the court said: "Under the circumstances of this case the defendant was not obliged to delay the collection of his debt until he could apply the proceeds of the Jersey property. The assignment of the Jersey property, although absolute on its face, was only a mortgage, and of course no good title can be given until a foreclosure of the equity of redemption against Dreamer. It would be inequitable for this court to compel him to submit to that delay when he offers to give to the complainant all the benefit which can be derived from that collateral security." The court ordered that the injunction should be dissolved unless the complainant should make payment to the defendant on the terms of the offer contained in the answer.

In *Evertson v. Booth*, 19 Johns. (N. Y.) 486, it was held that where the sufficiency of the fund to which the junior creditor cannot resort is doubtful, or the prior creditor refuses to run the

hazard of obtaining satisfaction of his debt out of that fund, equity will not také from him any part of his security until his debt is paid.

In *Francis v. Herren*, 101 N. Car. 497, the holder of a contract for the conveyance of certain land registered the contract after certain judgments had become liens on the land. The judgment creditors proposed to sell under their executions, and the holder of the contract sought to have their sales postponed, and to have them required to exhaust first the other assets and property of the judgment debtor. It appeared, however, that this course would entail litigation and delay. The court accordingly held that the judgment creditors should not be restrained from enforcing their executions according to their strict legal right. See also *Briggs v. The Planters' Bank*, 1 Freeman (Mass.) Ch. 574; *Ramsey's Appeal*, 2 Watts (Pa.) 228; *Herriman v. Skillman*, 33 Barb. (N. Y.) 378; *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 328; *Westerville v. Haff*, 2 Sandf. (N. Y.) Ch. 98; *Neff's Appeal*, 9 W. & S. (Pa.) 36; *Plain v. Roth*, 107 Ill. 588; *Evans v. Duncan*, 4 Watts (Pa.) 24; *Gray v. Heynut*, 32 Md. 552; *Jones v. Zollicoffer*, 2 Hawks (N. Car.) 623; *Kidder v. Page*, 48 N. H. 380; *Coker v. Shrophire*, 59 Ala. 542; *Clark v. Wright*, 24 S. Car. 526.

Burden of Proof.—The burden of proof is upon the junior creditor who wishes to restrict the paramount creditor to a particular fund, to show that it affords a sure and adequate means of payment. *Woolcocks v. Hart*, 1 Paige (N. Y.) 185; *Holditch v. Mist*, 1 Peere Williams 695. In *Wright v. Simpson*, 6 Vesey 714, a bill in equity was dismissed under the following circumstances: Sir James Wright, an American loyalist, was compelled to leave his home in Georgia and his estate was confiscated by the State, and vested in commissioners for the public use, saving the rights of such of his creditors as were well disposed to the cause of American independence. One of his American creditors pursued him to England and there obtained judgment against him. Wright subsequently died and his representatives filed a bill against the American creditor praying that he might be directed to have recourse in the first instance to the fund which was open to him in the United States. The answer averred that the claim had been presented to the

If the assets of a debtor are insufficient to satisfy all of his debts, a creditor who has a right to resort to a fund open to himself alone is not precluded from claiming, from the fund of the estate which is open to all creditors, a dividend on the full amount of his debt. He is not limited merely to a dividend on the balance; but the total received by him cannot exceed the sum due.¹

VI. DEFAULT OF THE PARAMOUNT CREDITOR AFTER NOTICE.—If a paramount creditor, after notice, knowingly does any act by which the junior creditor is defeated in his right of subrogation, he will be liable to the extent of the injury. If he has knowingly put it out of his power to make an assignment of his rights in the singly charged fund, he may be precluded from so much of his demand as the junior creditor might have recovered if the assignment could have been made.²

Georgia commissioners, but had been disallowed. *LORD ELDON* dismissed the bill, holding that the evidence did not show that the creditor had any certain means of recovering his debt in Georgia or that he had committed any wilful default.

Holditch v. Mist, 1 Peere Williams 695, was somewhat similar. There, an act of parliament divested the estate of a South Sea director and vested in the hands of trustees for the payment of his debts. The court held that the act did not render it incumbent on a creditor to have recourse to the fund thus set apart, or warrant an injunction restraining him from proceeding according to the ordinary course of law.

1. *Shunk's Appeal*, 2 Pa. St. 304; *Bair's Appeal*, 82 Pa. St. 113; *Findlay v. Hosmer*, 2 Conn. 350; *West v. The Bank of Rutland*, 19 Vt. 103; *Jarvis v. Smith*, 1 Abb. (N. Y.) Pr. N. S. 217; *Logan v. Anderson*, 18 B. Mon. (Ky.) 114; *Moss v. Raulet*, 2 N. H. 488. The rule seems to be different in Iowa. See *Wurtz v. Hart*, 13 Iowa 515. By the United States Bankruptcy Act of 1867 the creditors who held security had the option to prove for the balance of their claim, or to surrender the security and prove for their whole debt. See *Wallace v. Conrad*, 3 Brewst. (Pa.) 329; *Cook v. Farrington*, 104 Mass. 212; *Amory v. Francis*, 48 Mass. 368; *Wurtz v. Hart*, 13 Iowa 515.

In *Third National Bank of Baltimore v. Lanahan*, 66 Md. 461, a firm made an assignment for the benefit of creditors. A bank, one of the creditors of the firm, held as security for its debts notes of third parties belonging to the firm,

and collected a large sum therefrom. It was held that the bank was entitled to a dividend only on that part of its claim which remained unpaid after deducting the sums of money received from the collateral securities.

2. *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 413. A mortgagee, who has released a vendee of the mortgagor for a valuable consideration, cannot recover against a prior vendee of the mortgagor, as between whom and the second vendee the land of the latter was primarily liable for the mortgage money. *Paxton v. Harrier*, 11 Pa. St. 312.

In *Parkman v. Welch*, 19 Pick. (Mass.) 231, a mortgage was made of two parcels of land as security for the payment of a sum of money, and the right in equity to redeem one parcel was transferred to A and the right to redeem the other to B. The mortgagee afterwards released A's parcel from the mortgage. The court held that B on redeeming could not compel A to contribute, but that B was entitled to have an abatement of such a proportion of the sum due on the mortgage as the value of A's parcel bore at the time of the execution of the mortgage, to the value of both parcels. See also *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Berry v. Convention of the Episcopal Church*, 7 Md. 564; *Mount v. Potts*, 8 C. E. Green (N. J.) 188; *Teaff v. Ross*, 1 Ohio St. 469; *Welsh v. Beers*, 8 Allen (Mass.) 151; *Gaskell v. Sine*, 2 Beasley (N. J.) 62.

In *Groot v. Hitz*, 3 Mackey (D. C.) 247, it was held that when a creditor by his laches has lost his right to pro-

VII. AS BETWEEN CREDITORS OF DIFFERENT PERSONS.—In general the doctrine of marshalling does not apply as between creditors of different persons. Thus if A has a joint judgment against B and C, and X has a separate judgment against B alone, X cannot require A to proceed against C in the first instance.¹

ceed against the real estate, the doctrine of marshalling the assets by which the proceeds of the real estate will be first applied in the payment of the other creditors is not applicable.

In *Gusdorf v. Ikelheimer*, 75 Ala. 148, it was held that an execution creditor who at the time of levy on property sufficient to satisfy his claim, held certain choses in action of his debtor as collateral, would be compelled in equity to apply them to the satisfaction of his claim, to that extent releasing the property on which another creditor had subsequently levied; and that an agreement between the debtor and judgment creditor, after the levy and transfer of the collateral, that the latter should be used only to supply any deficit under the execution, could not impair the other creditor's right to the marshalling.

In *Depeyster v. Hildreth*, 2 Barb. Ch. (N. Y.) 109, S. S. & Co., certain creditors, had a prior judgment lien on premises which were mortgaged to the complainant. They subsequently levied on the personal property of the mortgagor to an amount sufficient to pay the debt. Subsequently they withdrew their execution, and all of the debtor's personal property was swept away by other judgments. The court held that it was inequitable as to the complainant for S. S. & Co. to consent to withdraw the first execution from the hands of the sheriff, so as to discharge the personal estate which the defendants in the judgment had at the time of issuing that execution, and to leave their judgment to be satisfied out of the real estate which had previously been mortgaged to the complainant; that the complainant's equity, to be paid out of the proceeds of the mortgaged premises, was greater than that of S. S. & Co., who had lost the opportunity to have their judgment satisfied out of other property of their judgment debtors by their own acts and by their negligence.

In *Ingalls v. Morgan*, 12 Barb. (N. Y.) 578, where land, bound by the lien of a judgment, was sold, and the notes given for the price delivered to the

judgment creditor with an agreement that he should collect them and apply the proceeds to the payment of the judgment debt, it was held that the creditor could not surrender the notes to the judgment debtor without losing the right to proceed against the land in the hands of the purchaser.

In *Alexander v. Welch*, 10 Ill. App. 181, it was decided that if one holding a first mortgage on land has additional security upon personalty, which he releases, or by his negligence loses, one holding a subsequent encumbrance on the land only may compel the first mortgagee, upon foreclosure, to deduct the value of the security so released or lost, provided the first mortgagee had notice actual or constructive of the subsequent encumbrance. It was further held that constructive notice will be presumed if, after the recording thereof, the first mortgagee, in taking a deed of or another mortgage upon a part of the same land, was driven to the record. See also *Washington Building Assoc. v. Beaghn*, 27 N. J. Eq. 98; *Glass v. Pullen*, 6 Bush (Ky.) 346; *Ingalls v. Morgan*, 10 N. Y. 178.

When the release is made in good faith the release of the primary fund, however, will not prejudice the prior creditor if made in good faith and without notice. Thus where a prior mortgagee has a second mortgage on another piece of land, but does not know of a subsequent mortgage on the first piece, he may release his mortgage on the other piece without being chargeable for the benefit of the subsequent mortgagee, with the value of that security upon his mortgage debt. See also *Shields v. Kimbrough*, 64 Ala. 504; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409; *Kidder v. Page*, 48 N. H. 380.

1. The principle is stated by LORD ELDON in *Ex parte Kendall*, 17 Vesey 520, as follows: "If A has a right to go upon two funds and B upon one, of the same debtor and the funds are the property of the same person, A shall take payment from that fund to which he can resort exclusively, so that both may be paid; but it was never said that if I

have a demand against A and B, a creditor of B shall compel me to seek payment from A, if not founded in some equity giving B the right for his own sake to compel me to seek payment of A."

LORD ELDON's words were quoted in *Meech v. Allen*, 17 N. Y. 301, in which case it was decided that equity will not supersede the legal priority of a judgment for a partnership debt rendered after the death of one partner, upon the real estate of the survivor, held in his individual right, in favor of a junior judgment against such survivor for his individual debt, though there is no other property to satisfy the latter judgment, and there is sufficient estate of the deceased partner to satisfy the judgment of the partnership creditor. The court held that it must appear that the estate of the deceased partner is bound in equity to relieve that of the survivor before a creditor having a right to resort to both can be required by a separate creditor of the survivor to resort first to the estate of the deceased partner.

In *Lloyd v. Galbraith*, 32 Pa. St. 103, one of several tracts of land encumbered by a common lien was aliened by the debtor. A creditor having a lien upon all the tracts, levied on and sold those remaining in the debtor. A junior encumbrancer who had a lien on those levied on, but not on the one previously aliened, was held not to be entitled to subrogation as against the tract so aliened. The decision was based on the principle that if one of several tracts of land, encumbered by a common lien, be aliened by the debtor, the tracts still remaining in him are in equity first liable to discharge the encumbrance. The funds did not belong to the same debtor, and the one which had been aliened was exempt from seizure until the other had been exhausted.

In *Dorr v. Shaw*, 4 Johns. (N. Y.) Ch. 17, the defendant had a judgment against a father and son, binding upon seventy-two acres of land owned by the father and thirty acres owned by the son. The plaintiff was the holder of a junior judgment on the father's land. He subsequently bought the father's land and the defendant became the purchaser of that which was owned by the son. The bill prayed that the defendant should be enjoined from levying on the seventy-two acre tract, or be compelled to assign his judgment to the plaintiff on receiving the debt, interest and costs. CHANCELLOR KENT said

that if both judgments had been against the father only, "the rule that the prior creditor must be thrown first on the fund not reached by the second judgment might have applied. But here we have no means of knowing whether he or his son ought to pay the debt, and it might be very unjust, as between these two original debtors, if the court should interfere and charge the debt upon one of them instead of the other. They are not before the court and we have nothing in the case to guide us in making a selection between them, the consequence is that we cannot interfere." See also *Lee v. Gregory*, 12 Neb. 282; *Lloyd v. Galbraith*, 32 Pa. St. 103; *Sanders v. Cook*, 22 Ind. 436; *Wise v. Shepherd*, 13 Ill. 41; *Ayers v. Husted*, 15 Conn. 504; *Cannon v. Hudson*, 5 Del. Ch. 112.

Mr. J. M. GEST, a writer in 27 An. Law Reg. 761 (1888), writes the following ingenious criticism of the principle of *Ex parte Kendall*: "The rule of *Ex parte Kendall* has certainly been often misapplied, and even in itself deserves careful examination. It is acknowledged that if A has a lien upon funds B and C, and D has a lien upon fund B only, equity will compel A in favor of D and against the common debtor of both, to exhaust fund C before impairing D's security, or what is the same thing, to substitute D to A's rights against B. This rule LORD ELDON refused to apply to the case, where the two funds were the property of two different creditors; *i. e.*, if A is a creditor of B and C, and D a creditor of B alone, A cannot be compelled to satisfy his debt from C's property in order that D may obtain payment from B's, because in such case C's property would be taken to pay B's debt to D. To this, however, there is the well recognized exception that if the relation of suretyship exists between B and C, so that B is a surety for C's debt, A may be compelled to make him pay who is primarily liable, and leave the surety's property to pay the surety's debts. Huston's Appeal, 69 Pa. St. 485. The thought, however, which naturally suggests itself, is that as between two joint debtors, he who pays the common debt is entitled to contribution from the other of his share. Considered relatively to each other, as to the one half of the debt, each is primarily liable; as to the other half, secondarily; as to one half, a principal; as to the other, a surety. Suppose then in the case put,

If, however, one of the joint debtors is primarily liable, marshalling may be enforced for the benefit of the creditors of the other, who is only secondarily liable for the debt.¹

VIII. MARSHALLING IN FAVOR OF SURETIES.—Wherever a person is liable to a charge which ought to be borne primarily by another person, the creditor should proceed in the first place against the person who is primarily liable, or at least assign his remedy to the person secondarily liable, on receiving the full amount of the demand. The creditor having two funds, equity will so marshal them as to do justice between the two debtors.² In accordance with this principle, if a surety is compelled to pay the debt of his principal he is equitably entitled to be subrogated to all the rights and remedies of the creditor as against the principal debtor.³

B pays the whole of B and C's debt to A, he may enforce contribution from C of his share, and there is no injustice, consequently, in making C's property pay that proportion of A's claim in the first instance."

1. *Huston's Appeal*, 69 Pa. 485.

2. *Philadelphia & Reading R. Co. v. Little*, 41 N. J. Eq. 519, it was held that in equity relief will be afforded to a surety for his indemnity out of the property of the principal, where the equitable rights of the surety may be protected without prejudicing the substantial rights of the creditor, either by an injunction bill to restrain the sale of the surety's property until the principal's property pledged for the same debt is first applied, or by a bill for subrogation to the creditor's rights against the principal's property, or by marshalling the securities and the application of them to the debt in the order in which they are equitably chargeable, according to the circumstances of the particular case.

In *Moore v. Topliff*, 107 Ill. 241, it was held that a surety is entitled to bring a bill for subrogation even before payment of the debt. See also *Delaware, Lack. etc. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151.

In *Marsh v. Pike*, 9 Paige (N. Y.) 595, the complainant in the bill sold and conveyed certain property to McLean, subject to a mortgage, which McLean covenanted to pay in consideration of a corresponding deduction from the price. McLean subsequently sold the same premises to Towle, who entered into a like covenant. After the mortgage became due, the complainant filed a bill to compel McLean and Towle to pay the judgment. The

court held that the complainant was a surety as regarded the mortgage, and that McLean and Towle were the principal debtors, Towle being primarily and McLean secondarily liable as between themselves; that the complainant was entitled to come into a court of chancery to compel the defendants, of whom he stood as a surety, to save him harmless by discharging the debt.

In *Missouri*, it was held that the holder of a note secured by collateral and by a surety cannot be compelled by the surety to look to his collateral before proceeding against him. *Callaway County Savings Bank v. Terry*, 13 Mo. App. 99.

Nor can a surety insist that security shall be exhausted before he is proceeded against. *Roberts v. Jeffries*, 80 Mo. 115.

3. In *England*, it has been held that a surety, when he has paid the principal's debt, is entitled to be subrogated to the collateral securities, but is not entitled to an assignment of the debt itself. Thus in *Copis v. Middleton*, 1 Turner & Russell, 229, two persons gave a bond, one as principal and the other as surety. The surety paid the bond. LORD ELDON decided that the surety, by paying the bond, did not become a specialty creditor, the bond being gone, but merely a simple contract debtor. Upon this principle a surety on payment is entitled to an assignment of the mortgage, but not of the bond.

JUDGE HARE, in his note to *Aldrich v. Cooper*, 2 Lead. Cases in Eq. 278, criticises the decision of *Copis v. Middleton*, as follows: "Such a distinction is hardly logical or just. It supposes that the accessory may exist,

notwithstanding the extinguishment of the principal. If the bond be gone, how can a mortgage given for the bond be enforced? It may be said that although the debt is paid, the legal estate remains in the mortgagee, and that a court of equity will compel him to use it for the surety's benefit, or compel the principal to redeem on pain of being foreclosed. But this implies that a chancellor may regard a debt which has been extinguished as it regards the creditor, as subsisting for the indemnity of the surety, contrary to the view of LORD ELDON in *Copis v. Middleton*. The argument is, moreover, inapplicable throughout the greater part of the United States, where payment *ipso facto* divests a mortgage without the necessity for a reconveyance." The rule of *Copis v. Middleton* has been changed by Statutes 19 and 20 Vict., ch. 99, § 5.

In the *United States*, where a surety pays the principal's debt, he may insist on being subrogated to all the creditors' rights respecting the debt. *Lochenmayer v. Fogarty*, 112 Ill. 572; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; *Torp v. Gulseth*, 37 Minn. 135; *Cuyler v. Ernsworth*, 6 Paige (N. Y.) 32; *Lower v. Buchanan Bank*, 78 Mo. 67; *Croft v. Moore*, 9 Watts (Pa.) 451; *Lumpkin v. Mills*, 4 Ga. 343; *Townsend v. Whitney*, 75 N. Y. 425; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Brewer v. Franklin Mills*, 42 N. H. 292; *Rockingham Bank v. Claggett*, 29 N. H. 292; *Edgerly v. Emerson*, 23 N. H. 555; *Wilson v. Burney*, 8 Neb. 39; *Wright v. Grover & Baker S. M. Co.*, 82 Pa. St. 80; *Cottrell's Appeal*, 23 Pa. St. 294; *Richter v. Cummings*, 60 Pa. St. 441; *Merriken v. Godwin*, 2 Del. Ch. 236; *Hollingsworth v. Floyd*, 2 Harr. & Gill (Md.) 87, 91; *Grove v. Brien*, 1 Md. 438; *McClung v. Beirne*, 10 Leigh (Va.) 394; *Carr v. Glascock*, 3 Gratt. (Va.) 343; *Bledsoe v. Nixon*, 68 N. Car. 521; *Neal v. Nash*, 23 Ohio St. 483; *Dinkins v. Bailey*, 23 Miss. 284; *Smith v. Rumsay*, 33 Mich. 183; *Brought v. Griffith*, 16 Iowa 26; *Torp v. Gulseth*, 37 Minn. 135; *Bates v. Wiggin*, 37 Kan. 44; *Smith v. Gillam*, 80 Ala. 296; *Canaday v. Bolivar*, 25 S. Car. 547; *Friberg v. Donovan*, 23 Ill. 58; *German American Savings Bank v. Fritz*, 68 Wis. 390; *Armstrong v. Poole*, 30 W. Va. 666; *Philbrick v. Shaw*, 61 N. H. 356; *Lane v. Westmoreland*, 79 Ala. 372; *Schuessler v. Dudley*, 80 Ala.

547; *Fairchild v. Lynch*, 99 N. Y. 359; *Taylor v. Tarr*, 84 Mo. 420; *Cowgill v. Linville*, 20 Mo. App. 138; *Smith v. Harry*, 91 Pa. St. 119; *Bailey v. Niles*, 1 Penny. (Pa.) 371; *Ward's Appeal*, 100 Pa. St. 289; *Simmons v. Goodrich*, 68 Ga. 750; *Alabama Gold Life Ins. Co. v. Anderson*, 67 Ala. 425; *Galliher v. Galliher*, 10 Lea (Tenn.) 23; *Beattie v. Dickinson*, 39 Ark. 205; *Harris v. Frank*, 29 Kan. 200; *Scherer v. Schutz*, 83 Ind. 543; *Bodkin v. Merit*, 86 Ind. 560; *Hevener v. Berry*, 17 W. Va. 474; *Keith v. Hudson*, 74 Ind. 333; *Kane v. State*, 78 Ind. 103; *Crawford v. Richeson*, 101 Ill. 351; *Matter of Lawrence*, 5 Fed. Rep. 349; *Campbell v. Rothwell*, 47 L. J., Q. B. Div. 144; *Steel v. Dixon*, L. R., 17 Ch. Div. 825; *In re Cochran*, L. R., 5 Eq. 209; *Ewart v. Latta*, 4 Macq. H. L. C. 983; *Pearl v. Deacon*, 24 Beav. 186; *Goodwin v. Gray*, 22 W. R. 212; *Boyd v. Myers*, 12 Lea (Tenn.) 175; *Schoonover v. Allen*, 40 Ark. 132; *Johnson v. Amana Lodge*, 92 Ind. 150; *Rice v. Rice*, 108 Ill. 109; *Moore v. Toppliff*, 107 Ill. 241; *Allen v. Powell*, 108 Ill. 584; *Fishback v. Weaver*, 34 Ark. 569; *Gunel v. Cue*, 72 Ind. 34; *Hollingsworth v. Pearson*, 53 Iowa 53.

Examples.—The right of the surety to subrogation extends to the principal's right of set-off, and to the benefit of any fund or collateral provided by the principal for the payment of the debt. *Rubey v. Watson*, 22 Mo. App. 428.

Payment by a surety of a note secured by a deed of trust operates in equity, as an assignment of the note and deed to the surety, and he is entitled to foreclose. *Taylor v. Tarr*, 84 Mo. 420.

Where a creditor accepts a draft from the surety as payment, the surety may sue the principal, although the surety may not otherwise have paid the debt. *Sapp v. Aiken*, 68 Iowa 699.

A surety on the official bond of a defaulting tax collector is entitled, on payment, to be subrogated to the rights of the State or county, against the property of the principal. *Schuessler v. Dudley*, 80 Ala. 547; *Miller v. Woodward*, 8 Mo. 169; *Richeson v. Crawford*, 94 Ill. 165.

Where plaintiffs, bound by a written guarantee to pay defendant's debt, paid the same without his knowledge, and took a written assignment of the debt from the creditor, it was held that they might recover from the defendant. *Teberg v. Swenson*, 32 Kan. 224.

Three separate judgments having been simultaneously entered against

the maker and two of the endorsers of a promissory note, Y, for the accommodation of the respective defendants, and with their knowledge and assent, became bail for stay of execution upon each of the judgments: it was held that upon payment of the amount for which he became surety, Y was entitled to be subrogated to the rights of the plaintiff in each of the respective judgments. *Yeager's Appeal* (Pa.), 8 Atl. Rep. 225.

A surety on an accommodation note given for the purchase price of a buggy, which stipulated that the title to the property was to remain in the vendor until the note was fully paid, was compelled, through the default of the maker, to pay a balance due on the note. It was held that he might replevy the buggy from a third party to whom the vendor had with the consent of the maker, but without the surety's knowledge, sold it. *Myers v. Yapple*, 65 Mich. 403.

A surety against whom a judgment has been rendered for the whole debt, having, after the satisfaction of such judgment out of his estate, the right of subrogation, whether against his principal or cosurety, a junior creditor of such surety whose lien ranks next to that of such judgment, is likewise entitled to be subrogated to the surety against the cosurety. *Bunting v. Riehl*, 2 Pa. County Ct. 450.

Where a surety paid the judgment rendered against himself and principal, it was held that he was entitled to an assignment of the judgment. *Searing v. Berry*, 58 Iowa 20.

A having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages B was compelled as surety to pay part of the debt. Upon A's death, it was held as against his assignee in bankruptcy that B was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay. *Heyman v. Dubois*, L. R., 13 Eq. 158.

A surety who has paid a judgment against himself and principal may, notwithstanding a formal assignment of the judgment, treat it as discharged and sue his principal for reimbursement. *Katz v. Moessenger*, 110 Ill. 372.

And a surety who has paid a judgment may have an assignment of it

made to a third party, to be kept alive for his benefit. *Chandler v. Higgins*, 109 Ill. 602; *Allen v. Powell*, 108 Ill. 584. See also *Sandford v. M'Lean*, 3 Paige (N. Y.) 117, 122; *Cottrell's Appeal*, 35 Pa. St. 294; *Dozier v. Lewis*, 27 Miss. 679; *Dempsey v. Bush*, 18 Ohio St. 376; *Bailey v. Brownfield*, 20 Pa. St. 41; *Hess's Estate*, 69 Pa. St. 272.

A surety can recover from his principal only the actual amount paid. *Mathews v. Hall*, 21 W. Va. 510; *Delaware, Lac. etc. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151.

Where three of several sureties settled with the creditor by giving a new bond in which their principal did not appear, and one of them paid it, it was held that he was entitled in equity to recover from his principal, the second bond extinguishing liability on the first only as to the creditor, and the surety being subrogated to the rights of the creditor under the first bond. *Dodd v. Wilson*, 4 Del. Ch. 108, 399.

A fund set apart by a debtor for the indemnity of his surety will be applied by a court of equity to the payment of the debt; equity will not permit its diversion to satisfy other debts and the right of the surety is not affected, except as to the amount of his claim, by the fact that he himself has paid a part of the debt. *Toole v. Bleckeler*, 12 Mo. App. 54.

A owed B upon a note secured by lien on A's real estate. C executed to B a note of like amount as collateral security for A. It was held that if C paid the note executed by him, he was entitled to be substituted to the benefit of the lien, though the original note had been assigned by B to D with C's knowledge, and D had with B's consent paid the original debtor the consideration for the note, and C when he signed his note was ignorant of a lien on A's real estate. *Hevener v. Berry*, 17 W. Va. 474.

Notes given for the purchase money of chattels contained provisions that title to the chattels should not vest until the notes were fully paid, and that the vendor might resume possession whenever he deemed himself insecure. It was held that the defendant, who as surety upon the notes paid them, was subrogated to the rights of the payee. *Torp v. Gulseth*, 37 Minn. 135.

The right of subrogation may be enforced in favor of the surety against one claiming under the principal as a purchaser with notice. Thus sureties

upon notes for the purchase money of land sold by title bond have an equity to have the land sold for the payment of the notes superior to any equity which a claimant under the vendee can have. *Beattie v. Dickenson*, 39 Ark. 205. See also *Dempsey v. Bush*, 18 Ohio St. 376.

In *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618, C and S purchased a lot of land from M in their joint names and gave a joint bond and mortgage for the purchase money. C subsequently conveyed to S his undivided half of the lot, subject to the payment of the mortgage, and S agreed to pay the amount due thereon and gave a bond of indemnity against the same. S subsequently conveyed the lot in question to B with covenants of seisin and warranty, and covenants against encumbrances. S became insolvent and left the State, failing to pay the amount due on the bond and mortgage given to M. When M was about to foreclose the mortgage, B induced him to bring suit against C upon the bond, instead of proceeding against the mortgaged premises. A rule *nisi* for judgment having been obtained against C in this suit, he tendered to M the amount due upon the bond and mortgage with interest and costs so that he might be enabled to enforce the collection thereof against the mortgaged premises. M in collusion with B refused to receive the money and make the assignment; C thereupon filed a bill in equity against M and B. The court held that the equitable rights of C and S under the agreement and conveyance were the same as though S had owned the whole lot originally and had mortgaged it to secure his own debt, and C had joined with him in the bond as a mere surety; that in such a case, as between the owner of the equity of redemption in the mortgaged premises and the surety in the bond, the land would be the primary fund for the payment of the debt; and that if the surety should be called upon by the mortgagees for payment, he would have the right to be subrogated, in their place, to their remedy against the land for the payment of the debt.

Where purchaser of land has taken it under an agreement that it shall be free from encumbrances, and subsequently it is swept away from him by an execution under a lien, he is entitled to a substitution to all the rights of the holder of the encumbrance. Thus, in

Eddy v. Traver, 6 Paige (N. Y.) 521, one of four heirs sold to the complainant his undivided fourth part of his ancestor's estate with a covenant of warranty. This part was afterwards sold for the payment of the debts of the decedent. It was held that the complainant had an equitable lien upon the unsold portion of the estate, and had a right to come in upon the fund raised by the sale of that portion under proceedings in partition.

But where it is agreed that the encumbrance shall be deducted from the consideration or paid by the purchaser, the vendor is then in a position of a surety, and is entitled to have the encumbrance paid from the land. *Skinner v. Starner*, 24 Pa. St. 123; *Atwood v. Vincent*, 17 Conn. 575; *Morris v. Oakford*, 9 Pa. St. 498.

The same principle is applicable to the sale of an equity of redemption subject to the mortgage. *Jumel v. Jumel*, 7 Paige (N. Y.) 591; *Hansell v. Lutz*, 20 Pa. St. 284.

Case Where Subrogation Has Not Been Allowed.—Sureties on a note given for the purchase price of land, who have paid the balance due on the note, cannot be subjected to the vendor's equitable lien on the land against a subpurchaser of a portion of the tract when the purchase money paid by the latter has been applied in partial payment of the note on which the sureties were bound. *Sawyers v. Baker*, 72 Ala. 49.

A husband being indebted to his wife, borrowed money to pay her, for which he gave his note with two sureties. The wife used the money so received to discharge a purchase lien on her homestead. It was held that the sureties were not entitled to be subrogated to the rights of the holder of the purchase money lien. *Flannarty v. Utley* (Ky.), 5 S. W. Rep. 878.

Subrogation will not be enforced against a *bona fide* purchaser. *Wise v. Shepherd*, 13 Ill. 41; *Reilly v. Mayer*, 2 Beas. (N. J.) 351. In *Orvis v. Newell*, 17 Conn. 97, it was held that a surety who had mortgaged his own property as a security for the debt, could not be subrogated to the lien of the creditor on another tract, which had been mortgaged by the principal for the same debt, as against a purchaser from the principal without notice of the suretyship; the reason being that the purchaser is *prima facie* entitled to require that both tracts should contribute equally to the discharge of the obligation,

and may have been influenced by that in buying.

The endorser as surety of a note, received a mortgage from a third person, stranger to the note, to indemnify him. The holder of the note obtained judgment upon the note against the maker and the surety, who were both insolvent. It was held that the surety having suffered no damage and the mortgagor being a stranger, that the judgment plaintiff had no right to be substituted to the rights of the surety or to subject the mortgage to the judgment. *Macklin v. Ky. North Bank*, 83 Ky. 314.

Where the sureties on an appeal bond paid the amount found due on a mortgage, in pursuance of their obligation—the court held that they were not entitled to be subrogated to the rights of the mortgagee in the mortgage and decree, as against holders of encumbrances subsequent to the mortgage, but prior to the appeal. *Powell v. Allen*, 11 Ill. App. 129.

Subrogation will not be decreed until the creditor is paid in full. *Magee v. Leggett*, 38 Miss. 139; *Field v. Hamilton*, 45 Vt. 35; *Hoover v. Epler*, 52 Pa. St. 522; *Ewart v. Latta*, 4 Macq. H. L. C. 983.

In *Miller v. Stout*, 5 Del. Ch. 259, M held two mortgages on T's land. S held a judgment, intermediate between these mortgages, against A and T, A being the principal and T the surety. After the giving of the bond on which this judgment was found, A became surety for T; T became insolvent. The mortgages were foreclosed and a sum of money realized sufficient to pay the first mortgage, but not both the judgment and the second mortgage. M contended that as the judgment was payable from the proceeds partly of the land covered by the second mortgage, he was entitled to be subrogated to the judgment. A had not paid the liabilities on which he was surety for T. It was held that A's equities were such that the doctrine of subrogation could not be invoked to put M in the position sought by him.

The name of a person was signed as surety on a sheriff's bond in violation of the Kentucky statute providing that no person shall be bound as surety by the act of an agent unless the authority of the agent is in writing signed by his principal (Gen. St., ch. 22, § 20). The person whose name was so signed, supposing himself to be bound, paid the bond. It was held that he was not en-

titled to be subrogated to the right of the sheriff, his principal on the bond. *Dawson v. Lee*, 83 Ky. 49.

The judgment on which a replevin bail was liable was rendered on one of the several notes secured by mortgage or real estate, only a part of which were due when the judgment was rendered. It was held that the surety by paying such judgment could not be subrogated to the rights of the judgment creditor. *Vert v. Voss*, 74 Ind. 565.

Where two properties are mortgaged by A to B for distinct sums, and C is surety for the one only, the right of B to retain all the securities until repaid both debts overrides the right of C to have the benefit of the securities for that debt for which he is surety. *Farebrother v. Wodenhouse*, 23 Beav. 18.

The doctrine, *Copes v. Middleton*, has been followed in *Vermont*. *Moore v. Campbell*, 36 Vt. 361. In *Alabama*, it is held that after the payment of a judgment by a surety, the judgment is not kept alive for the surety's reimbursement. *Morison v. Marvin*, 6 Ala. 797; *Preslar v. Stallworth*, 37 Ala. 402; *Smith v. Harrison*, 33 Ala. 706.

In *Nevada*, a surety who has paid a note and had it assigned to himself, though he may maintain an action against the principal debtor for his payment, has no remedy upon the note itself. *Frevert v. Henry*, 14 Nev. 191. The same rule seems to prevail in *Massachusetts*. See *Brackett v. Winslow*, 17 Mass. 153; *Adams v. Drake*, 11 Cush. (Mass.) 504.

In *Lynn v. Richardson*, 78 Me. 367, a note upon which plaintiff was liable as surety, and which was also secured by a mortgage, was paid by the plaintiff, and the note and the mortgage were surrendered to him without cancellation or discharge executed thereon or on the record thereof, and without any assignment to him. The court held that a bill in equity asking that the mortgage might be decreed to be still subsisting, that he might be subrogated to the rights of the mortgage, and empowered to foreclose the same, could not be sustained upon general demurrer. See in general, on the question of subrogation, as to sureties—

Vermont.—*Clay v. Severance*, 55 Vt. 300; *Morrill v. Morrill*, 53 Vt. 74.

Missouri.—*Lower v. Buchanan Bank*, 78 Mo. 67; *Berthold v. Berthold*, 46 Mo. 557.

Iowa.—*Coleman v. Riggs*, 61 Iowa 543; *Searing v. Berry*, 58 Iowa 20;

This equity will be enforced even in favor of the creditor of a surety. Thus, where a creditor has a judgment against a principal and surety, and another person has a judgment against the surety alone, if the creditor who holds the joint judgment recovers from the surety, the other creditor is entitled to be subrogated to the joint judgment to enforce it against the principal.¹

Hollingsworth v. Pearson, 53 Iowa 53.
Tennessee.—Boyd v. Myers, 12 Lea (Tenn.) 175.

Indiana.—Johnson v. Amana Lodge, 92 Ind. 150; Stout v. Duncan, 87 Ind. 383; Scherer v. Schultz, 83 Ind. 543; Strong v. Taylor School Twp., 179 Ind. 208, 213.

West Virginia.—Mattingly v. Sutton, 19 W. Va. 19.

Massachusetts.—Stafford v. New Bedford Five Cents Savings Bank, 132 Mass. 315; Kelley v. Herrick, 131 Mass. 373; Talor v. Van Deusen, 3 Gray (Mass.) 498.

South Carolina.—Hellams v. Abercrombie, 15 S. Car. 110; Gourdin v. Trenholm, 25 S. Car. 362.

Pennsylvania.—Ward's Appeal, 100 Pa. St. 289; Yeager's Appeal (Pa.), 6 Cent. Rep. 587; Wallace's Estate, 59 Pa. St. 401.

Alabama.—Tyree v. Parham, 66 Ala. 424; Fearn v. Ward, 80 Ala. 555.

Georgia.—Simmons v. Goodrich, 68 Ga. 750.

Kansas.—Harris v. Frank, 29 Kan. 200; Rizer v. Callen, 27 Kan. 339.

Maryland.—Cresfield v. State, 55 Md. 192.

Virginia.—Coffman v. Hopkins, 75 Va. 645; Washington, O. & W. R. Co. v. Casenove, 3 S. E. Rep. 433.

Minnesota.—Kimmel v. Lowe, 28 Minn. 265.

Maine.—Re Fickett, 72 Me. 266; Scribner v. Adams, 73 Me. 541; Lynn v. Richardson, 78 Me. 367.

Illinois.—Crawford v. Richeson, 101 Ill. 351; Billings v. Sprague, 49 Ill. 509.

Ohio.—Butler v. Berkey, 13 Ohio St. 514.

North Carolina.—York v. Landis, 65 N. Car. 535.

Arkansas.—McGee v. Russell, 49 Ark. 104.

1. This is well illustrated by the interesting case of Huston's Appeal, 69 Pa. St. 485. In that case Sylvis obtained a judgment against Titterington and Hollen for \$271.67, Hollen being surety for Titterington. Subsequently Huston and Huston obtained a judgment against Hollen for \$2,235. At

this time Clawson was endorser on a note for Hollen to a bank. The note was protested and the bank obtained judgment against Clawson for \$1,200 and levied upon and sold his real estate. On April 2d, 1869, Hollen's real estate was sold by the sheriff. Out of the proceeds Sylvis received \$302.79 in full of his judgment. The Hustons received but \$1,425 of their judgment. Sylvis then assigned to the Hustons his judgment. Subsequently Hollen, in the suit of Sylvis v. Titterington and Hollen executed an assignment to Clawson of all his rights in the said judgment, arising from the sale and appropriation of his real estate to the payment of the note. Clawson then applied to the court to be subrogated to the rights of Sylvis. The Hustons resisted this application. The court entered a decree in favor of Clawson. On appeal the decree was reversed, the court, WILLIAMS, J., saying: "Why, then, were not the appellants entitled to be subrogated to the equitable rights of Hollen under the judgment for which he was surety. The proceeds of his real estate on which their judgment was a lien were appropriated to its payment, and as against their judgment debtor the appellants were clearly entitled to the proceeds thus applied, and would have received them but for the superior legal right of Sylvis under the prior lien of his judgment. It is true that the appellant's right of subrogation depends on the equity of Hollen, but, as between them, their equity is superior to his. If, then, the fund which they would otherwise have received has been applied to the payment of the judgment for which he was surety, on what principle of equity or justice could he claim subrogation to the judgment which has taken the fund to the prejudice of the appellants, and be allowed to pocket its fruits, leaving their judgment against him unpaid? If they had had no lien on the fund applied to the payment of the judgment, then they would have had no equity to be substituted to the rights of the surety under it. But having a lien on the fund, they

IX. MARSHALLING IN FAVOR OF LEGACIES—(See title LEGACY).—The marshalling of the assets of a decedent's estate for the payment of debts is treated under the title DEBTS OF DECEDENTS.

X. MARSHALLING IN ADMIRALTY.—The doctrine of marshalling is enforced by the courts of admiralty in cases where there are two bondholders, one holding bonds against the ship, freight and cargo, while the other has bonds only against the ship and freight. In such a case the creditor who has a charge on the cargo will not be permitted to disappoint the creditor who has only a charge on the ship and freight.¹

XI. INVERSE ORDER OF ALIENATION—1. **General Principle.**—Where an estate is subject to a mortgage or other encumbrance and is sold by the owner in parcels at different times, the encumbrancer being a creditor with two funds, is required to proceed primarily against the fund upon which the grantee has no claim. It results from this principle that, as between purchasers of different parcels of land, the whole of which is subject to a prior lien, the land is chargeable in equity in the inverse order of alienation.²

would be entitled to subrogation as against Hollen on the plainest principles of equity, and to decree otherwise would shock all sense of justice."

1. *The Arab*, 5 Jur., N. S. 417; *The Edward Oliver*, L. R., 1 Ad. & Ecc. 383; *The Trident Semson*, 1 W. Rob. 29; *La Constanca*, 2 W. Rob. 404.

Marshalling in admiralty is sometimes enforced in favor of wages. *The Eugenie*, L. R., 4 Ad. & Ecc. 123; *The Mary Ann*, 9 Jur. 95; *The Edward Oliver*, L. R., 1 Ad. & Ecc. 379.

2. The principle is clearly explained by CHANCELLOR KENT in *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 440, as follows: "If there be several purchasers in succession at different times, I apprehend that in that case there is no equality, and no contribution as between purchasers. Thus, for instance, if there be a judgment against a person owning, at the time, three acres of land, and he sells one acre to A, the remaining two acres are first chargeable in equity with the payment of the judgment debt; . . . and that, too, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B, the remaining acre is then chargeable, in the first instance, with the debt as against B, as well as against A, and if it should prove insufficient, then the acre sold to B ought to supply the deficiency, in preference to the acre sold to A: because when B purchased he took his land

charged with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him as is said of the heirs, he sits in the seat of his grantor, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or ratable part of it, back upon A. It is to be observed that the debt in this case is the personal obligation of the debtor, and that the charge on the land is only by way of security; the case is not analogous to a rent charge, which grows out of the land itself, and every purchaser of distinct parcels of a tract of land, charged with the rent, takes it with a proportionable part of the charge. The owners of the land, in that case, all stand equal, and if the whole rent be levied upon one, he shall be eased in equity, by a contribution from the rest of the purchasers, because of the equity of right between them."

Examples.—A mortgaged a tract of land to B and divided the same into three lots. The first he mortgaged to C, the second he mortgaged to D, the third he conveyed to E. B entered judgment on the bond accompanying his mortgage, and D became the purchaser at sheriff's sale of the lot mortgaged to him. A became a bankrupt and the lot mortgaged to C was sold by his assignees in bankruptcy, free of all liens,

for a sum sufficient to pay the mortgage of B, to whom the fund was awarded. C filed a bill against B, D and E, claiming to be subrogated to the rights of B as against D and E, and to realize his claim by a sale of their lots in the inverse order of their alienation. On demurrer to the bill it was held that when C took his mortgage, he had an equity to compel A to pay the paramount mortgage to B, out of the remaining portions of the property covered by it; and as C's security, by no act of his own or of B, had been taken to pay the common encumbrance, he had a right to be relieved as against D and E in the inverse order of the conveyances to them, and that, being subrogated herein to B's rights, he should be entitled to the lien of the paramount judgment for this purpose, although the same had been paid by process of law. *Milligan's App.*, 104 Pa. 504.

Lands subject to mortgages had been sold by the mortgagor in parcels, and the proceeds of the last parcel sold were applied upon the first of the mortgages, and as a part of the same arrangement the mortgagee in the second, who was mortgagor in the first, and under obligation to pay it, assigned the second to a party who was to hold it for the protection of the fee against another specified claim, but who afterwards sold it for value to one who took it in good faith. It was held that under the rule that when mortgaged land is alienated in parcels, the parcels must be applied to the satisfaction of the mortgage in the inverse order of alienation, the mortgage was to be deemed satisfied in the first arrangement, and that as the second assignment was not made with the consent of the owner of the fee, the assignee took nothing thereby. *McVeigh v. Sherwood*, 47 Mich. 545.

After a mortgage had been executed to A on three parcels of land the first parcel was sold to B; afterwards the second to C, and finally the third to C and D, who mortgaged it to E. On foreclosure of A's mortgage it was held that equitably the undivided half of D in the third parcel should be first sold, then the second parcel, then the undivided half of C in the third parcel, and finally the first parcel. But as there would be a sacrifice in selling undivided interests, the whole of the second and third parcels should be first sold, and half of the proceeds of the third applied on A's mortgage, then those of the

second, and lastly those of the other half of the third parcel; and that any surplus should be paid into court, and on its distribution, the rights of C and D, as to contribution should be determined. *Van Slyke v. Van Loan*, 26 Hun (N. Y.) 344.

A and B, the owners of land, mortgaged it to C, and afterwards sold part of it, taking back a purchase money mortgage. On foreclosure of the latter, A and certain of B's heirs purchased. B's heirs then proceeded to have a partition of that part of the land unsold by A and B, and a sale was made in the partition proceedings. Then A and certain of B's heirs bought C's mortgage. On their suit to foreclose the mortgage, it was held that the purchaser at the partition sale was not entitled to have the part sold by A and B sold under the foreclosure before his part was resorted to, the sale in partition creating no new equity, nor affecting that existing. *Powles v. Griffith*, 37 N. J. Eq. 384.

Where two buy land and give a joint purchase money note and mortgage and then divide the land, and one sells his part to a grantee who assumes his grantor's debt, the other having paid his share, the land so sold must first be looked to for the debt. *Higham v. Harris*, 108 Ind. 246.

Where the Land Is in Different States.

--The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mortgage, before resort shall be had to his portion, applies although part of the residue is situated in another State. *Welling v. Ryerson*, 94 N. Y. 98. In this case the owner of land executed a mortgage upon his farm, a portion of which was situated in New York, the residue in New Jersey; he subsequently conveyed to R five acres of that portion situated in New York, and thereafter executed another mortgage upon the whole farm. The owner of the two mortgages commenced foreclosure suits, one in New York to foreclose the first mortgage, another in New Jersey to foreclose both. In the first suit judgment was rendered directing the sale of the land in New York, without reference to that in New Jersey, and providing that the portion not sold to R should be first sold. Pending proceedings to enforce the judgment, the grantee of R tendered to the plaintiff in the foreclosure suit the amount due on his mortgage with costs

and demanded an assignment of the mortgage or a release of his land, which was refused. In an action brought to compel such an assignment it was held that the grantee was entitled to the relief sought and that he was entitled to have his land released and discharged from any liability.

After Acquired Lands.—The rule that lands subject to a lien which have been alienated should be applied to satisfy the lien in the inverse order of alienation, holds when part of the lands were acquired after the time when the lien attached. *Crawford v. Richeson*, 101 Ill. 351.

Where the Lands Conveyed Are Charged with the Debt.—Where a mortgagor sells part of the mortgaged land, and by the deed charges the payment of the mortgage debt thereon, the land so conveyed must be exhausted in satisfaction of the debt before any other part of the mortgaged lands can be resorted to for payment, whether they remain in the hands of the mortgagor himself or have been conveyed to other parties. *Bunger v. Greif*, 55 Md. 518. See also *Pancoast v. Duval*, 26 N. J. Eq. 445; *Mutual Life Ins. Co. v. Boughrum*, 24 N. J. Eq. 44.

But where a part of a tract of land is granted subject to a mortgage which covers the whole, the purchaser does not take the entire burden of the mortgage, but he is entitled to require that the residue of the land shall contribute in proportion to its value to the discharge of the encumbrance. *Hoy v. Bramhall*, 4 C. E. Green (N. J.) 74. See also *Zabriskie v. Salter*, 80 N. Y. 555; *Briscoe v. Power*, 47 Ill. 447.

In *Chapman v. Beardsley*, 31 Conn. 115, the owner of land mortgaged his homestead and an adjacent lot to secure the payment of a note. He subsequently sold the lot to B, the consideration being a promise by B to pay the note. B subsequently conveyed the lot to C, at the same time informing C of the promise, and that it had not been fulfilled. C claimed that as he had not made the promise he was not bound by it. The court, however, held that the promise was obligatory on the purchaser with notice, and that the lot conveyed to C must be taken in execution before proceeding against the residue of the premises in the hands of the mortgagor or of a purchaser from him. See also *Atwood v. Vincent*, 17 Conn. 575; *Engle v. Haines*, 1 Halst. Ch. (N. J.) 86; *Caruthers v. Hall*, 10 Mich. 40;

Allen v. Clark, 17 Pick. (Mass.) 47.

Warranty—A mortgagor conveyed a portion of the premises by warranty, and afterwards another portion to another purchaser, and foreclosure was had against both. It was held that on redemption by the last purchaser he could not compel contribution from the first. *Henderson v. Truitt*, 95 Ind. 309.

A covenant of warranty, however, is not absolutely necessary to show the intent that the grantee is to be exempt from the paramount charge. Such an intent is deduced where the title is not warranted. *Cooper v. Bigley*, 13 Mich. 463, 474; *Welch v. Beers*, 8 Allen (Mass.) 151. But see *Aiken v. Cole*, 37 N. H. 50.

The Rule Not Applicable Where There Are Successive Sales Under Executions.

—In *Carpenter v. Koons*, 20 Pa. St. 222, two lots subject to a common mortgage were owned by A. On a judgment against A the sheriff sold one lot to B, and under a subsequent execution on the same judgment he sold the second lot to C. The court held that both purchasers must contribute. CHIEF JUSTICE BLACK said: "A man who purchases part of a tract covered by a mortgage, buying the title out and out, clear of encumbrances, and paying a full price for it, has a plain right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought towards the extinguishment of the mortgage before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back again by the second sale. In other words, the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it. But if the rule is to cease when the reason of it ceases, it cannot extend to a case where the first sale was made subject to a mortgage; and that is the condition of the present one. The defendant's deed is older than his adversary's, but it conveys him nothing but the equity of redemption. The act of 1830 provides that if the oldest lien be

a mortgage and the land be sold on a judgment, the sheriff's vendee shall take it subject to the mortgage. When the defendant made his purchase, therefore, he had manifestly no claim either on the mortgagor or on anybody else to pay off the whole mortgage and relieve him entirely from what was probably the most burdensome part of his contract. His share of the mortgage formed a part of the price he agreed to pay for the land. The statute of 1830 entered into and made one of the elements of his contract. There is a wide and palpable difference between one who buys land subject to a mortgage and has a reduction in the price equal to the amount of the lien, and another who pays its full value and stipulates for a title clear of encumbrances. Such a distinction is anything in the world but a 'theoretical subtlety.'

Two purchasers at a sheriff's sale, subject to a mortgage which is a common encumbrance on the land of both, stand on a level. Neither of them has done or suffered anything which entitles him to a preference over the other. Equality is equity. They must pay the mortgage in proportion to the value of their respective lots."

Land Contemporaneously Sold.—Where land is sold in parcels at the same time, and is subject to a mortgage, all the purchasers must contribute ratably to the common burden. *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Brown v. Simons*, 44 N. H. 475. In determining priority the date of the contract and not of the deed will be considered. *James v. Hubbard*, 1 Paige (N. Y.) 228; *Chapman v. West*, 17 N. Y. 125.

In *Carpenter v. Koons*, 20 Pa. St. 222, it was held that the principle did not apply to two or more purchasers at a sheriff's sale, who had bought subject to a common encumbrance. In such a case equality is equity.

The general principle has been applied in the following cases:

New Hampshire.—*Gage v. McGregor*, 61 N. H. 47; *Mahagan v. Mead*, 63 N. H. 570; *Brown v. Simons*, 44 N. H. 475.

Illinois.—*Hosmer v. Campbell*, 98 Ill. 572; *Iglehart v. Crane*, 42 Ill. 261; *Niles v. Harmon*, 80 Ill. 396.

Colorado.—*Fassett v. Mulock*, 5 Colo. 466.

Mississippi.—*Georgia Pac. R. Co. v. Walker*, 61 Miss. 481.

Pennsylvania.—*Nackin v. Stanley*,

10 S. & R. (Pa.) 450; *Taylor v. Maris*, 5 Rawle (Pa.) 51; *Cowden's Estate*, 1 Pa. St. 267; *Merrey's Appeal*, 4 Pa. St. 80; *Phelps' Appeal*, 98 Pa. St. 546; *Milligan's Appeal*, 104 Pa. St. 503.

Michigan.—*McVeigh v. Sherwood*, 47 Mich. 545; *Cooper v. Bigly*, 13 Mich. 463.

Connecticut.—*Hunt v. Mansfield*, 31 Conn. 488.

New York.—*James v. Hubbard*, 1 Paige (N. Y.) 228; *Gouverneur v. Lynch*, 2 Paige (N. Y.) 300; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47; *Guion v. Knapp*, 6 Paige (N. Y.) 35; *Chapman v. West*, 17 N. Y. 125; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Welling v. Ryerson*, 94 N. Y. 98; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Burchell v. Osborne*, 19 N. Y. St. Rep. 52; *Pallen v. The Agricultural Bank*, 1 Freeman (Miss.) Ch. 419.

Alabama.—*Bank v. Dundas*, 11 Ala. 661.

New Jersey.—*Mount v. Potts*, 8 C. E. Green (N. J.) 188; *Powles v. Griffith*, 37 N. J. Eq. 384.

Maine.—*Holden v. Pike*, 24 Me. 427; *Cushing v. Ayer*, 25 Me. 383; *Shepard v. Adams*, 32 Me. 63.

Massachusetts.—*Allen v. Clark*, 17 Pick. (Mass.) 47; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Bradley v. George*, 2 Allen (Mass.) 392; *George v. Wood*, 9 Allen (Mass.) 80.

South Carolina.—*Canaday v. Boliver*, 25 S. Car. 547.

Ohio.—*Sternberger v. Hanna*, 42 Ohio St. 305; *Green v. Ramage*, 18 Ohio 428; *Commercial Bank of Lake Erie v. Western Reserve Bank*, 11 Ohio 444.

Vermont.—*Gates v. Adams*, 24 Vt. 71; *Root v. Collins*, 34 Vt. 173; *Lyman v. Lyman*, 32 Vt. 79.

Wisconsin.—*Aiken v. Milwaukee & St. Paul R. Co.*, 37 Wis. 469; *Worth v. Hill*, 14 Wis. 559; *State v. Titus*, 17 Wis. 241; *Ogden v. Glidden*, 9 Wis. 46.

Texas.—*Miller v. Rogers*, 49 Tex. 398; *Rippetoe v. Dwyer*, 49 Tex. 498.

Florida.—*Ritche v. Eichelberger*, 13 Fla. 169.

Georgia.—*Cumming v. Cumming*, 3 Ga. 460.

Indiana.—*Cissna v. Haines*, 18 Ind. 496; *Day v. Patterson*, 18 Ind. 114; *Williams v. Perry*, 20 Ind. 437; *Aiken v. Bruen*, 21 Ind. 137; *McCullum v. Turpie*, 32 Ind. 146; *McShirley v. Birt*, 44 Ind. 382; *Houston v. Houston*, 67 Ind. 276; *Hahn v. Behrman*, 73 Ind. 120.

2. Nature of the Encumbrance Immaterial.—The principle is irrespective of the nature of the encumbrance, and is applicable to land encumbered by a mortgage, judgment, decedent's debts, legacies charged by will, or any lien charge whatever.¹ It is also immaterial by whom the paramount encumbrance was created.²

Minnesota.—Johnson v. Williams, 4 Minn. 260.

Nebraska.—Lausman v. Drahos, 8 Neb. 457.

In *Iowa*, the rule that the sale shall take place in the inverse order of alienation is rejected, a ratable contribution being considered more equitable. Bates v. Ruddick, 2 Iowa 423; Barney v. Myers, 28 Iowa 472; Tufts v. Stanley, 42 Iowa 628; Iowa L. & T. Co. v. Mowery, 67 Iowa 113; Huff v. Farwell, 67 Iowa 208; Massie v. Wilson, 16 Iowa 390; Windsor v. Evans, 72 Iowa 692.

In *Kentucky*, also, the rule is not followed. Dickey v. Thompson, 8 B. Mon. (Ky.) 312; Campbell v. Johnston, 4 Dana (Ky.) 179.

United States Courts.—It has been decided that the courts of the United States sitting in any State in which the rule is established will follow it. Orvis v. Powell, 98 U. S. 176. See also National Savings Bank v. Creswell, 100 U. S. 641.

Ireland.—The rule generally adopted in *America* has been followed in *Ireland*. In Hartley v. O'Flaherty, Lloyd & Gool Cases temp. Plunket 208, LORD PLUNKET said: "If afterwards the mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable, in the first instance, to the discharge of the mortgage, and in case of the *bona fide* purchaser; and it is contrary to any principle of justice to say that a person afterward purchasing from that mortgagor shall be in a better situation than the mortgagor himself in respect to any of his rights." See also Harbert's Case, 3 Coke 11.

1. Mortgages.—Examples in which the rule has been applied in the cases of mortgages are given in the preceding note.

Judgments.—In Hurd v. Eaton, 28 Ill. 122, a judgment creditor was compelled to exhaust the property of the judgment debtor before levying on land, which, though subject to his judgment, had become the property of a third person. See also Woods v. Spalding, 45 Barb.

(N. Y.) 602; Lloyd v. Gilbraith, 32 Pa. St. 103.

Legacies Charged on Land.—In Jenkins v. Freyer, 4 Paige (N. Y.) 47, it was held that when lands charged with the payment of legacies have been sold by the devisee to different purchasers, such lands will be charged in the inverse order of their alienation.

Debts Charged on the Land of Decedents.—The principle has been applied to lands of decedents charged with the payments of debts in *Re Clark*, 3 Redf. (N. Y.) 225; Eddy v. Traver, 6 Paige Ch. (N. Y.) 521; 31 Am. Dec. 261; Succession of O'Laughlin 18 La. An. 142.

In Phelps' Appeal, 98 Pa. St. 546, the lien was a recognizance in partition. In Hunt v. Ewing, 12 Lea (Tenn.) 519, it was held that as between purchasers of different parcels of land, the whole of which is subject to a prior lien, the land is chargeable, in equity, in the inverse order of alienation, and that this rule applies as well where the lien is a creditor's lien as where it was created by contract.

2. In Guion v. Knapp, 6 Paige (N. Y.) 35, CHANCELLOR WALWORTH said: "The principle of charging different parcels of the mortgaged premises, which have been sold at different times subsequent to the mortgage, in the inverse order of their alienation, is not always confined to the original alienations by the mortgagor, who is personally liable for the payment of the debt. The principle is equally applicable to several conveyances at different times, by a grantee of the whole or a part of the mortgaged premises, where he conveys with warranty. Thus, if the mortgage is a lien upon 200 acres of land, and the mortgagor conveys 100 acres thereof to A, the 100 acres which remains in the hands of the mortgagor is to be first charged with the payment of the debt, and, if that is not sufficient, the other 100 acres is next to be resorted to. But, if A has subsequently conveyed one-half of his 100 acres to B with warranty, the 50 acres remaining in the hands of A, is, in equity, first chargeable with the payment of the balance of the debt,

3. Notice.—It is not necessary that the second purchaser should have notice of the equity of the first purchaser; but the first purchaser must perfect his title so as not to mislead subsequent purchasers.¹

which cannot be raised by a sale of the 100 acres that still belong to the mortgagor or his subsequent grantee, before resort can be had to the 50 acres which A has conveyed with warranty. And if A conveys his remaining 50 acres to C, either with or without warranty, that portion of the premises is still liable for the balance of the mortgage debt, and must first be sold before a resort can be had to the 50 acres previously conveyed with warranty to B." See also *Nellons v. Truax*, 6 Ohio N. S. 97; *Wikoff v. Davis*, 3 Green Ch. (N. Y.) 224.

1. Where the record discloses an encumbrance on property of which a party is taking a conveyance, and also discloses the further fact that the encumbrance rests on other property, and on an examination directed to such other property it becomes apparent that a conveyance of the latter has been made, which creates an equitable right to throw the burden of the encumbrance on the first property, the purchaser will be presumed to have made such examination, and will be regarded as constructively notified of such equity. *Hunt v. Mansfield*, 31 Conn. 488.

The principle is illustrated in the leading case of *Chase v. Woodbury*, 6 Cush. (Mass.) 143, in which the facts were as follows: The owner of land, one Sibley, made a mortgage thereof, and subsequently conveyed one-half of the tract to his son Sylvester. On the same day he conveyed the other half to his son Reuben. Subsequently, in 1838, Sylvester conveyed his half to Sally B. Chase. Reuben did not place his deed on record until 1840. The question was, whether Sally B. Chase should contribute to the payment of the mortgage. CHIEF JUSTICE SHAW said: "It will be observed that after the making of both these deeds Nathaniel, the father, remained liable for the payment of the mortgage, and had he paid it, he would have been entitled to no contribution from either. So, had he made his deed to Sylvester of one-half, remaining himself owner of the other half, though the whole estate remained bound to the mortgagee, had Nathaniel, the mortgagor, redeemed the remaining half by paying the whole mortgage, he would have had no contribution. So, any

other person, claiming merely Nathaniel's title and interest, on redeeming could have no contribution. Nathaniel or the person claiming only his interest, would have only paid his own debt, and although such payment would *de facto* discharge Sylvester's moiety from an encumbrance, it would be done because Nathaniel was bound to do it, and could have no contribution. But, in fact, these deeds bear date the same day; there is nothing in the terms of either which makes it subject to the other, and *prima facie*, therefore, they were in fact simultaneous, and both were subject to the whole mortgage. But Reuben did not put his deed on record till 1840, and in the meantime Sylvester conveyed to the demandant in 1838. Suppose a simultaneous deed would have been an encumbrance, it could not affect her without notice, and an unrecorded deed was no notice, actual or constructive. She knew undoubtedly of the encumbrance by the outstanding mortgage of \$2,500; but by the record, one-half of the estate remaining apparently in the grantor, she knew that by law the other moiety was first liable, and if sufficient in value to pay the encumbrance, her moiety would be free from it. She had no notice of the specific lien on her moiety, arising from a liability to contribute to the owner of the other moiety, which would have existed had the two conveyances been simultaneous. Reuben, although he stood on an equal footing with Sylvester, in the first instance, as to the mortgage, by failing to put his deed on record, as notice to purchasers, enabled Sylvester to make an apparently good title to Sally B. Chase, without notice of the encumbrance, and therefore he could not set it up against her." It was accordingly held that Sylvester's grantee was not liable to contribute towards the payment of the mortgage. See also *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Brown v. Simons*, 44 N. H. 475. Where there is actual notice, contribution enforced cannot be from the prior grantor. Thus in *George v. Kent*, 7 Allen (Mass.) 16, it was held that one who takes a deed of mortgage of a portion of a lot of ground, the whole of which is subject to a prior mortgage, with notice of a prior

4. **How the Equity of the Grantee Is Enforced.**—The courts enforce the equity of the grantee or grantees by controlling the execution, and directing the sale of the different parcels in the inverse order of their alienation.¹ After the sale has been made the equities of the parties may be enforced by a decree of subrogation.²

XII. PARTNERSHIP ASSETS—1. **The Rule Stated.**—When a partnership becomes insolvent, it is a general rule in equity that the firm debts shall be paid out of firm assets, and the separate debts of each partner out of his own separate estate.³

unrecorded deed of warranty of an adjoining portion of the same lot from the same grantor to a third person, cannot compel the latter to contribute towards the redemption of the first mortgage, and a direct reference in his deed of mortgage to such third person as the owner of the adjoining land will amount to such notice.

In *Pike v. Goodnow*, 12 Allen (Mass.) 472, the owner of land executed a mortgage on it to a hospital, and subsequently a second mortgage to one Abigail Willis, excepting from the second mortgage a small portion of the land which he subsequently conveyed to Steadman by a deed executed in 1840 but not recorded until 1866. In 1842 Abigail Willis purchased the equity of redemption to the land mortgaged to her, and this descended to the plaintiff, her heir, who subsequently, in February, 1865, took an assignment of the mortgage to the hospital. In March, 1865, Steadman conveyed the small tract to the defendant. The plaintiff had paid the interest on the paramount mortgage for twenty-six years without asking for contribution. The court held that when the plaintiff inherited "her rights and obligations, the duty of contributing towards the payment of the original mortgage stood thus: 1. The plaintiff, as owner of the equity of redemption of the second mortgage, was first liable for the full amount. 2. Steadman, as the next previous grantee, was liable to make good any deficiency in the value of that equity; and 3. The plaintiff as owner of the second mortgage, would be the last to be called on." As the plaintiff's deed described his land as bounded by "land of Francis Steadman," it was immaterial that Steadman's deed was not recovered.

In *Chapman v. West*, 17 N. Y. 125, it was held that the filing of notice of the pendency of an action against the vendor alone charges a subsequent purchaser of any part of the mortgaged premises with notice of all equities of the plaintiff,

arising out of his right to a conveyance, in respect to the order of sale upon foreclosure or otherwise. See also *James v. Hubbard*, 1 Paige (N. Y.) 228.

1. *Georgia Pac. R. Co. v. Walker*, 61 Miss. 481; *Welling v. Rverson*, 94 N. Y. 98; *Milligan's Appeal*, 104 Pa. St. 503.

In *Pennsylvania*, the act of April 23rd, 1856 (P. L. 534), provides that in cases where the real estate of several persons is subject to the lien of a judgment to which they should contribute, or to which one should be subrogated as against the others, the person having such right of contribution or subrogation may, upon suggestion thereof, obtain a rule on the plaintiff to show cause why he should not levy on and make sale of the real estate so liable in the proportion or in the succession in which the properties of the several owners shall be respectively liable. In *Milligan's Appeal*, 104 Pa. St. 504, it was held that this act did not give the right of substitution, but merely provides a mode of enforcing it in certain cases, as, for example, where a plaintiff in a judgment which binds several properties is about to collect it, and there are equities to be adjusted between the terre-tenants. The act does not apply to cases where a sale had already been made, and in this *Milligan's Appeal* is distinguished from *Arnes' Appeal*, 65 Pa. St. 72, and *Phillips' Appeal*, 98 Pa. St. 546.

2. *Milligan's Appeal*, 104 Pa. St. 503.

3. The rule was stated by LORD KING, in *Ex parte Cook*, 2 P. W. 500, as follows: "It is settled and is a resolution of convenience that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate besides what will pay the joint creditors, the same shall be applied to pay the separate

2. Reason of the Rule.—The rule is based on the equity in each partner to have the firm assets applied to the payment of the firm debts, so that his own estate may, so far as possible, be relieved from liability of paying them. A partner is individually liable for all the firm debts; if, therefore, the creditors of another partner, who is insolvent, should be allowed to come upon the partnership assets, the firm creditors would then resort to the solvent partner's estate, and the latter would have no recourse except to the insolvent estate of the other partner. It follows from this that the right of a firm creditor to be paid out of the firm assets can only be worked out through the equity of the partners. If for any reason the equity of the partner shall cease, the prior right of the firm creditors to the firm assets also ceases.¹

creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors."

1. In *Case v. Beauregard*, 99 U. S. 119, JUSTICE STRONG said: "The effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it enures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members; their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce, through it, the application of those assets primarily to payment of the debts due them, when-

ever the property comes under its administration."

In *Fitzpatrick v. Flannagan*, 106 U. S. 648, 654, JUSTICE MATTHEWS said: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner through which it is derived remains." See also *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310; *Farley v. Moog*, 79 Ala. 148; *Rice v. Barnard*, 20 Vt. 479; *Couchman v. Moupin*, 78 Ky. 33; *Saunders v. Reilly*, 105 N. Y. 12; *Meech v. Allen*, 17 N. Y. 300; *Menagh v. Whitwell*, 52 N. Y. 146; *Deveaux v. Fowler*, 2 Paige Ch. (N. Y.) 400; *Moody v. Downs*, 63 N. H. 50; *Waterman v. Hunt*, 2 R. I. 298; *Snodgrass Appeal*, 13 Pa. St. 471; *Brown v. Beecher*, 120 Pa. St. 590; *Coover's Appeal*, 29 Pa. 9; *Doner v. Stauffer*, 1 P. & W. (Pa.) 198; *Page v. Thomas*, 43 Ohio St. 38; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; *Day v. Wetherby*, 29 Wis. 363; *Gwin v. Selbey*, 5 Ohio St. 96; *Smith v. Jones*, 18 Neb. 481; *Bowen v. Billings*, 13 Neb. 439; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *Holloway v. Turner*, 61 Md. 217; *Glenn v. Gill*, 2 Md. 1, 16; *Thompson v. Frist*, 15 Md. 24; *Allen v. Grisom*, 90 N. Car. 90; *Talbott v. Pierce*, 14 B. Mon. (Ky.) 195; *Black v. Bush*, 7 B. Mon. (Ky.) 210; *Caussey v. Bailey*,

3. Appropriation of Firm Assets to Separate Debts.—Where all the partners of a solvent firm agree, for a sufficient consideration and without fraudulent intent, to appropriate a portion of the partnership assets to the payment of a separate debt of one of the partners, the partners thereby abandon their equity, and the claim of the firm creditors, which cannot rise higher than that of their debtor, is also defeated.¹

57 Tex. 665; Hawk Eye Woolen Mills v. Conklin, 26 Iowa 422; Tillinghast v. Champlin, 4 R. I. 173; Fullam v. Abrahams, 29 Kan. 725; Golden State & Miners Iron Works v. Davidson, 73 Cal. 389; Schaeffer v. Fithian, 17 Ind. 463; Dunham v. Hanna, 18 Ind. 270; Dean v. Phillips, 17 Ind. 406; Hanover Nat. Bank v. Klein, 64 Miss. 141; Thompson v. Frist, 15 Md. 24; Tillinghast v. Champlin, 4 R. I. 173; Washburn v. Bank of Bellows Falls, 19 Vt. 278.

1. A complaint in an action by creditors to set aside chattel mortgages executed by defendants doing business under the name of "F Bros." alleged that defendants being indebted to plaintiffs, and for the purpose of defrauding their creditors, executed mortgages covering their stock, to relatives; that one mortgage was given to secure a debt of the old firm of "F Bros." and that the other was to secure an individual debt of one of the defendants, and that neither of the debts secured by the mortgages were those of the present firm to which plaintiffs gave credit; that since the execution of the mortgages defendants had made a voluntary assignment; and that the assignee was threatening to sell the property and pay off the mortgages. It was held in demurrer that the complaint was insufficient, it not being charged that the debts were not fairly owing to the mortgagees. *Fisher v. Syfers*, 109 Ind. 514.

A and B, partners, borrowed money of a bank, for part of which they gave their individual notes and for part the firm notes. The money, as the bank knew, was to be used to pay the individual indebtedness of A, and he was charged with the amount on the firm books. Afterwards, all the notes were taken up, and firm notes, secured by chattel mortgage, given for the whole loan. It was held that an assignee of the firm for the benefit of creditors was bound to pay the whole of the mortgage out of the firm assets. *In re Assignment of Stewart*, 62 Iowa 614.

One who has a lien against one partner individually is not entitled to a fund raised from partnership property, unless a portion of it comes into the hands of said partner as his share after the partnership debts are paid. *Haines v. Millers*, 61 Ga. 344.

In *Snodgrass' Appeal*, 13 Pa. St. 471, a promise by one of two partners to pay the amount of an execution which had been levied on the partnership effects under a judgment against the other partner, if the sheriff would forbear, was held to give the separate debt a preference over a subsequent levy for an obligation contracted by the firm. The promise was treated as an agreement to devote the joint property to the separate debt, which precluded the partners and consequently the joint creditors. See also *Seigler v. Chidsey*, 28 Pa. 279; notes to *Selk v. Prune*, 2 Lead. Cas. Eq. 397.

In *Case v. Beauregard*, 99 U. S. 119, a member of a firm assigned and transferred in good faith his interest in the partnership property in payment of a just debt for which he was solely liable. The creditor took possession of it, and sold it to A, who, by an act of sale, in which the other member of the firm united, transferred it for a valuable consideration to B. The firm and the members of it were insolvent. C, claiming to be a simple-contract creditor of the firm, then filed his bill to subject the property to the payment of his debt; but the court held that C had no specific lien on the property, and there being no trust which a court of equity could enforce, the bill could not be sustained.

A member of an insolvent firm, with the consent of his partner, applied funds of the partnership to the payment of the premiums on insurance for the benefit of his wife, to whom he was largely indebted. It was held that the application was *prima facie* valid; and that partnership creditors having no lien upon the assets of the firm must show that it was fraudulent before they would be entitled to pursue the money

The firm, however, must be solvent,¹

paid for such premiums. *Hanover Nat. Bank v. Klein*, 64 Miss. 141.

Members of an insolvent partnership in good faith and in ignorance of the true condition of its affairs, transferred the firm property to a corporation in exchange for shares of stock, to be divided between the partners according to their several interests. The transfer was not fully completed until after the death of one of the partners. It was held that the stock issued to the deceased partner was not partnership property, nor liable to the payment of the partnership debts in preference to his individual debts. *Singer v. Carpenter*, 125 Ill. 117.

The members of a firm executed their joint promissory notes, in their individual names, and on the same day conveyed their partnership property in trust to secure payment of the notes. A creditor holding acceptances given in the name of the firm, in the course of business, and for partnership purposes, but prior to the execution of the notes, filed a bill to have the trust conveyances set aside and to subject the property therein described to the payment of such acceptances. The court held that as there was no proof of an intention to defraud the creditors of the firm, and as ordinary creditors of a firm have no lien upon the property of the firm so as to be able to prevent a *bona fide* alienation of it, the beneficiary in the deed of trust was entitled to the payment of his debts out of the proceeds of the sale of the property conveyed, the surplus, if any, to be paid to the complainant. *Carver Gin Co. v. Bannon*, 85 Tenn. 712.

If the members of a firm mortgage its land for an individual debt of a member, and there is no fraud nor collusion, the lien of the mortgage is paramount to the claims of partnership creditors. *Anderson v. Norton*, 15 Lea (Tenn.) 14.

In *New Hampshire*, the appropriation of partnership property to the payment of the individual debts of a partner is valid against subsequent creditors of the firm. *Farrell v. Metcalf*, 63 N. H. 276.

In *Kansas*, it is held that during the existence of a solvent partnership, it may, upon a *bona fide* consideration, all the partners assenting, transfer and appropriate the partnership property in payment of the individual debt of one of its members. *Woodmansie v. Hol-*

comb, 34 Kan. 35. See also *Schmidlapp v. Currie*, 55 Miss. 597; *Reeves v. Ayers*, 38 Ill. 418; *Sexton v. Anderson*, 95 Mo. 373; *Priest v. Chouteau*, 85 Mo. 398; *Stebbins v. Williard*, 53 Vt. 665; *Van Rossum v. Walker*, 11 Barb. (N. Y.) 237; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *National Bank of the Metropolis v. Sprague*, 5 C. E. Greene (N. J.) 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511; *Allen v. Center Valley Co.*, 21 Conn. 130; *Bullitt v. The Methodist Church*, 26 Pa. St. 108; *Kimball v. Thompson*, 13 Metc. (Mass.) 283; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411.

1. Payment of an individual debt of one of the partners out of the partnership assets when the firm is insolvent, is considered in most of the States a fraud upon the firm creditors. Thus in *Iowa*, an insolvent firm sold their stock of goods to two of their creditors, who, in part payment therefor, canceled an individual debt of one of the partners. It was held that such a division of the firm property to the payment of the individual debt of a partner was a fraud upon creditors of the firm and invalidated the sale as to them. *Patterson v. Seaton*, 70 Iowa 689. See also *Strauss v. Frederick*, 91 N. Car. 121.

In *Louisiana*, it is held that the separate creditors of a member of a firm will not be allowed to apply the firm assets to pay his debt, to the prejudice of the partnership creditors, even though the other members have acquiesced therein. *Carter v. Allen*, 36 La. An. 473.

In *Texas*, in an action against the members of a firm, an attachment was issued, under which property was seized, which defendant claimed under an assignment of one of the partners, purporting to convey his individual interest in the property for the benefit of such of his creditors as would consent to take under it and release him. The court held that the assignment passes, only the interest of the assignor left after the partnership affairs were settled. *Still v. Focke*, 66 Tex. 715.

In *Missouri*, several parties hired a theatre for a term of years and carried it on under an agreement to divide the profits in a specified proportion at the end of each year, reserving a certain proportion to meet contingent losses. One of the parties mortgaged his interest in the leasehold to secure his private debt. It was held that the arrangement

and the conveyance without fraud.¹

was a partnership; that the mortgage was subordinate to the partnership debts, and that the mortgagee, having notice of the equitable rights of the other parties, should not be protected as against their claims. *Priest v. Chouteau*, 85 Mo. 388.

In *Rhode Island*, one of two partners make an assignment for the benefit of his creditors. His copartner was insolvent, and there were no partnership assets. It was held that the partnership creditors were entitled to participate *pro rata* with the individual creditors in the distribution of the assigned estate. *Alexander v. Gorman*, 15 R. I. 421. See also *Miller v. Creditors*, 37 La. An. 604; *Buckingham v. Ludlum*, 37 N. J. Eq. 137.

In *Goodbar v. Cary*, 16 Fed. Rep. 316, it was held that where one lends money to the individual members of a firm, taking their individual notes therefor, a conveyance of land owned by the firm in part payment of such notes is an appropriation of partnership property to the payment of the debts of its members; and if at the time of such conveyance the firm is insolvent, it is fraudulent as to existing creditors, although valid as between the parties thereto, and will be set aside at the suit of a creditor who has obtained a judgment against such firm.

See also *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146; *Keith v. Fink*, 47 Ill. 272; *Cox v. Platt*, 32 Barb. (N. Y.) 126; *French v. Lovejoy*, 12 N. H. 458; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13; *Walker v. Marine Nat. Bank*, 98 Pa. St. 574; *Waterman v. Hunt*, 2 R. I. 298; *Bailey v. Kennedy*, 2 Del. Ch. 12; *Roop v. Herron*, 15 Neb. 73; *Crane v. Roosa*, 40 Hun (N. Y.) 455; *Vernon v. Upson*, 60 Wis. 418; *Black v. Bush*, 7 B. Mon. (Ky.) 210; *O'Connor v. Coats*, 79 Ind. 596.

1. The Assignment Must be in Good Faith.—Thus, where a surviving partner has transferred or parted with his right to have the partnership effects applied to the payment of the firm debts, before proceedings by the partnership creditors to liquidate the affairs of the partnership are commenced, but his action has not been in good faith, he cannot afterward surrender it to the prejudice of the partnership creditors. *Robinson v. Allen* (Va.), 8 S. E. Rep. 835.

In *Heineman v. Hart*, 55 Mich. 64, it

was held that a chattel mortgage given without consideration to secure the antecedent individual debt of one of the partners is fraudulent as against creditors of the firm, if at the time it was given, the firm was insolvent or would become so by such a shrinkage in outstanding accounts as might reasonably be expected.

In *California*, in an action of accounting between partners, firm creditors may join in an intervention for the purpose of sharing in a fund in the hands of one of the partners resulting from a fraudulent sale by him of the firm property. *Grossini v. Perazzo*, 66 Cal. 545.

A transfer by a partner of his interest in the copartnership property to pay the debts of the firm, cannot be adjudged fraudulent as against the individual creditors of the partner making the transfer in the absence of evidence that any surplus would remain after the payment of the firm debts. *Citizens' Nat. Bank v. Reddall*, 18 N. Y. St. Rep. 471; s. c., 2 N. Y. Sup. 331.

An agreement by a partner with special experience to remain in the firm, though desiring to retire, was held a sufficient consideration for the payment of a debt of his out of the capital of the firm. *George v. Wamsley*, 64 Iowa 175.

Suits Against Separate Creditors to Recover Partnership Assets in Their Hands.

—A suit in equity to recover payments made by a partner to his individual creditors from the partnership funds cannot be maintained in the names of the other partners, or in the name of the firm for the use of firm creditors, without showing the insolvency of the firm, and that the money sought to be recovered was necessary for the payment of firm debts. *Davis v. Atkinson*, 124 Ill. 474.

Specific articles of partnership property were sold on execution for the individual debt of one of the partner. The supreme court of Indiana held that the firm could maintain an action to set aside the sale without tendering the money paid by the purchaser, and that declarations made by one of the partners in the absence of the others, that the property in question was the individual property of the partner for whose debt it was taken, were not within the scope of his powers as a partner, and did not estop the firm from asserting, as against the purchaser, that the prop-

4. Effect of Sale of One Partner's Interest to Another Partner.—So also where a partner retires from a firm and in good faith assigns his interest in the partnership to the other partners, the equities of the partners are extinguished, and the equities of the partnership creditors are also at an end.¹ But such a transfer when the firm

erty belonged to the partnership. *Williams v. Lewis*, 115 Ind. 45.

A surviving partner in his individual name executed a mortgage on property described as formerly owned by the firm, but declared in the mortgage to be the separate property of the mortgagor. By a bill in equity alleging that the partnership owned an undivided interest in the property which constituted all of its assets, a partnership creditor sought to have the mortgage declared and foreclosed as a general assignment enuring to the equal benefit of the partnership creditors. The court held that the bill could not be maintained, for though complaint might have an equity as a partnership creditor founded on rights independent of the mortgage, he could not elect to accept the rights and benefits it conferred, and at the same time have its uses set aside, and the property appropriated to other and different uses. *Espy v. Comer*, 80 Ala. 333.

It is the duty of a partner, upon learning that his copartner has misappropriated the firm assets for the payment of his individual debts, to notify the persons so paid of his intention to hold them liable, so that they may take immediate steps to save themselves out of any individual estate such copartner then may have; and a delay of nearly two years in proceeding to collect from the creditors so paid, is unreasonable. *Davies v. Atkinson*, 124 Ill. 474.

Partnership property conveyed by the partners in payment of their individual debts, and subsequently conveyed to a *bona fide* purchaser, cannot be subjected to partnership debts. *Jewett v. Meech*, 101 Ind. 289; *Case v. Beauregard*, 99 U. S. 119; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Sigler v. Knox Co Bank*, 8 Ohio St. 511; *Bullitt v. The Methodist Church*, 26 Pa. St. 108.

1. In *Baker's Appeal*, 21 Pa. St. 76, *LEWIS, C. J.*, said: "It is well settled that the right to confine each partner, or those who claim under him, to his interest in the surplus after the payment of the partnership debts, is an equity which rests in the other partners alone, and not in the creditors of the firm.

The latter have no lien on the property, and must work out their preference in the distribution of the partnership funds entirely through the medium of the partners, whose interests remain undisposed of. *Story's Equity*, § 1253. If they consent to a disposition of the assets, the preference of the creditors is at an end, and they must rely upon the personal responsibility of the partners who contracted the debts. Where one partner sells his interest to another, in consideration of an engagement by the latter to pay the partnership debts, the rule is the same. The engagement to pay them is but a personal contract. It creates no lien on the property. It follows as a necessary consequence that if the partner who has acquired the interests of his former associates, and in whom resides the right to appropriate the partnership assets to the payment of partnership liabilities, thinks proper to exercise his dominion, and to make a different disposition of them, he has a right to do so; and the preference of the partnership creditors engrafted upon them, and deriving its support from his equity, ceases to exist. The scion dies with the stock."

When a partner retires and transfers his interest to the other partners, the newly constituted firm may prefer the joint debts which are exclusively their own, or prefer the joint debts which they owe in common with the retiring partner. *Frons' Estate*, 73 Pa. St. 459; *Robb v. Mudge*, 14 Gray (Mass.) 534.

In *Dimon v. Hazard*, 32 N. Y. 65, it was held that when one of his partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had always been his own separate property, and that he could consequently appropriate it to the payment of his separate debts.

In *ex parte Ruffin*, 6 Ves. 119, there was a partnership of two persons and one retired, assigning the partnership property to another, and taking a bond for the value and a covenant of indemnity against debts. *LORD ELDON* ruled that the joint creditors had no

is insolvent is a fraud upon the partnership creditors, and is invalid.¹

equity attaching upon partnership effects even remaining in specie.

In *Stanton v. Westover*, 101 N. Y. 265, A and B, copartners, dissolved, each agreeing to pay one-half of the debts, and A transferring his interest to B. B was insolvent, but neither he nor A knew this, and the transfer was made in good faith, the firm being solvent. It was held that firm creditors could not impeach A's transfers in payment of his individual debts.

Where the members of a firm, acting in good faith, dissolve it, one member selling his interest to the other, the latter will not be deprived of the right to hold such property exempt from the payment of a partnership debt afterwards asserted against him. *Mortley v. Flanagan*, 38 Ohio St. 401.

A member of a partnership whose copartners had retired and left him sole owner of the partnership, confessed judgment in favor of his individual creditors. It was held that in the absence of any evidence of fraud such creditors were entitled to the proceeds of the firm property in preference to firm creditors. *Brown v. Miller*, 11 Colo. 431. See also *Durfee v. Bump*, 20 N. Y. St. Rep. 833; s. c., 3 N. Y. Supp. 505.

In *Alabama*, it is held that where one partner sells out his interest to the other, the effects become the exclusive property of the purchaser discharged from any lien on account of partnership debts, and that, if the sale was fair and valid, the continuing partner may claim an exemption in the partnership property as against a partnership creditor. *Levy v. Williams*, 79 Ala. 171. See also *Jones v. Fletcher*, 42 Ark. 422.

But in *Indiana*, if one buys out the interest of his copartners, assuming the debts of the firm, the partnership creditors may participate in the proceeds of his estate on equal terms with his individual creditors. *Warren v. Farmer*, 100 Ind. 593.

The general rule, however, is that a sale by one partner to another in good faith destroys the equities of the firm creditors. *Hubbs v. Bancroft*, 4 Ind. 388; *Frank v. Peters*, 9 Ind. 343; *Reese v. Bradford*, 13 Ala. 387; *Rankin v. Jones*, 2 Jones (N. Car.) Eq. 169; *McDonald v. Beach*, 2 Blackf. (Ind.) 55;

Dunham v. Hanna, 18 Ind. 270; *Waterman v. Hunt*, 2 R. I. 298; *Bullitt v. The Methodist Church*, 26 Pa. St. 108; *Mayer v. Clark*, 40 Ala. 259; *Griffith v. Burke*, 14 Md. 102; *Robb v. Mudge*, 14 Gray (Mass.) 534.

1. A transfer of the interest of a partner of an insolvent to his copartner does not enable the transferee as against the firm creditors, to apply the partnership property to the payment of his individual debts. *Roop v. Herron*, 15 Neb. 73.

A partner sold his interest in the firm to his copartner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor it was held that the right of the former to be paid out of the firm assets in preference to the latter, was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeeley*, 66 Mo. 554. See also *Atkins v. Saxton*, 77 N. Y. 195.

A sold his partner B his interest in the firm. B assumed its liabilities, and gave a lien upon its effects to secure the price, and to indemnify A against firm debts that he might be called upon to pay. A conveyed his interest to C, an individual creditor. After A and B's insolvency, the partnership creditors filed a bill on which it was held that A's conveyance was void against them, and that they were entitled by subrogation to the benefit of the lien. *Buck Stove Co. v. Johnson*, 7 Lea (Tenn.) 282.

When the condition of the firm at the time of the transfer is such as to warrant the partners in supposing that a "necessity for marshalling assets" is likely to shortly arise, it is, under such circumstances, a fraud in the partners to make a transfer or division of the assets, and thus attempt to deprive firm creditors of their preference. *Black's Appeal*, 44 Pa. St. 503.

The case of *Ex parte Mayou*, 34 L. J. 25; s. c., 11 Jur., N. S. 433, was where a firm in insolvent circumstances dissolved, one partner assigning to the other his interest, and the continuing

5. Effect of Sale of Partner's Interest by Legal Process.—A similar rule prevails where the individual interests of the several partners are sold under executions and the partnership is thereby terminated. If, however, a levy is made by the partnership creditors before a sale of the interests of the partners by their separate creditors, the levy of the partnership creditors will prevail over the levy of the separate creditors, even though it be subsequent in date.¹

partner assuming the debts of the firm. In his opinion WESTBURY, L. C., said: "This case was very learnedly argued with reference to several decisions of LORD ELDON, but I take it that the principle of all the decisions is, that which is shortly stated by LORD ELDON, in the case of *Ex parte Williams*, 11 Ves. 3, in which he very concisely states that every one of these transactions must depend entirely upon the bona fides." And without considering the question of fraudulent intent he held, "that there was no bona fides in this transaction, that the assignment was fraudulent, that it was void, that it did not operate as a conversion of the bankrupt's property into the separate estate of Wood (the surviving partner), that it must be still considered as joint property and distributed as such among joint creditors."

In re Cook, 3 Biss. (U. S.) 122, was similar in facts to *Ex parte Mayou*. In that case HOPKINS, J., said: "I think where a firm is insolvent that partners should be considered rather in the light of trustees of the firm property for the benefit of creditors, and should not be allowed to sell to each other and so defeat the equitable priority of the firm creditors," and he decided that such an assignment is a "fraud in law" which "equity would at once set aside." See also *In re Sauthoff*, 8 Biss. (U. S.) 35; *Ransom v. Van Deventer*, 41 Barb. (N. Y.) 307; *Wilson v. Robertson*, 21 N. Y. 587; *Tenney v. Johnson*, 43 N. H. 144; *Phelps v. McNealy*, 66 Miss. 554; *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155; *Flack v. Charron*, 29 Md. 311; *Sanderson v. Stockdale*, 11 Md. 563; *Collins v. Hood*, 4 M'Lean (U. S.) 186; *Burtus v. Tisdall*, 4 Barb. (N. Y.) 571; *Deveau v. Fowler*, 2 Paige (N. Y.) 400; *Crooker v. Crooker*, 46 Me. 250; *Kirby v. Schoomaker*, 3 Barb. Ch. (N. Y.) 48.

In a few cases such transfers have been upheld. *Allen v. The Center Valley Co.*, 21 Conn. 130.

1. This is well illustrated by *Richard v. Allen*, 117 Pa. St. 199. In this case Sargent and Holt were partners. Richard held a judgment against Sargent individually, and Henry a similar judgment against Holt. Executions were issued on both judgments, and on September 1st, 1883, a constable levied upon the partnership property. On September 4th, 1883, the firm confessed judgment to Copeland, and before the constable's sale, Allen, the sheriff, under the judgment, levied upon the same property previously levied upon by the constable. The constable sold the property to Richard, and subsequently the sheriff sold the same property to Copeland. Richard then brought suit against Allen for damages. The court decided that the sale to Copeland was valid and payment was entered in favor of the defendant. On a writ of error the judgment was sustained, *GORDON, C. J.*, saying: "The constable's levies were necessarily confined to the property of the individuals against whom they were issued, *qua* individuals, and his seizure of the goods of the firm was a trespass and legally void. A partnership is a distinct entity, and the joint effects belong to it, and not to the several partners. *Dover v. Stauffer*, 1 P. & W. (Pa.) 198. It follows that the levies on the goods of the firm of Sargent & Holt, for the several debts of the individual members of that firm, created no lien upon those goods, and were in fact as nugatory as though levied upon the property of a stranger. Admittedly had the sale been on but one of the writs, the purchaser would have taken no right in the firm assets, but only the right to compel an account with the continuing partner. . . . If, however, a levy on the interest of a single partner would have created no lien on the goods in controversy, we cannot see how a levy on the individual interests of both could alter the legal aspect of affairs, for in either case those interests were several, and the

firm rights remained unaffected. The action of the constable did not deprive the partnership of the control of its own goods; the several partners still continued to be the agents of the firm, and it would not be proper to say that a sale by both or either of them, as such, would not have passed a good title to a purchaser of these goods regardless of the levies. But the sheriff's levy, made by virtue of an execution issued on a judgment against the partnership, was a lien on the goods themselves, and his sale was not the disposition of a mere right in the firm, but of the property itself, and therefore vested in his vendee the absolute ownership thereof, leaving to the constable's vendees the right to have so much of the proceeds of the sale as remained after the satisfaction of the sheriff's suit. Had there been no levy by the sheriff on the property in question until after the sale to the plaintiffs, their case would have been different. In that event, the interest of both parties having been disposed of, there would, thereafter, have been no partnership in existence, hence no firm goods on which to levy. *Doner v. Stauffer, supra*. The equities of partnership creditors depend on the equities of the partners, and as long as a partner continues to have an interest in the partnership, so long do the equities of the firm creditors continue; but when the rights of all the partners have been disposed of, either by judicial or private sale, neither partnership nor partnership rights remain, and consequently they, the creditors, have no longer anything to which they can look for a satisfaction of their claims except individual responsibility. But as a levy on the right of a partner, neither divests that right nor dissolves the partnership, clearly the power of the firm to dispose of its own goods is not thereby affected, and as a consequence the equities of the firm creditors remain. That the judgment was confessed by the firm subsequently to the levies by the constable, even though the debt for which it was given was contracted after those levies, is not of material consequence; it was nevertheless a debt of the firm for the payment of which the goods might have been assigned, or converted into cash; and as the levies by the constable created no lien, the property was entirely free for seizure on the execution against the partnership."

In *Powers v. Large*, 69 Wis. 621, a

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creditor of one partner in an insolvent firm recovered judgment against him and levied on the firm property. Before sale under the levy a creditor of the firm attached the property and obtained a judgment against the firm. It was held that he, having secured a lien on the property before it was appropriated to the payment of the separate debt, had a prior claim upon the proceeds of the sale made under the individual creditor's levy.

The seizure and actual removal of specific chattels of a partnership, on *mesne* process against one member thereof for his private debt, and the exclusion of the firm from the possession thereof, is a trespass. *Sanborn v. Royce*, 132 Mass. 594.

An attachment by a creditor of an individual partner will not affect the lien acquired by an earlier attachment in favor of a creditor of the partnership, and no different rule should prevail in equity in cases where the distribution of the partnership estate only, is proceeding on equitable principles in insolvency. *Cunningham v. Gushee*, 73 Me. 417.

Only the tangible personal property of a firm can be levied upon for the individual debt of a partner; an actual levy must be made. The property, at the time of the sale, must be in actual possession of the sheriff, and within view of those in attendance, and the sheriff must sell only the interest of the debtor. A sale of the partner's interest in the firm generally, pursuant to a mere constructive levy, does not pass title. *Read v. McLanahan*, 47 N. Y. Supr. Ct. 275.

But in *Michigan* it was held that an execution for an individual debt cannot be levied on specific articles of property in which defendant's only interest is that of a partner or joint owner. *Hutchinson v. Dubois*, 45 Mich. 143.

As a general rule, a levy for a separate debt will yield to a subsequent levy for a debt due by the firm. *Morrissey v. Blodgett*, 8 N. H. 238; *Lovejoy v. Bowers*, 11 N. H. 404; *Tappan v. Blaisdell*, 5 N. H. 189; *Pierce v. Jackson*, 6 Mass. 242; *Rice v. Austin*, 17 Mass. 197; *Matlack v. Matlack*, 5 Ind. 403; *Holland v. Fuller*, 13 Ind. 195; *Coover's Appeal*, 29 Pa. St. 9; *Hoskins v. Johnson*, 24 Ga. 625; *Crane v. French*, 1 Wend. (N. Y.) 311; *Dunham v. Murdock*, 2 Wend. (N. Y.) 553; *Douglas v. Winslow*, 20 Me. 89; *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310; *Rainey*

6. Rights of the Separate Creditors.—As a general rule, when a firm is insolvent the separate creditors have a prior claim upon the separate estates of the partners, but where the firm is solvent each partner may apply his individual property to the payment of the partnership debts.¹ Where, however, a partner first mort-

v. Nance, 54 Ill. 29; *Houseal's Appeal*, 45 Pa. St. 484; *Witter v. Richards*, 10 Conn. 37; *Crooker v. Crooker*, 46 Me. 250; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Peck v. Fisher*, 7 Cush. (Mass.) 386; *Jarvis v. Brooks*, 27 N. H. 37; *Matlack v. James*, 2 Beasley (N. J.) 26; *Shedd v. Wilson*, 27 Vt. 478; *Russ v. Fay*, 3 Williams (Vt.) 191; *Boro v. Harris*, 13 Lea (Tenn.) 36; *Harris v. Phillips*, 49 Ark. 58; *Commercial Bank v. Mitchell*, 58 Cal. 42; *Hershfield v. Clafin*, 25 Kan. 166.

A sale of a partner's interest can confer upon the purchaser no greater interest than the partner has himself, that is, his share of the partnership funds after the partnership debts are paid. *Book v. McIntyre*, 31 Ala. 532; *Menagh v. Whitwell*, 52 N. Y. 146; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Horton's Appeal*, 13 Pa. 67; *Christian v. Ellis*, 1 Gratt. (Va.) 396; *Sanders v. Young*, 31 Miss. 111; *Smith v. Barker*, 10 Me. 458; *Crooker v. Crooker*, 46 Me. 250; *Newman v. Bean*, 21 N. H. 93.

1. In *Gallagher's Appeal*, 114 Pa. St. 353, JUSTICE PAXSON said: "It is conceded law that one partner may not pay his private debt out of the assets of his firm, and it was contended by the appellants that the converse of this proposition is true; that is to say, that one member of a firm may not pay the debt of his firm out of his individual assets until his private debts are first paid. If the appellants' contention amounts to anything it amounts to just this. This position is so palpably unsound that it does not require extended discussion. The difference between the two propositions is obvious to the dullest understanding. To pay a private debt out of firm assets is a fraud—an actual fraud. It is taking the money of one person to pay the debt of another, and being an unlawful act, may be restrained by an injunction. But who ever heard of restraining by injunction a man from paying his own debts with his own money, which precisely what a man does when he pays a debt of his firm out of his private means? Not only will the law not interfere in such case, but it

will lend its aid to compel him to do this very thing. For a debt of the firm the creditor may levy upon and sell the private property of one partner." See *Bowyer v. Knapp*, 15 W. Va. 277; *Reese v. Bradford*, 13 Ala. 837; *Reeves v. Ayres*, 38 Ill. 418; *Robertson v. Baker*, 11 Fla. 192; *National Bank of the Metropolis v. Sprague*, 5 C. E. Green (N. J.) 13.

Where a partner advances his individual property to pay a firm indebtedness, the general partnership creditors must be paid before the advance can be repaid to the partner. *Gordon's Estate*, 11 Phila. (Pa.) 136.

A partnership creditor is not entitled to share *pro rata* with individual creditors in individual property. *New Market Nat. Bank v. Locke*, 89 Ind. 428.

But where a judgment against a partnership becomes a lien on private property before a private debt is contrasted, on which a judgment is subsequently obtained, the first judgment will not be displaced in equity so as to give place to the second. *Louden v. Ball*, 93 Ind. 232.

Where land of one partner is set off on execution for a debt of the firm, and afterwards the same land is set off for a separate debt of the partner, the separate creditor will hold the land. *Jarvis v. Brooks*, 23 N. H. 136; *Crockett v. Crain*, 33 N. H. 542; *Holton v. Holton*, 40 N. H. 77; *Treadwell v. Brown*, 41 N. H. 12.

The equity of a dormant partner will not be enforced against persons who have had no notice of its existence. *Ex parte Norfolk*, 19 Ves. 458; *Brown's Appeal*, 17 Pa. St. 480; *Van Valen v. Russell*, 13 Barb. (N. Y.) 590.

In some of the States the levy of a separate creditor on the assets of a firm is confined to the right, title and interest of the defendant. The sheriff cannot take possession of the goods to the exclusion of the firm. *Treadwell v. Brown*, 43 N. H. 290; *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Deal v. Bogue*, 20 Pa. 228; *In re Smith*, 16 Johns. (N. Y.) 102; *Zoller v. Grant*, 19 N. Y. State Rep. 311; *Newman v.*

Bean, 21 N. H. 93; Garvin v. Paul, 47 N. H. 158; Sanborn v. Royce, 132 Mass. 594.

In other States the sheriff levies upon and takes possession of the partnership property, but the plaintiff on the execution is liable to account to the partnership creditors. Gerard v. Bates, 124 Ill. 150; Newhall v. Buckingham, 14 Ill. 405; Sanders v. Young, 31 Miss. 111; Witter v. Richards, 10 Conn. 37; White v. Woodward, 8 B. Mon. (Ky.) 484; Harris v. Phillips, 49 Ark. 58. In the States where this rule prevails the court will stay the execution if it appears that the partnership is insolvent. Place v. Sweitzer, 16 Ohio 142; Hubbard v. Curtis, 8 Iowa 1.

Upon an assignment for benefit of creditors, claims against a firm of which the assignor was formerly a member, cannot be allowed against his individual estate, where the latter is insufficient to pay his individual debts. Fox's Appeal (Pa.), 11 Atl. Rep. 228.

In *Missouri*, it is held that the separate estate of a deceased partner must be applied in payment of all principal and interest due to his separate creditors, before any part of such estate can be touched by the creditors of the firm, and the creditors of the firm are first paid out of the partnership assets. Level v. Farris, 24 Mo. App. 445.

A firm made an assignment for the benefit of creditors, by which they assigned all their partnership and individual property to plaintiff to be applied to the payment of partnership debts prior to the payment of their individual debts. It was held that the assignment was void for preferring partnership creditors over individual creditors as to the individual property. O'Kane v. Hyde, 70 Cal. 6.

Members of a copartnership executed an assignment of all their property for the benefit of creditors, which provided that after the payment of the copartnership debts the residue should be applied to the payment of the individual and private debts of the assignors or either of them, and if insufficient for that purpose, then the same should be applied *pro rata* to the payment of such debts. The individual assets and liabilities of the assignors were largely unequal. It was held that in the absence of proof of an intent to defraud, the assignment would not be held void by reason of the provision in regard to the payment of individual assets and indebtedness of the assignor, but the

provision would be construed as expressing only the individual wishes of the assignors with reference to their individual property and liabilities. Crook v. Rindskopf, 105 N. Y. 476.

Members of an insolvent firm assigned the partnership and their individual estates for the benefit of creditors. The individual estate of one of the firm was more than enough to pay his individual debts. It was held that the individual debts of this member were to be paid with interest to the date of distribution. *Re Duncan*, 10 Daly (N. Y.) 95.

A creditor of A only, as to A's separate property, has no priority over a creditor of A & B where there are no firm assets and B is insolvent. Shackelford v. Clark, 78 Mo. 91.

An insolvent firm mortgaged its property to a trustee to secure seven claims, the separate debts being clearly stated, but one of them being an individual and not a partnership debt. No fraud was intended. The court held that the mortgage was void as to the last claim, as against an attaching creditor, but not as to the other six. Walker v. White, 60 Mich. 427. See also Pritchett v. Pollock, 82 Ala. 169.

Where, at the time a debt is contracted for the benefit of a firm, the creditor requires and receives the joint and several obligations of the copartners, individually, it thereby becomes the several debt of each of them, and the holder is entitled to prove the obligation against the separate estate of a deceased member of the firm, and to share *pro rata* with the other separate creditors in the distribution. Matter of Gray, 111 N. Y. 404.

A surviving partner assumed a partnership debt and gave his individual notes in payment thereof. It was held that the partnership debt was thereby converted into a separate demand, and the partnership creditor became the individual creditor of the surviving partner. Espy v. Comer, 80 Ala. 333.

In *New Jersey*, it is held that on marshalling the assets of both partnership and individual estates, under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until the individual creditor's claims have been satisfied. Davis v. Howell, 33 N. J. Eq. 72.

In *South Carolina*, joint creditors, after exhausting firm assets, come

in for balance on partner's separate real estate *pari passu* with his separate creditors. Thus B, C and D traded as B & Sons. B borrowed \$5,000 of E and title deeds of land held by B and contract for purchase of land were deposited for preparation of mortgage to secure loan. B died before the mortgage was executed. Then C died. The heirs of B and C executed the mortgage to E. A *et al.* firm creditors enjoined D, and prayed for a receiver to take the land bargained for. The court said: "We think the true doctrine is, . . .

with respect to the right of the separate creditor, if any equity exists in his behalf, such as two funds . . . to throw the copartnership creditors on the partnership assets in the first instance, but after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us. Besides a debt contracted by a copartnership is not only a debt of the firm, but a debt in substance of each individual member of the firm, and the property of the firm, and of each member, is liable for it. But the property of the firm is not liable for the separate debt of a member; only the interest of the member is liable, which is nothing until the firm debts are paid. So that, because a copartnership creditor has an exclusive claim upon the firm property, it does not follow that a separate creditor should have an exclusive claim upon the separate property. In the first place, the effect of the contract is to pledge, as a basis of credit, both partnership and private property; in the second case, the separate property alone gives the credit. And as to partnership property, there is no separate property until the debts are paid, which is liable to both partnership and separate debts by contract." *Hutzler v. Phillips*, 26 S. Car. 136.

In *Kentucky*, an exceptional rule of distribution prevails. It is there held that where partnership creditors exhaust the firm assets without being paid in full, the individual creditors must receive a like sum from the individual assets; and when this is done the individual estate remaining will be distributed between all the creditors, partnership and individual, in proportion to the amount of their respective debts. *Fayette Nat. Bank v. Kenney*, 79 Ky.

133.

It has been held in a number of cases

that where there is no joint estate, and the firm and all the partners are insolvent, the creditor who first obtains a lien upon a fund is entitled to priority. *Scull's Appeal*, 19 W. N. C. (Pa.) 70; *Schackelford v. Clark*, 78 Mo. 491; *Curtis v. Woodward*, 58 Wis. 499; *Sanguoit etc. Co's. Appeal* (Pa.), 9 Atl. Rep. 77; *Alexander v. Gorman*, 15 R. I. 421; *Harris v. Peabody*, 73 Me. 262; *Curtis v. Woodward*, 58 Wis. 499; *Higgins v. Rector*, 47 Tex. 361; *Emanuel v. Bird*, 19 Ala. 596; *Brock v. Bateman*, 25 Ohio St. 609.

Right of Separate Creditors in the Estate of a Deceased Partner.—Partnership creditors are entitled to payment from the estate of a deceased partner only after his individual creditors are paid. *Warren v. Able*, 91 Ind. 107; *Bake v. Smiley*, 84 Ind. 212.

But a partnership creditor may demand the allowance of his claim by the probate court from the estate of a deceased partner, although the surviving partners are solvent, where the rights of the individual creditors will not be prejudiced. *Doggett v. Dill*, 108 Ill. 560.

Individual creditors are entitled to a preference over partnership creditors in the distribution of individual assets of one of the firm, when the firm creditors have not shown the nonexistence of firm assets at the time of the decease. *D'Invellor's Estate*, 13 Phila. (Pa.) 362.

In *Illinois*, it is held that a partnership debt is joint and several, and the creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner, or against the estate of the deceased partner. *Silverman v. Chase*, 90 Ill. 37. See also *ex parte Rowlandson*, 3 P. W. 405; *Ex parte Bond*, 1 Atkyns; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *Bouser v. Cox*, 6 Beavan 84.

In *Arnold v. Hamer*, 1 Freem. (Miss.) Ch. 509, the court said: "It is well settled that upon the death of one of several partners, a joint creditor has no claim for the payment of his debt out of the separate estate of the deceased partner, until the claims of the separate creditors have been first satisfied. It is true that joint creditors may come into equity to enforce their claim against the estate of a deceased partner, and equity will then consider the claim as it is considered at law, both joint and several; but this can only be done where the claims of the joint creditors

gages his land to secure an antecedent partnership debt and afterwards mortgages the same land to secure an individual debt, the holder of the latter mortgage cannot invoke the principle that individual property is to be applied to individual debts.¹

XIII. DECEDENTS' ESTATES—1. In Favor of Creditors.—Before the

do not come in conflict with those of the separate creditors. In such case, the priority of the separate creditors is always preserved. Upon the death of one partner, the claim of the joint creditors survives against the surviving partner, and is extinguished at law against the estate of the deceased partner, to which they can only resort through the aid of a court of equity, where the advantage thus thrown by accident upon the separate creditors, will be preserved. And in such case it makes no difference that the surviving partner is insolvent. If the assets to be administered are purely legal, the separate creditors having acquired a priority at law, and having equal equity, that priority will be preserved. For where the equities are equal, the legal right must prevail. A different rule obtains where the assets are purely equitable, and where, therefore, both joint and separate creditors would have to seek the aid of a court of equity. In such case neither party having a legal preference, and the surviving partner being insolvent, the claimants would be decreed to take *pari passu*. It may, I think, be hence laid down, that in administering upon the legal assets of an insolvent partner his property should be applied to the payment of his private debts, and partnership claims should not, be reported for a *pro rata* dividend."

In a note to 3 Kent 65, MR. JUSTICE HOLMES says: "The exclusion of the joint creditors from the separate fund in case of the death of one partner has been thought to rest on the ground that the law cast all firm obligations on the survivor, and the partnership creditors had no claim against the estate of the deceased partner except in equity, wherefore they were postponed to the separate creditors, who had a right at law." See Harris v. Peabody, 73 Me. 262; Fellows v. Greenleaf, 43 N. H. 421; Weaver v. Weaver, 46 N. H. 188; Davis v. Howell, 33 N. J. Eq. 72; Lord v. Davendorf, 54 Wis. 491; Bridge v. McCullough, 27 Ala. 661; Evans v. Winston, 74 Ala. 349; Bush v. Clark, 127 Mass. 111; McIntire v. Yates, 104

Ill. 491; Doggett v. Dill, 108 Ill. 560; Warren v. Able, 91 Ind. 107; Huff v. Lutz, 87 Ind. 471; Miller v. Clarke, 37 Iowa 325; Thornton v. Bussey, 27 Ga. 302.

Practice.—Where a fund to be distributed is in the hands of the court under a sale of property, upon its order, belonging to an insolvent firm, and no persons are interested in it except the individual creditor under whose levy the property was sold, and petitioning firm creditors, the court cannot determine their rights without a resort to equity. Powers v. Large, 69 Wis. 621.

A creditor of a dissolved partnership being nonresident of the State may proceed at once in equity in the United States circuit court to have the assets marshalled and distributed. Fiske v. Gould, 12 Fed. Rep. 372.

Where a separate creditor of a partner levied upon and sold an undivided half of the partnership property, without bringing an action to determine said partner's interest in the property as provided by the Iowa Code, § 3054, it was held that a creditor of the firm, who subsequently levied upon the property, might maintain an action in equity to determine the conflicting claims of the two creditors. Aultman v. Fuller, 53 Iowa 60.

In *Delaware*, it was held on a question of distribution between individual and partnership creditors by an assignee under a general assignment for the benefit of creditors, that the court would go behind a judgment to ascertain whether the debt on which the judgment was founded was a partnership or an individual debt. Green v. Walker, 5 Del. Ch. 26.

In *Virginia*, it was held that the pendency of an action by a creditor to have the estate of a deceased partner administered for the benefit of the separate creditors, will not suspend an action to administer the partnership property for the benefit of the partnership creditors, the object of the two suits not being the same. Robinson v. Allen, 8 (Va.) S. E. Rep. 835. See also Ross v. Titsworth, 37 N. J. Eq. 333.

1. McIntire v. Yates, 104 Ill. 491.

passage of statutes subjecting the real estate of a decedent to his simple contract debts,¹ it was held that where the deceased left both specialty and simple contract creditors, and the former, instead of resorting to the realty which they alone could reach, proceeded against the personalty to the exclusion of the simple contract creditors who had no other fund, the latter, under the equitable doctrine of marshalling, so far as the personalty had been exhausted to satisfy the specialty debts, should stand against the realty whether devised or descended, in the place of the specialty creditors.² So where the testator dies leaving an uncompleted contract for the purchase of realty, and purchase money is afterwards paid out of the personal assets, simple contract creditors of the testator are entitled to stand in the place of the vendor with respect to his heir on the estate sold, as against the devisee of that estate.³ The same principle obviously applies where the personalty has been exhausted by the payment of mortgages.⁴ The

1. DEBTS OF DECEDENTS, section IV.

2. Wms. Exrs. (7th Eng. ed.) 1713; *Sagetary v. Hyde*, 1 Vern. (Eng.) 455; *Neave v. Alderton*, 1 Eq. Cas. Abr. (Eng.) 144; *Wilson v. Fielding*, 2 Vern. (Eng.) 763; *Galton v. Hancock*, 2 Atk. (Eng.) 436; *Selby v. Selby*, 4 Russ. (Eng.) 341; *Torr's State*, 2 Rawle (Pa.) 250, 252; *Story Eq.*, § 561 *et seq.*

So where the specialty debts had been paid out of the personalty, and at the time of the payment the personalty was sufficient to pay also the simple contract debts, and the executor subsequently committed a devastavit by which the personalty became insufficient for that purpose, it was held that the simple contract creditors were entitled to be paid out of the realty so far as the personalty had been applied in payment of the specialty debts. *Ellard v. Cooper*, 81 Ir. Ch. Rep. 376. But see *Kearnan v. Fitzsimons*, 3 Ridg. C. C. (Eq.) 16.

But the simple contract creditors are not entitled to have a larger fund for payment of their debts than they had originally, and hence cannot stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unpaid. *Cradock v. Piper*, 15 Sim. (Eng.) 301.

Equity Marshals the Assets by Subrogation.—"When a person may get satisfaction out of either of two funds, and another can get satisfaction only out of one of them, and they are both equally convenient and accessible to him who may get satisfaction out of either, and nothing but mere caprice

governs him in making the selection then equity will restrain him to the fund not operated by the claims of the other; but if convenience and not caprice is his motive, the most that equity does is to substitute the disappointed claimant to his rights. The first is rarely done; for it is a matter of extreme delicacy to restrain a person in the exercise of a legitimate right, in favor of one who has no claim upon him by contract, and whose only connection with him arises from being interested in the same common fund; yet where there is a fraud, moral or legal, or mere caprice, he will be restrained. The latter, to wit, subordination, is very frequently done, and is the foundation of marshalling assets in favor of legatees and simple contract creditors, and applies in cases where there is neither fraud nor caprice; it is sufficient that his fund has been exhausted by one who had a double means of satisfaction." *HENDERSON, J.*, in *Jones v. Zollicoffer*, 2 Hawks (N. Car.) 623, 642; s. c., 11 Am. Dec. 795, 797, and note p. 799.

3. *Selby v. Selby*, 4 Russ. (Eng.) 336, 340. See *Kimmell v. Burns*, 84 Ind. 370, 374.

Of course in States in which the doctrine of vendor's lien is not recognized, simple contract creditors have no equity. See *Com. v. Shelby*, 13 S. & R. (Pa.) 348, 353.

For a full discussion of the doctrine of vendor's lien for prepaid purchase money, see *Mackreth v. Symmons*, 1 Ld. Cas. Eq. (4th Am. ed.) 447.

4. *Aldrich v. Cooper*, 8 Ves. (Eng.)

assets will not be marshalled against judgment creditors.¹ Statutes subjecting the lands of the deceased to his simple contract debts have diminished the importance of the doctrine of marshalling by enabling simple contract creditors to resort to the realty without invoking its aid;² on the other hand the same statutes, as will hereafter appear, have greatly increased the number of instances in which it will be applied in favor of legatees.

2. Marshalling in Aid of Legatees.—Legatees may invoke the aid of the equitable doctrine of marshalling against the heir or devisee where personal assets applicable to the payment of their legacies have been exhausted by a mortgagee³ or vendor holding a lien on

382; s. c., 2 Ld. Cas. Eq. (4th Am. ed.) *78; *Gwynne v. Edwards*, 2 Russ. (Eng.) 289, note; *Lornas v. Wright*, 2 My. & K. (Eng.) 769; *Hales v. Cox*, 32 Beav. (Eng.) 118. See *Post v. Mackall*, 3 Bland Ch. (Md.) 518; *Debts of Decedents*, § 3, pp. 256, 257.

In *Aldrich v. Cooper*, 8 Ves. (Eng.) 382, it was held that where a mortgagee of freehold and copyhold estates, who was also a specialty creditor, had exhausted the personal assets, simple contract creditors were entitled to stand in his place against both the freehold and copyhold estates so far as the personal estate had been taken away from them by such specialty creditor, although at the time of the decision the copyhold estates were not liable to either specialty or simple contract debts unless secured by specific liens or testamentary charge.

So covenantors, who claim under a merely voluntary covenant, have been held entitled as against devisees to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts. *Lornas v. Wright*, 2 My. & K. (Eng.) 769; *Hales v. Cox*, 32 Beav. (Eng.) 118.

In *Greenwood v. Taylor*, 1 R. & M. (Eng.) 185, SIR JOHN LEACH, M. R., following the English bankrupt practice, held that under the equitable doctrine of marshalling a specialty creditor, whose debt was also secured by a mortgage, could only prove under a decree in a creditor's suit for so much of the debt as the mortgaged estate did not extend to pay. But in *Mason v. Boy*, 2 My. & Cr. (Eng.) 448, overruling *Greenwood v. Taylor*, LORD COTTENHAM held that in an administration suit a mortgagee might prove his whole debt and afterwards realize his security for the deficiency.

See further upon this point Trower's *Prevalence of Equity*, 1-6; *Davis v. Dowding*, 2 Keen (Eng.) 245; *Brocklehurst v. Jessop*, 7 Sim. (Eng.) 438; *Tipping v. Power*, 1 Hare (Eng.) 410; *King v. Smith*, 2 Hare (Eng.) 239; *Greenwood v. Firth*, 2 Hare (Eng.) 241 note; *Aldridge v. Westbrook*, 5 Beav. (Eng.) 193; *Bouser v. Cox*, 6 Beav. (Eng.) 84; *Lockhart v. Hardy*, 9 Beav. (Eng.) 349; *Armstrong v. Storer*, 14 Beav. (Eng.) 535; *Rome v. Young*, 3 Y. & C. Exch. (Eng.) 199; *Wickenden v. Payson*, 6 De G. M. & G. (Eng.) 210; *Tuckley v. Thompson*, 1 J. & H. (Eng.) 130; *Cockerell v. Dickens*, 3 Mo. P. C. C. (Eng.) 112; *Marshall v. M'Asadey*, 3 Dr. & W. (Eng.) 232; *Pinchard v. Fellows*, L. B., 17 Eq. (Eng.) 422.

The English Judicature Act 1875 (38 and 39 Vict., ch. 77, § 10) enacts that in the administration of the assets of any person who may die after the commencement of this act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

A devisee of mortgaged property is not entitled to exoneration out of the personal estate as against creditors. *Crecy v. Pierce*, 69 N. Car. 67; *Moore v. Dunn*, 92 N. Car. 63, 67.

1. *Sharpe v. Lord Scarborough*, 4 Ves. (Eng.) 538.

2. See *Post v. Mackall*, 3 Bland (Md.) Ch. 518.

3. Wms. Exrs. (7th Eng. ed.) 1719; *Rop. Leg.* (20th Am. ed.) *957-*961; *Ludkins v. Leigh*, *Forrest* (Eng.) 53; s. c., *Cas. t. Talb.* 54. See *Rider v.*

the land so descending or devised,¹ or by creditors whose debts

Wager, 2 P. Wms. (Eng.) 329, 335; Tipping v. Tipping, 1 P. Wms. (Eng.) 729; Howell v. Price, 1 P. Wms. (Eng.) 294; Aldrich v. Cooper, 8 Ves. (Eng.) 397; Wythe v. Henniker, 2 Myl. & K. (Eng.) 635; Johnson v. Child, 4 Hare (Eng.) 87; Selby v. Selby, 4 Russ. (Eng.) 341; Romilly, M. R., in *Middleton v. Middleton*, 15 Beav. (Eng.) 450, 453. Anon. Chan. Cas., part 2, 4; Lucy v. Gardiner, Bunb. (Eng.) 137; Mason's Estate, 1 Pars. Eq. (Pa.) 129; Mollan v. Griffith, 3 Paige Ch. (N. Y.) 402, 404; Rice v. Harbison, 63 N. Y. 493. Compare Gibson v. McCormick, 10 G. & J. (Md.) 65; Mollan v. Griffith, 3 Paige Ch. (N. Y.) 402, 404.

Although the natural fund for the payment of debts is the personal estate and the heir or devisee is in general entitled to have the personal estate applied in exoneration of encumbrances affecting the realty; yet the court of chancery will not permit such arrangement to take place, when it would defeat specific or general legatees of their legacies. *Rop. Leg.* (20th Am. ed.) *960. See *Rider v. Wager*, 2 P. Wms. (Eng.) 329, 335; *Gonto v. Winthrop*, 5 R. I. 319, 323; *Mason's Estate*, 1 Pars. Eq. (Pa.) 129, 132; *Hoff's Appeal*, 24 Pa. St. 200, 206; *Thomas v. Thomas*, 2 C. E. Green (N. J.) 356.

In *O'Neal v. Mead*, 1 P. Wms. (Eng.) 693, the principle is exemplified in favor of a specific legatee.

Devisee "Subject to a Mortgage."—"The rule of law is clear that a testator by devising lands expressly subject to a mortgage, does not thereby declare any intention that the devisee shall take *cum onere*, as against the testator's personal estate. (See *Wills*.) It is equally well settled that the amount of a testator's general personal estate is not a circumstance from which any inference can be legitimately drawn as to the construction of his will. Yet if the amount of a testator's personal estate be insufficient for the payment of his debts and legacies, the court discovers an intention on the part of the testator, that the devisee of his real estate, subject to a mortgage, should take it *cum onere*. If the court in that state of circumstances, had decided upon apportioning the deficiency between the pecuniary legatees and the devisee of the land, a reason might have been found for the determination, in the consideration that the court was dividing a burthen which

the caprice of the creditor might otherwise have thrown wholly upon either. But that is not the determination of the court. The court is active in throwing the burthen wholly upon the devisee of the land, upon the party apparently and upon the ordinary principles of the court entitled to be exonerated. And it is remarkable that in *Forrester v. Lord Leigh* (Amb. 171), the possibility of this very circumstance is stated as the reason why the court will not in favor of a pecuniary legatee marshal the assets by compelling a bond creditor to proceed against devised estates." *WIGRAM, V. C.*, in *Johnson v. Child*, 4 Hare (Eng.) 87, 94.

Leaseholds.—On the same principle, if a leasehold estate subject to a mortgage be specifically bequeathed, the specific legatee must take the legacy *cum onere*, if the testator's personal estate be insufficient for the payment of his debts and legacies; and consequently the pecuniary legatees are entitled to have the assets marshalled and to stand in the place of the mortgagee as against the leasehold estate. *Johnson v. Child*, 4 Hare (Eng.) 87.

1. *Sproule v. Prior*, 8 Sim. (Eng.) 189; *Birds v. Askey*, 24 Beav. (Eng.) 618; *Lord Lilford v. Powys Keck*, L. R., 1 Eq. (Eng.) 347; *Barnwell v. Ironmonger*, 1 Dr. & Sm. (Eng.) 255.

In *Wythe v. Henniker*, 2 My. & K. (Eng.) 635, *SIR J. LEACH, M. R.*, held that pecuniary legatees could not stand in the place of the vendor upon land devised, although if the estate purchased had descended they would have been so entitled. This distinction was rejected by *LORD ROMILLY* in *Birds v. Askey*, 24 Beav. (Eng.) 618, and in *Lord Lilford v. Powys Keck*, 1 L. R., 1 Eq. (Eng.) 347, and by *KINDERSLEY, V. C.*, in *Barnwell v. Ironmonger*, 1 Dr. & Sm. (Eng.) 255.

In *Pennsylvania*, the doctrine of vendor's lien is not recognized. *Commonwealth v. Shelby*, 13 S. & R. (Pa.) 348, 353.

Effect of Legislation.—Under 17 and 18 Vict., ch. 113 (*Locke King's Act*) and its amending acts, 30 and 31 Vict., ch. 69, and 40 and 41 Vict., ch. 34, lands or hereditaments upon which there is a mortgage or vendor's lien, are primarily chargeable therewith, so that the necessity for marshalling does not arise. The corresponding New York statute applies only to the lien of a mortgage.

have been charged on the realty.¹ So, at common law, where a specialty creditor, who had a general lien on the real estate, as a creditor by bond in which the testator bound himself and his heirs, received payment out of the personalty and thereby exhausted it, so as to leave nothing for the payment of legacies, a general legatee was entitled to stand in the place of such

3 Banks & Bro. (7th ed.), p. 2205, § 4; Wright v. Holbrook, 2 Rob. (N. Y.) 516, 522; s. c., 32 N. Y. 587. See, as to construction, Harrington v. True, L. R., 33 Ch. D. (Eng.) 195; Sackville v. Smyth, L. R., 17 Eq. (Eng.) 153; Brownson v. Lawrence, L. R., 6 Eq. (Eng.) 1, 6; Gibbons v. Eyden, L. R., 7 Eq. (Eng.) 371; Rice v. Harbeson, 2 T. & C. (Eng.) 4, 6; Re Gray, 27 Hun (N. Y.) 455; Erwin v. Loper, 43 N. Y. 521, 524; Taylor v. Wendel, 4 Barb. (N. Y.) 324, 330; Rogers v. Rogers, 1 Paige Ch. (N. Y.) 188; note to 1 Lead. Cas. Eq. (4th Am. ed.) 183.

In *California, Kansas and Missouri*, "it is provided that the encumbrance of any land devised shall not be deemed a revocation of the devise, but the devisee shall take the same subject to the encumbrance.

These words on first impression might seem to imply that the onus of discharging the encumbrance is thereby thrown upon the land. No adjudications of the point have come to the knowledge of the writer; but a number of considerations suggest that the legislature meant simply to abrogate the rule existing at common law, whereby an encumbrance of lands previously devised worked a revocation of such devise." Woerner's Am. L. of Adm., § 407, p. 1112, n. (6). See Woodworth's Estate 31 Cal. 595, 607. A similar statute in *Indiana* is followed by explicit directions out of what funds such mortgage is payable.

Indiana Revised Statutes, §§ 2564, 2573.

1. Foster v. Cook, 3 Bro. C. C. (Eng.) 347; Knight Bruce, V. C., in Tombs v. Roch, 2 Coll. (Eng.) 407; Patterson v. Scott, 2 De G. M. & G. (Eng.) 531; Surtees v. Calkin, 19 Beav. (Eng.) 406; Hoover v. Hoover, 5 Pa. St. 351, 357.

Thus if land be devised for or made subject to the payment of debts, assets will be marshalled in favor of legatees, or annuitants who will stand in the place of the creditors who may have been satisfied out of the personal assets. Foster v. Cook, 3 Bro. C. C. (Eng.) 347; Bradford v. Foley, 3 Bro. C. C. (Eng.)

351, n.; Webster v. Alsop, 3 Bro. C. C. (Eng.) 352, n.; Arnold v. Chapman, 1 Ves. (Eng.) 110; Norman v. Morrell, 4 Ves. (Eng.) 769; Hanby v. Fisher, 2 Coll. (Eng.) 515; Rickard v. Barrett, 3 K. & J. (Eng.) 289; Patterson v. Scott, 1 De G. M. & G. (Eng.) 531.

"The legatees not being charged with the payment of debts while the real estate devised is so charged, the legatees will be regarded as more the objects of the testator's bounty than the devisee; and where the personal estate is not sufficient to pay both the creditors and the legatees, the latter will be entitled to charge the real estate devised so far as the personal estate has been applied in payment of debts. Foster v. Cook, 3 Bro. C. C. 347; Lutkins v. Cas. temp. Talb. 53; Forrester v. Leigh, Amb. R. 171; Norman v. Morrell, 4 Ves. 769; Aldrich v. Cooper, 8 Ves. 381, 396; Livingston v. Livingston, 3 Johns. Ch. 148, 153. Nor is there any distinction in this regard between specific legatees and pecuniary legatees, the right to marshal the assets in the case supposed being affirmed equally in favor of the latter as of the former. Forrester v. Leigh, Amb. 171; Wythe v. Henniker, 2 Myl. & K. 365." See J. in Elliott v. Carter, 9 Gratt. (Va.) 541, 550.

This language, if confined to cases in which the land is charged in exoneration of the personalty, is perfectly intelligible, but unfortunately for logical consistency the doctrine is equally applicable to cases in which the land is merely charged in aid of the personalty. Surtees v. Parkin, 19 Beav. (Eng.) 408; Paterson v. Scott, 1 De G. M. & G. (Eng.) 535.

The effect of the doctrine so applied appears paradoxical. Thus, suppose testator charges his realty with his debts in aid of his personalty, and bequeaths legacies to the amount of £500 and dies leaving £500 personal estate, real estate of the value of £500, and debts £500. The consequence would be that though the personal estate is the primary fund for the payment of debts, and though the testator has manifested no intention to relieve it from its primary liabilities

specialty creditor, as against real assets descended,¹ but not

(LEGACIES AND DEVISES, section IV, 4); yet by the application of the doctrine of marshalling, the debts would be primarily thrown upon the realty, so that in the result the pecuniary legatees would be paid in full, and the devisees get nothing. See note to *Surtees v. Parkin*, 19 Beav. (Eng.) 408.

It is immaterial whether there is an express trust or only a charge; nor has the law upon the subject been affected by the passage of statute 3 and 4 W. IV, ch. 104, by which real estate was made liable to simple contract debts. *Rickard v. Barrett*, 3 K. & J. (Eng.) 289.

For a decree where estates devised, charged with debts and an annuity, were marshalled in favor of annuities and legacies so charged, see *Kerrison v. Earl of Stradbroke* 2 Set. Dec. (Eng.) 985, 986.

Whether a general charge binds lands specifically devised, LEGACIES AND DEVISES, section IV, 7.

1. Wms. Exrs. (7th Eng. ed.) 1717; Rop. Leg. (2nd Am. ed.) 969, 970, 971; *Bowman v. Reeve*, Pre. Ch. (Eng.) 578; *Lutkins v. Leigh*, Cas. temp. Talb. (Eng.) 54; *Hanby v. Roberts*, Amb. (Eng.) 128; s. c., Dick. (Eng.) 105; *Binns v. Nicholls*, L. R., 2 Eq. (Eng.) 256. See *Culpepper v. Ashton*, 2 Ch. Cas. (Eng.) 117; *Tipping v. Tipping*, 1 P. Wms. (Eng.) 734; *Lucy v. Gardner*, Bunb. (Eng.) 137; *Herne v. Mayrick*, 1 P. Wms. (Eng.) 202; *Robards v. Wortham*, 2 Dev. Eq. (N. Car.) 173; S. P. 22 Am. Dec. 738; *Chase v. Lockerman*, 11 G. & J. (Md.) 185, 186; s. c., 35 Am. Dec. 277, 283, 284.

"In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that if those creditors having a right to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund, both are in law liable to the creditors; and therefore by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied." LORD ELDON, in *Aldrich v. Cooper*, 8 Ves. 382, 396. s. c., 2 Ld. Cas. Eq. (2nd Am. ed.) 228, 237.

Lands in Foreign Jurisdiction.—Land in a foreign country is governed by the *lex loci rei sitæ*, and is only liable to such debts as would be cast upon it by the law of that country. Hence legatees cannot marshal the assets against lands descended which lie in a foreign jurisdiction unless by the law of that jurisdiction their right to do so would be recognized. Thus where a testator domiciled in England died possessed of personal estate and also of real estates in Scotland, and the Scotch estates descended to the heir at law, and the personal estate was exhausted in payment of the debts, it was held that the Scotch law threw the debts primarily on the personalty, there could be no marshalling in an English court against the Scotch heir in favor of pecuniary legatees. "The legatees ask that by virtue of the English doctrine of equity applicable to the administration of English real estates descended, where personal legatees would be disappointed by the payment of creditors out of their fund, these legatees may be declared entitled to acquire the rights of creditors against the Scotch real estate. It is clear that in Scotland they would have no such right, and to me it seems equally clear that unless they have such a right in Scotland, the law of England cannot give it to them. It is admitted, as I understand, that the burthen of liability to debts, so far as relates to real estate, can only be created by the *lex loci rei sitæ*; but it is suggested that the burthen may be laid on real estate on which it is not imposed by the *lex loci rei sitæ* by an indirect equity in favor of the legatees, because the creditors who have been paid might have pursued their own rights against the real estate without waiting, in the first instance, to see whether there was personal estate or not. It seems quite impossible that this can be correct, because, in the first place, as against the real estate in Scotland the courts of England have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate is Scotland, can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who in this case is the Scotch heir. What is that personal equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not

against real assets devised,¹ although devised to the heir taking as devisee.² Since the passage of statutes subjecting real estate to liability to simple contract debts,³ it would seem clear upon principle that if a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the general legatees would be entitled to stand in his place against lands descended,⁴

enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their own favor, which would not be imposed by the law of Scotland? It seems to me quite clear that this court cannot found any such equity upon the accident of this heir at law being before it as a party to the suit. The equity must be founded upon some higher principle. The fallacy which pervaded the whole of Mr. Anderson's [counsel for legatee] argument was this, that he assumed that the Scotch estate was properly brought into this court as the forum of administration. But without first showing what this court has to do, with respect to Scotch real estate, and why it ought to be done, the proposition is not made out. There are, in point of fact, no debts to be paid out of the Scotch real estate; there are no trusts to be executed as to the Scotch real estate; there is no contract to be enforced as to the Scotch real estate; and unless this point is settled in Mr. Anderson's favor, that the indirect burthen is to be thrown upon the real estate in Scotland in favor of these legatees, which is the very matter in controversy, it is not here in the proper forms of administration." LORD SELBORNE in *Harrison v. Harrison*, L. R., 8 Ch. App. (Eng.) 342, 349, 350. See also *Brown v. Bashford*, 11 B. Mon. (Ky.) 67; 52 Am. Dec. 559; *Salmond v. Price*, 13 Ohio St. 368; 42 Am. Dec. 204; *McLawrin v. Salmons*, 11 B. Mon. (Ky.) 96; 52 Am. Dec. 563; *Post v. Mackall*, 3 Bland (Md.) Ch. 486, 515. But see *Rice v. Harbeson*, 63 N. Y. 493.

DEBTS OF DECEDENTS, 5 Am. & Eng. Encyc., section III, pp. 254, 255.

1. *Rop. Leg.* (2nd Am. ed.) 973; *Hanby v. Roberts*, Amb. (Eng.) 128; s. c., *Dick*, (Eng.) 105; *Scott v. Scott*, Amb. (Eng.) 383; s. c., 1 *Eden* (Eng.) 458; *Keeling v. Brown*, 5 Ves. (Eng.) 359; *Aldrich v. Cooper*, 8 Ves. (Eng.) 397; *Clifton v. Burt*, 1 P. Wms. (Eng.) 678.

If one devises his real estate, and

gives general pecuniary legacies not charged on that real estate, and dies, leaving specialty debts, and the specialty creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, because it was the intention of the testator that the devisees should have the real estate as well as the legatees be paid. *Hanby v. Roberts*, Amb. (Eng.) 127, 128.

Nor will a specific legatee be allowed to stand in the place of specialty creditors as against real estate devised. *Hashwood v. Pope*, 3 P. Wms. (Eng.) 324, 5th resolution. Compare *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122, 132.

Nor a residuary devisee in States in which such devise is specific. But specific and demonstrative legacies and devisees, whether specific or residuary, contribute *pro rata*. Nor for the same reason can a pecuniary legatee in such States marshal the assets against residuary devisees, unless the land is charged with debts or legacies, or subject to a specific lien. Nor can such pecuniary legatee demand contribution. LEGACIES AND DEVISES, section V, 3.

2. Wms. Exrs. (7th Eng. ed.) 1717. See *Biedesman v. Seymour*, 3 Beav. (Eng.) 368; *Scott v. Scott*, Amb. (Eng.) 383; *Chaplin v. Lerond*, 5 M. & S. (Eng.) 114. See *Ellis v. Page*, 7 Cush. (Mass.) 161.

Under 3 and 4 Wm. IV, ch. 106, § 3, an heir to whom lands are devised by his ancestor takes as devisee for all purposes. *Strickland v. Strickland*, 10 Sim. (Eng.) 374.

For further discussion see LEGACIES AND DEVISES, section V, 3, note.

3. DEBTS OF DECEDENTS, section IV.

4. Wms. Exrs. (7th Eng. ed.) 1717. See *Theobald on Wills* (2nd ed.) 620 627; *Knight Bruce*, V. C., in *Tombs v. Roch*, 2 Coll. (Eng.) 490, 498, 499; *Hoover v. Hoover*, 5 Pa. St. 351, 357; *Lightfoot v. Lightfoot*, 27 Ala. 351; *Warley v. Warley*, Bailey Eq. (S. Car.) 397; *Hope v. Wilkinson*, 14 Lea (Tenn.)

but not lands devised.¹ Where the general personal estate is exhausted, by the payment of one or more legacies charged on the

21. See *Brown v. James*, 3 Strobb. Eq. (S. Car.) 24; *Dunlap v. Dunlap*, 4 Dessaus. (S. Car.) 305.

If creditors seize and apply specific legacies to the satisfaction of their claims, the legatees are entitled to stand in the place of such creditors against lands descended. *Trumbo v. Sorrencey*, 3 T. B. Mon. (Ky.) 284; s. c., 16 Am. Dec. 103; *Com. v. Shelby*, 13 S. & R. (Pa.) 348.

So where the heir is in by descent and not by purchase, although the estate be devised. *Ellis v. Page*, 7 Cush. (Mass.) 161.

In some cases the right of legatees to marshal the assets under such statutes has been denied substantially for the following reasons: "A specialty creditor has a common law right to bring suit against the heir, and hence, if, instead of adopting this course, he exhausts the personal estate, the specific legatees may claim the benefit of the principle on which a court of equity marshals assets. Such is not the position of a simple contract creditor. He has no direct remedy against the land, and can only have recourse to it in the event of the insufficiency of the personal estate. Such a decree would be at variance with the rule that a creditor shall not be satisfied at the expense of one who is interested in a fund which is secondarily liable for the sake of leaving the primary fund open to another claimant. This is conceded as regards creditors, and should apply *a fortiori* to a legatee, whose claim depends exclusively on the bounty of the testator." Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (4th Am. ed.) 328. See *Alston v. Munford*, 1 Brock. (U. S.) 266; *Chase v. Lockerman*, 11 G. & J. (Md.) 185, 186; 35 Am. Dec. 277; *Dugan v. Hollins*, 4 Md. Ch. 139; *Elliott v. Carter*, 9 Gratt. (Va.) 541; *Robards v. Wortham*, 2 Dev. Eq. (N. Car.) 173; 22 Am. Dec. 738; *Miller v. Harwell*, 3 Murph. (N. Car.) 104; *Miller v. Johnson*, 3 Murph. (N. Car.) 194. Compare *Thomas v. Thomas*, 2 C. E. Green (N. J.) 356.

Had such a course of reasoning been adopted in Pennsylvania, where the right of a specialty creditor to bring suit against the heir has become obsolete, and the personalty is the primary fund for the payment of all debts, the assets could not be marshalled in any

case in aid of a legatee. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (4th Am. ed.) 329, 330; citing *Torr's Estate*, 2 Rawle (Pa.) 250.

1. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (4th Am. ed.) 327; citing *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148, 158; *Hennes v. Wood*, 8 Pick. (Mass.) 478; *Woodworth's Estate*, 31 Cal. 595. See also *Hoover v. Hoover*, 5 Pa. St. 351, 357; *Hope v. Wilkinson*, 14 Lea (Tenn.) 21; *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 169, 181; *Wallace v. Wallace*, 21 N. H. 149.

"Where the estate is neither charged with debts nor legacies, nor subject to a specific lien, and it does not descend but is devised to a stranger or the heir, a chancellor refuses to marshal the assets in favor of a general legatee, because there is no reason to think he was as near the testator's heart as was the specific devisee." *Gibson, C. J.*, in *Barklay's Estate*, *Loomis's Appeal*, 10 Pa. St. 387, 389.

But in States in which a residuary or general devise has ceased to be specific, there would seem to be no reason why general pecuniary legatees should not be allowed to marshal the assets as against a residuary devisee. See *LEGACIES AND DEVISES*, section V, 3; *Blaney v. Blaney*, 1 Cush. (Mass.) 107. Compare *Woodworth's Estate*, 31 Cal. 595.

In Pennsylvania, it has been said, "the residuary devisee and legatee of the whole estate would seem to stand precisely in the condition of the heir at law upon whom a part of the estate has been allowed to descend; and it seems that he cannot take so long as there are general legacies remaining unsatisfied." *Lowrie, J.*, in *McGlaughlin v. McGlaughlin*, 24 Pa. St. 20, 23.

If this position is correct, a residuary devise is no longer specific, and lapsed devises should pass *ipso facto* under the residuary clause independently of any further legislation. But in *Massey's Appeal*, 88 Pa. St. 470, it was held that a lapsed devise went to the heir, and to carry such devise to the residuary devisee required the passage of the act of June 4th, 1879, P. L. 88. Hence it would seem that the dictum of Justice *Lowrie* must be considered virtually overruled by *Massey's Appeal*, and a residuary devise in Pennsylvania is

land, general legacies not so charged are entitled to stand in their place as a charge upon the land.¹

But where the charge fails in consequence of an event happening subsequent to the death of the testator, as the death of the legatee before the time of payment, the court will not marshal the assets in favor of the legatee's representative so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas; as against the real estate, it

still specific. See LEGACIES AND DEVISES, section II, 1, f.

It has also been held in this State that by virtue of the liability of the land to simple contract debts the testator is to be presumed to have made his will in contemplation of such liability, and hence to have devised his lands subject to a general charge. Nevertheless, the doctrine is not carried so far as to allow legatees to marshal the assets against lands devised unless there is an expression of intention to charge the devised lands with his debts, in which case assets will be marshalled in favor of specific and pecuniary legatees. *BELL, J.*, in *Hoover v. Hoover*, 5 Pa. St. 351, 357. See *Walker's Estate*, 3 Rawle (Pa.) 229, 241; *Com. v. Selby*, 13 S. & R. (Pa.) 348, 353; *Scott's Intestate Law* (2nd ed.) 765.

Effect of the Doctrine Upon the Order of Application of Assets.—The effect of marshalling the assets in favor of legatees against lands descended is to make such lands liable to the payment of debts before general pecuniary legacies. This applies only to the mutual relations of the heir and legatees, and does not affect the mode by which the creditors must proceed to enforce their obligations against the land, since under the statutory procedure in nearly all the States the exhaustion or insufficiency of the personalty is essential to an order for the sale of the realty. DEBTS OF DECEDENTS, sections III and IV. See also *Hope v. Wikinson*, 14 Lea (Tenn.) 21, 23-29; *Mollan v. Griffith*, 3 Paige Ch. (N. Y.) 404; *Butts v. Genung*, 5 Paige Ch. (N. Y.) 254; *Gere v. Clarke*, 6 Hill (N. Y.) 350; *Parsons v. Bowne*, 7 Paige (N. Y.) 354; *Roe v. Swezey*, 10 Barb. (N. Y.) 247; *Stuart v. Kisson*, 11 Barb. (N. Y.) 271, 282; *Blossom v. Hatfield*, 24 Hun (N. Y.) 275; *Selover v. Coe*, 63 N. Y. 438; *Laughlin v. Har.* 89 Ill. 119; *Hoffman v. Wilding* 85 Ill. 453; *McLean v. McBean*, 74 Ill. 134; *Bishop v. O'Conner*, 69 Ill. 431; *Ryan v. Jones*, 15 Ill.

1; *Crocker v. Smith*, 10 Ill. App. 376; *Laidley v. Kline*, 8 W. Va. 218, 229; *Gibson v. McCormick*, 10 G. & J. (Md.) 65, 66; *McCloud v. Roberts*, 4 H. & M. (Va.) 443. *Compare* *Ticknor v. Davies*, 14 N. H. 272; *Lucy v. Lucy*, 55 N. H. 9; *Newby v. Skinner*, 1 Dev. & B. (N. Car.) Eq. 488; s. c., 31 Am. Dec. 397; *Hudgin v. Hudgin*, 6 Gratt. (Va.) 320; *McGik v. Wells*, 54 Miss. 137, 149; *KENT, C. J.*, in *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614, 628; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; s. c., 20 Am. Dec. 716; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122, 152; *Bray v. Neill*, 21 N. J. Eq. 343, 350; *Gross v. Howard*, 52 Me. 192.

1. *Wms. Exrs.* (7th Eng. ed.) 1720; *Rop. Leg.* (2nd Am. ed.) 953; *Hanby v. Roberts, Amb.* (Eng.) 127; *Masters v. Masters*, 1 P. Wms. (Eng.) 421; *Bligh v. Lord Darnley*, 2 P. Wms. (Eng.) 619; *Bonner v. Bonner*, 13 Ves. (Eng.) 379; s. c., 2 My. & Cr. (Eng.) 700; *Scales v. Collins*, 9 Hare (Eng.) 656; *Sellon v. Watts*, 9 Week. Rep. (Eng.) 847; *Set. Dec.* (4th ed.) 987. See *Patterson v. Scott*, 1 De G. M. & G. (Eng.) 531; *BELL, C. J.*, in *Perry v. Hale*, 44 N. H. 363, 367; *Lockwood v. Stockholm*, 11 Paige Ch. (N. Y.) 87; *Cryder's Appeal*, 11 Pa. St. 72. *Compare* *Com. v. Shelby*, 13 S. & R. (Pa.) 348, 354; *Elliott v. Carter*, 9 Gratt. (Va.) 541, 550.

Though a legatee may elect, or may be compelled to resort to the personal estate as the fund first liable to the payment of the legacy, yet the legatees of the personal estate thus applied will in equity be entitled to stand in the place of the legatees, whose legacies were charged on the land as against the land itself. *Adams Equity*, 263, note.

"The principle of the court is this: that where one legatee has two funds to resort to for the payment of his legacy in full, and the legatee has only the personal estate, or one fund to resort to, the court presumes that the inten-

would sink by the death of the legatee.¹ Real assets will not be marshalled in aid of a residuary legatee, although the land be subject to a mortgage or other specific lien,² nor on behalf of a charity, whether the bequest is general or residuary, since to do so would in effect evade the statutes of mortmain.³ In jurisdictions in which aliens cannot hold real estate, courts of equity

tion of the testator is that all should be paid in full, and therefore marshals the assets, throwing the particular legacy upon the real estate." There is no distinction in the application of the principle between the case of a class of legacies and the case of individual legacies. *Scales v. Collins*, 9 Hare (Eng.) 656, 658.

1. *Rop. Leg.* (2nd Am. ed.) *979; note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (6th Eng. ed.) 181; *Prowse v. Abington*, 1 Atk. (Eng.) 482. See *Pearce v. Loman*, 3 Ves. (Eng.) 135. Compare *Tombs v. Roch*, 2 Coll. (Eng.) 504.

"There is a singularity in the doctrine as it now stands, that as far as it affects one fund it is good; as far as it affects the other, bad; but it would be still more singular if it shall sink in one case and not in the other, but the land making good the personal estate shall be charged." LORD ROSELYN in *Pearce v. Loman*, 3 Ves. (Eng.) 135, 139.

2. *Rider v. McGee*, 2 P. Wms. (Eng.) 328, 335. See LORD LOUGHBOROUGH, in *Hamilton v. Worley*, 4 Bro. C. C. (Eng.) 204; *Ruston v. Ruston*, 2 Yeates (Pa.) 54, 63; *Walker's Estate*, 3 Rawle (Pa.) 229. *Chase v. Lockerman*, 11 G. & J. (Md.) 185, 203.

The very terms of such a bequest imply that the legatee is to take only what remains after debts and legacies are satisfied. So where the bequest is of the whole personal estate, although not in terms residuary unless there are words of demonstration or description to render it specific or unless the land is charged in exoneration of the personality. *Howe v. Lord Dartmouth*, 7 Ves. (Eng.) 137; *Ancaster v. Mayer*, 1 Bro. C. C. (Eng.) 454; *Keiling v. Brown*, 5 Ves. (Eng.) 359. See *Chase v. Lockerman*, 11 G. & J. (Md.) 185, 203; *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 591. As to whether a bequest is specific or residuary, see LEGACIES AND DEVISES, section II, 1, e.

As to what will exonerate the personality, see LEGACIES AND DEVISES, section IV, 4. See further *Waineright v.*

Bendlowes, 2 Vern. (Eng.) 718; *Adams v. Meyrick*, 1 Eq. Cas. Abr. (Eng.) 271; *Webb v. Jones*, 2 Bro. C. C. (Eng.) 60; *Bardwell v. Bardwell*, 10 Pick. (Mass.) 19. See *Appellant*, 18 Pick. (Mass.) 285. *Spraker v. VanAlstyne*, 18 Wend. (N. Y.) 200.

M'Fait's Appeal, 8 Pa. St. 290.

3. *Rop. Leg.* (2nd Am. ed.) *981; *Wms. Exrs.* (7th Eng. ed.) 1720. *Mogg v. Hodges*, 2 Ves. Sr. (Eng.) 52; *Att. Gen. v. Tyndall*, Amb. (Eng.) 614; *Foster v. Blagden*, Amb. (Eng.) 704; *Hillegard v. Taylor*, Amb. (Eng.) 713; *Makeham v. Hooper*, 4 Bro. C. C. (Eng.) 153; *Foy v. Foy*, 1 Cox (Eng.) 163; *Ridges v. Morrison*, 1 Cox (Eng.) 180; *Att. Gen. v. Hurst*, 2 Cox (Eng.) 364; *Hobson v. Blackburn*, 1 Keen (Eng.) 273; *Williams v. Kershaw*, 1 Keen (Eng.) 274, n.; *Philanthropic Society v. Kemp*, 4 Beav. (Eng.) 581; *Sturge v. Dimsdale*, 6 Beav. (Eng.) 462.

Thus, if a testator gave his real and personal estate, consisting of personality savoring of realty, as leaseholds and mortgage securities, and also pure personality, to trustees upon trust to sell and pay his debts and legacies, and bequeathed the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate and the personality savoring of the realty in order to leave the pure personality for the charity. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (6th Eng. ed.) 186; citing *Mogg v. Hodges*, 2 Ves. (Eng.) 52; *Att. Gen. v. Tyndall*, 2 Eden (Eng.) 257; s. c., Amb. 614; *Foster v. Blagden*, Amb. (Eng.) 704; *Middleton v. Spicer*, 1 Bro. C. C. (Eng.) 201; *Att. Gen. v. Earl of Winchelsea*, 3 Bro. C. C. (Eng.) 373; *Makeham v. Hooper*, 4 Bro. C. C. (Eng.) 153; *Crosbie v. Earl of Liverpool*, 1 R. M. (Eng.) 761, n.; *Fowdrin v. Gowdey*, 2 L. R. Eq. (Eng.) 284; *Wigg v. Mitchell*, 14 L. R. Eq. (Eng.) 92.

"The preceding authorities clearly settle the rule that the court of chancery will not marshal the assets so as to throw the debts upon the real estate, and have the personal a clear fund for

the charity; but it will be proper in this place to notice a rule of the court in the administration of the general residue bequeathed to a charity, and consisting partly of mortgage securities and leaseholds which savored of the realty and partly of assets purely personal. In such case the bequest of the residue, so far as regards the mortgage securities and leaseholds, fails, as being within the statute of mortmain, and lapsed for the benefit of the next of kin. As between such next of kin who are considered in the light of legatees of the mortgage securities and leaseholds, and the charities which have an indisputable right as legatees of the other personalty not partaking of the nature of real estate, the court will not allow a creditor or general legatee to resort exclusively to the assets purely personal, to the disappointment of the charity, but will direct a ratable contribution by the charities and next of kin, in proportion to their respective interests, for the satisfaction of the debts and legacies. In the exercise of this branch of equitable jurisdiction, the court adopts a rule well established by the cases on marshalling, namely: that a person having two funds to resort to for the satisfaction of his demand shall not, by his option of resorting to either of those funds, determine whether one of two parties whose equities are equal shall be paid or not." *Rop. Leg.* (2d Am. ed.) *985. See *Theobald on Wills* (2nd ed.) 619. *Att. Gen. v. Winchelsea*, 3 Bro. C. C. (Eng.) 373; s. c., *Nom. Att. Gen. v. Hurst*, 2 Cox (Eng.) 364; *Curtis v. Hutton*, 14 Ves. (Eng.) 537; *Crosbie v. Mayor of Liverpool*, 1 R. & M. (Eng.) 761, n.; *Howse v. Chapman*, 4 Ves. (Eng.) 542; *Paice v. Archbishop of Canterbury*, 14 Ves. (Eng.) 372, 1 R. & M. (Eng.) 759, note; *Blann v. Bell*, L. R., 7 Ch. D. (Eng.) 382. *Compare Williams v. Kershaw*, 1 Keene (Eng.) 274, n. *Hobson v. Blackburn*, 1 Keene (Eng.) 274, n. *Hobson v. Blackburn*, 1 Keene (Eng.) 273; *Philanthropic Society v. Kemp*, 4 Beav. (Eng.) 581; *Sturge v. Dimsdale*, 6 Beav. (Eng.) 462.

So if a simple pecuniary legacy is given out of two sorts of personalty, there must be an abatement in the proportion of the mixed to the pure personalty. *Ridges v. Morrison*, 1 Cox (Eng.) 180; *Walker v. Childs*, Amb. (Eng.) 524; *Att. Gen. v. Tyndall*, Amb. (Eng.) 624; s. c., 2 Eden (Eng.) 207; *Foster v. Blaten*, Amb. (Eng.)

704; *Wakeham v. Hooper*, 4 Bro. C. C. (Eng.) 153; *Hobson v. Blackburn*, 1 Keene (Eng.) 273. See also *Williams v. Kershaw*, 1 Keene (Eng.) 274, n; *Philanthropic Society v. Kemp*, 4 Beav. (Eng.) 581.

Or, as LORD COTTENHAM has expressed himself: "The rule of the court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be paid out of the prohibited fund." *Williams v. Kershaw*, 1 Keene (Eng.) 275, n. See also *Waite v. Webb*, 6 Mad. (Eng.) 71, *Johnson v. Lord Harrowby*, Johns. (Eng.) 425; *Janne v. Att. Gen.*, 3 Giff. (Eng.) 308; *Scott v. Forrestall*, 13 W. R. (Eng.) 37. *Compare Baker v. Sutton*, 1 Keene (Eng.) 224; *Hobson v. Blackburn*, 1 Keene 273.

And this apportionment should be made according to the respective values of the pure and impure personalty at the testator's death. *Colvert v. Armitage*, New Rep. (Eng.) 60. Overruling on this point *Robinson*, the Governor of London Hospital, 10 Hare (Eng.) 19; *Luckcraft v. Pridham*, 48 L. J. Ch. (Eng.) 636, 639; *Brook v. Badley*, 3 L. R., Ch. App. (Eng.) 675.

Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (6th Eng. ed.) 186, 187.

"The reader will observe the distinction between the rule of *contribution* established by the class of cases just discussed and the case of *marshalling*. By marshalling the court would indirectly allow the charge upon the real estate for the benefit of a charity, contrary to the statute of mortmain, and the practical result would, in most cases, be that of excluding the next of kin wholly, or in part, from that portion of the residue which falls by the statute and to which by law they have an equal right with legatees, to whom legacies are effectually given. On the other hand, the court, in adopting the rule of *contribution* before stated, considers the equities of the next of kin and the charities equal, and therefore directs a ratable contribution from each toward the payment of debts and legacies." *Rop. Leg.* (2nd Am. ed.) *989.

Effect of Direction to Pay Legacies to Charities Out of Pure Personalty.—Although equity will not marshal the assets for a charity, the testator may in effect do so himself by directing the charitable legacies to be paid exclusively

out of his pure personality. In such case the charitable bequests partake of the nature of demonstrative legacies in that the pure personality is the fund, in the first instance, applicable to their payment; on the other hand, they differ from demonstrative legacies to individuals since if the particular fund fails they cannot (under the Mortmain act, 9 Geo. II, ch. 36) be paid out of the personality savoring of realty. In such case the court may with perfect propriety carry out the intention provided the personality savoring of realty is sufficient to pay the legacies to individuals, and the will does not purport to make the legacies to individuals payable out of the pure personality as well as out of the personality savoring of realty. "Where there is no direction as to the payment of any legacy out of a particular fund, it may be admitted, for the purpose of the present question, that the different legacies may fairly be regarded as intended to be paid out of the different funds ratably. *Roberts v. Walker*, 2 Y. & C. (Eng.) 50. And where there is a deficiency of personality savoring of realty to pay the legacies to individuals, then, in furtherance of the general or paramount intention that all the legacies should be paid, the legacies to individuals may be paid partly out of the pure personality, even although the legacies to charities may be expressly made payable out of the pure personality; and this will more especially be the case where the will purports to make the legacies to individuals also payable out of the pure personality as well as out of the personality savoring of realty, as in *The Philanthropic Society v. Kemp*, 4 Beav. (Eng.) 58. Where, however, the testator expressly directs charitable legacies to be paid exclusively out of his pure personality, and the personality savoring of realty is sufficient for the payment of the legacies to individuals; and the will does not purport to make those legacies payable out of the pure personality as well as out of the personality savoring of realty, and the pure personality is not sufficient or only sufficient for the payment of the charitable legacies, then, it appears to me, that to direct that the legacies to individuals should be paid partly out of the pure personality, to the partial defeasance of the charitable legacies, would be a complete and unjustifiable invasion of the rule that charities are favored in law, and an utter violation of the general or paramount intention

of the testator as to the payment itself, and probably, also, of the particular or subordinate intention as to the mode of payment.

"As regards the rule that charities are favored in law, it cannot be reasonably contended for one moment that an exception to this rule is called for in the present case, in order to prevent the mischiefs intended to be guarded against by the statute of mortmain. The charitable legacies are expressly made payable out of pure personality, and no legacy of pure personality, however large, however unjust towards relations who have the strongest moral claims on the testator, however 'languishing' or near death the testator may be at the time of making his will, is contrary to the provisions of the statute of Mortmain, for that statute does not affect to prohibit dispositions of pure personality at all. The cases in which the court has refused to marshal assets have, in truth, nothing whatever to do with the present case. In those cases, a testator had affected to do what he could not lawfully do; he had attempted to make charitable bequests payable wholly or partly out of real estate or personality savoring of realty, and the court refused to marshal his assets in favor of the charities, and thereby caused the legacies to be paid in a different way from that which he intended. But in the present case the testator has himself marshalled or arranged his assets by directing the charitable legacies to be paid exclusively out of the pure personality, and there can be no reasonable doubt of the lawfulness of his intention. He gives charitable legacies out of his pure personality; it cannot be said that it would have been a contravention of the Mortmain act if he had merely made charitable bequests out of the pure personality and had made no other bequests, and it can make no difference that he happens to have left other legacies. It may, however, be said that if the charitable legacies be allowed to exhaust the whole of the pure personality, the diminution of personality savoring of realty caused by the payment thereof of legacies to individuals is indirectly occasioned by the charitable legacies. Now, this argument, if it proved anything, would prove too much, for it would prove that the legacies to individuals ought to be entirely paid out of the pure personality so far as it would extend, rather than out of personality savoring of realty, and that

will not marshal the assets on their behalf any more than for

the charitable legacies ought to take no part of the pure personality until after the other legacies were satisfied; but that would never be contended. And again, this argument is founded on mere conjecture, for *non constat*, but that the testator, if he had not given legacies to charities, would have given as much more to individuals, so that the parties interested in the personality savoring of realty after payment of legacies would take no more than if the charitable legacies had not been given, and therefore it cannot be said with any certainty that by allowing the charitable legacies to exhaust the pure personality the parties interested in the personality savoring of realty are injured by the bequests being made in favor of charities, for they would equally have been injured if additional bequests had been made in favor of individuals."

LORD TRURO, in *Robinson v. Geldard*, 3 Mac. & G. (Eng.) 735, 746, 749; approved by LORD CRANWORTH, in *Tempest v. Tempest*, 7 De G., M. & G. (Eng.) 470, 474, and LORD SELWYN, Ch. J., in *Beaumont v. Oliveiga*, L. R., 4 Ch. App. (Eng.) 309, 316. See Williams on Personal Property (5th ed.) *321. See, however, *The Philanthropic Society v. Kemp*, 4 Beav. (Eng.) 581; s. c., 1 New Rep., H. L. (Eng.) 452; *McKisson v. Cockill*, 32 L. J., N. S. Ch. (Eng.) 753; s. c., 3 De G., J. & S. (Eng.) 622; *Ligg v. Nicholl*, L. R., 14 Eq. (Eng.) 92; *Wills v. Bonne*, 9 L. R., 16 Eq. (Eng.) 487; *Miles v. Harrison*, L. R., 9 Ch. App. (Eng.) 316; *In re Pitt, Lacy v. Stone*, Week. Notes (Eng.) (March 21st, 1885), p. 61, n.; *Gaskin v. Rogers*, L. R., 2 Eq. (Eng.) 284.

A bequest of a residue of pure and impure personality to trustees upon trust to divide the same among such charities in England as they should think proper, has been held equivalent to a direction to the trustees in effect to marshal the residue by applying the impure personality to charities exempt from the Mortmain act, and the pure personality to other charities. *Lewis v. Allenky*, L. R., 10 Eq. (Eng.) 668.

Where testator by his will charged his real estate with the payment of his debts and legacies, except three legacies given for charitable purposes, which three legacies he directed to be paid out of his personal estate, LORD WORTHINGTON, apparently upon analogous principles, decreed the charity legacies

to stand in the place of the specialty creditors, for what this should exhaust of the personal estate. Att. Gen. v. Lord Mountmorris, 1 Dick (Eng.) 379. But although the testator may have directed his charity legacies to be paid out of his pure personality in priority to other legacies, if he has given no direction as to the funds out of which his debts, funeral and testamentary expenses and costs of administration are to be paid, the pure personality must contribute with the other personal estate to their payment before it can be applied in satisfaction of the charity legacies. In such cases the principle of *Robinson v. Geldard*, 3 Mac. & G. (Eng.) 735, is inapplicable. In other words, a direction to pay charitable legacies out of pure personality does not make them so far demonstrative as to entitle them to preference in abatement over other general legacies. *Tempest v. Tempest*, 7 De G., M. & G. (Eng.) 470, 474; *Beaumont v. Oliveiga*, L. R., 4 Ch. App. (Eng.) 309, 317, 319; *Lewis v. Boetefer*, 38 L. T., N. S. (Eng.) 93.

The testator may, of course, exonerate his pure personality from debts by throwing them expressly or by implication upon some other fund as the realty, or impure personality in default of realty. *Wills v. Bourne*, L. R., 16 Eq. (Eng.) 487; *Miles v. Harrison*, L. R., 9 Ch. App. (Eng.) 316.

But in *England*, exonerating the pure personality from debts does not relieve it from bearing its full share of the costs of administration unless they are otherwise provided for. *In re Fitzgerald*, *Adolph v. Dolman*, 26 W. R. (Eng.) 53. Compare *Bassett v. McKenna*, 52 Conn. 437, 442.

STATUTES IN WHICH STATUTES OF MORTMAIN ARE NOT IN FORCE.—Since the only reason that a court of equity will not marshal the assets in aid of charitable legacies is that the practice, if adopted, would lead to the evasion of the statutes of mortmain, it would seem to follow that in no jurisdiction in which neither the statutes of mortmain nor the policy upon which they are founded is recognized, charities would have the same right to marshal the assets as any other class of legatees. See *McDonald v. McDonald*, L. R., 14 Eq. (Eng.) 60, 67.

So a charity expressly authorized to take in mortmain may marshal the assets. *Makeham v. Hooper*, 4 Bro. C.

charities, since to do so would in effect change the law indirectly.¹ Where one of several legatees incurs an expense in protecting their joint interest, the others have been held liable to contribution.²

3. Marshalling in Aid of Devisees.—Where lands not chargeable with the payment of debts are sold for that purpose, the devisee thereof may subject lands devised to pay debts to reimbursement.³ So where one of several devisees of a tract of land liable to be made assets to pay legacies and other liabilities of the testator pays them off even after partition, and thereby relieves the land, the other devisees are liable for contribution though they protested against the payment.⁴ Devisees of land sold to pay debts before exhausting the personalty,⁵ or where the personalty was exhausted and other personal property came into the executor's hands after sale of the realty, are entitled to be subrogated to the rights of creditors who were paid from the proceeds against the personal estate, provided such reimbursement will not prejudice other parties having a more favored claim.⁶ A widow taking a devise in lieu of her dower right has been subrogated to the rights of a creditor against the land taken by him to the extent to which her dower was thereby diminished.⁷ The right of a devisee to marshal the assets as against the heir is not less established than that of a specific legatee, and depends upon the same

C. (Eng.) 53; s. c., *Rop. Leg.* (Eng.) (Am. ed.) *984.

1. *Rop. Leg.* (2nd Am. ed.) *990; *Fourdrin v. Gowdey*, 3 M. & K. (Eng.) 383.

They, however, adopt the principle of contribution explained in the preceding note. The proper course in such cases is for the master to enquire how much of the general produce of the testator's estate had arisen from real estate and chattels real, and how much from pure personalty, and then to set a value on the two portions of the estate respectively, and the legacies and charges must be borne by each in proportion to its value. *Fourdrin v. Gowdey*, 3 M. & K. (Eng.) 383, 397, 408.

2. *New Orleans v. Baltimore*, 15 La. An. 625; see *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92, 97.

3. *Cranmer v. McSnords*, 24 W. Va. 594, 600.

4. *Cook v. Cook*, 92 Ind. 398.

A similar rule applies where one of several heirs pays the debt of his ancestor. *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419.

Where land subject to pay a debt of the testator is devised one-fourth to one devisee and three-fourths to another, a

judgment against them should be separately against each for his *pro rata* share of the debt with a reservation to the plaintiff to proceed against the interest of either for any deficiency after exhausting the interest of the other. *Pugh v. Russell*, 27 Gratt. (Va.) 789, 802.

Under the Michigan statutes (How. St. 1882, § 5, 820) contribution between devisees in the probate court must be by execution and not by an order to sell land to pay debts. *Atwood v. Frost*, 59 Mich. 409.

5. *Chase v. Lockerman*, 11 G. & J. (Md.) 185, 203; *Morris v. Mowatt*, 2 Paige Ch. (N. Y.) 586, 591. See *Wms. Exrs.* (7th Eng. ed.) 1694.

Judgment creditors of the heirs or devisees have a right to ask for the application of the personal estate in the first place to the satisfaction of the debts due by the testator, or that they be substituted in the place of the creditors of the testator as to such personal estate. *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 591.

6. *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 169, 181. See *Wms. Exrs.* (7th Eng. ed.) 1694.

7. *Durham v. Rhodes*, 23 Md. 233, 242.

principle.¹ Devisees and specific legatees contribute *pro rata*.²

4. Widow's Paraphernalia.—A widow's claim to paraphernalia is preferred to a general legacy, and hence she will be entitled to marshal the assets whenever a general legatee could do so.³

5. Jurisdiction of Probate Courts.—In the *United States*, the probate, orphans' or surrogates' courts, possess about the same powers formerly exercised in England by the ecclesiastical and chancery courts, and hence have jurisdiction to enforce the principles of the equitable doctrine of marshalling in the settlement of

1. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (4th Am. ed.) 339. See *Livingston v. Newkirk*, 3 Johns. Ch. (N.Y.) 312; *Brooks v. Dent*, 1 Md. Ch. 523; *Dugan v. Hollins*, 11 Md. 41; *Mitchell v. Mitchell*, 21 Md. 244.

A charge of debts on lands specifically devised does not preclude the right of the devisee to exoneration from land taken by descent. *Livingston v. Newkirk*, 3 Johns. Ch. (N.Y.) 312; *Stiers v. Stiers*, 1 Hall Ch. (N.J.) 224.

A legacy charged generally on the real estate is payable out of land descended before recourse is had to land devised. *Mitchell v. Mitchell*, 21 Md. 244.

As to whether a general charge of legacies affects lands specifically devised, see LEGACIES AND DEVISES, section IV. 7.

2. LEGACIES AND DEVISES, section V. 3.

But a devisee is not entitled to contribution from another devisee to a mortgage, which is peculiar to the land bestowed on himself, unless such was the intention of the testator, which will not be inferred from a general charge of debts on the real estate. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (4th Am. ed.) 340. Citing *Gibson v. McCormick*, 10 G. & J. (Md.) 65; *Thomas v. Thomas*, 2 C. E. Green (N.J.) 356.

As to the exoneration of mortgaged property, see WILLS.

As to effect of blending real and personal property in residuary clause, see LEGACIES AND DEVISES, section IV. 6.

3. Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. (6th Eng. ed.) 185.

The case of paraphernalia is a very strong one for this proposition, that, wherever there is a double fund, though this court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator." LORD ELDON, in *Aldrich v. Cooper*, 8 Ves. (Eng.) 382; s. c., 2 Lead. Cas. Eq. (4th Am. ed.) 237.

Thus she could marshal the assets against real estate devised, if subject to a mortgage or other specific lien by throwing the charge upon the land as a general legatee could have done. *Neal v. Mead*, 1 P. Wms. (Eng.) 693; *Ludkins v. Leigh*, Cas. temp. Talb. (Eng.) 53.

Or where the real estate is devised subject to a general charge of debts. *Inclendon v. Northcote*, 3 Atk. (Eng.) 438; *Boynton v. Parkhurst*, 1 Bro. C. C. (Eng.) 576; s. c., 1 Cox (Eng.) 106.

Or as against real assets descended, where the property subject to her claim has been exhausted by specialty creditors, the land is subject neither to a specific lien nor general testamentary charge. *Tipping v. Tipping*, 1 P. Wms. (Eng.) 730; *Tynt v. Tynt*, 2 P. Wms. (Eng.) 542; *Probert v. Clifford*, 1 Atk. (Eng.) 440; s. c., Amb. 6, 2 P. Wms. (Eng.) § 44, note.

But not, as it seems, against a devisee in the absence of a specific lien, or general charge. *Probert v. Clifford*, Amb. (Eng.) 6; s. c., 1 Atk. (Eng.) 440; 2 P. Wms. (Eng.) 540, note. See *Forrester v. Leigh*, Amb. (Eng.) 171.

As to the nature of widow's claim to paraphernalia, see *Northey v. Northey*, 2 Atk. (Eng.) 77; *Ridout v. Plymouth*, 2 Atk. (Eng.) 104. Note to *Hulme v. Tenant*, 1 Lead. Cas. Eq. (4th Am. ed.) 679; (6th Eng. ed.), pt. 2, p. 88. See PARAPHERNALIA.

In some instances the claim to paraphernalia has been held to have priority over specific legacies. *Graham v. Londonderre*, 3 Atk. (Eng.) 395; *Snelson v. Corbet*, 3 Atk. (Eng.) 369; *Northey v. Northey*, 2 Atk. (Eng.) 77, 78; *Tipping v. Tipping*, 1 P. Wms. (Eng.) 731. *Contra*, *Burton v. Pierpoint*, 2 P. Wms. (Eng.) 79. Her claim to paraphernalia, with the exception of necessary wearing apparel, is inferior to the claims of her husband's creditors. *Townshend v. Windham*, 2 Ves. Sr (Eng.) 7; *Burton v. Pierpoint*, 2 P. Wms. (Eng.) 79.

estates, although their mode of procedure under the local statute may differ from that pursued by courts of chancery.¹

MASONIC LODGES.—See SOCIETIES.

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How. St. 1882 (Mich.), § 5820; Minn. Gen. St. 1878, p. 571, § 33; Neb. Comp. St. 1887, ch. 23, § 159; Nev. Gen. St. 1885, § 2850; N. H. Gen. L. 1878, p. 478, § 14; Wis. Rev. St. 1878, § 3868; Mich. How. St. 1882, § 5820; Atwood v. Frost, 59 Mich. 409.

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I. MASTER—DEFINITION.—The master is one who has the superior choice, control and direction; whose will is represented, not merely in the ultimate result of the work in hand, but in all its details; one who is the responsible head of a given industry;¹ one who has the power to discharge;² one who has in his employment one or more persons hired by contract to serve him, either as domestic or common laborers;³ one who not only prescribes the end, but directs, or may at any time direct, the means and methods of doing the work;⁴ a head or chief, an instructor, an employer;⁵ a director, a governor.⁶

II. SERVANT—DEFINITION.—A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter.⁷

Servants Under the Common Law.—The first sort of servants acknowledged by the law of England were *menial*; so called from their being *intra mœnia*, or domestic. The relation arising from the contract of hiring was construed, no time of service being named, to be for a year.⁸

Under an early statute all single men between twelve years old and sixty, and married men under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, were compellable, by two justices to go out to service in husbandry, or certain specific trades, for the promotion of honest industry, and no master could put away his servant, or servant leave his master, after being so retained,

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| <p>1. Shear & Redf. on Neg., § 160.</p> <p>2. Gen. Steam Nav. Co. v. British etc. Nav. Co., L. R., 3 Exch. 330; Dalyell v. Tyrer, El. B. & El. 899; Michael v. Stanton, 3 Hun (N. Y.) 462; Robinson v. Webb, 11 Bush (Ky.) 477.</p> <p>3. 2 Bouv. L. Dict. 112.</p> <p>4. Bailey v. Troy etc. R. Co., 57 Vt. 252.</p> <p>5. 2 Burrill's L. Dict. 187.</p> <p>6. Rapalje & Lawrence's L. Dict. 801.</p> <p>Mine Owner.—The owner of a mine who furnishes the operating ma-</p> | <p>chinery and engages another to open the mine sustains the relation of master to persons employed by him. Fell v. Rich Hill Coal Mining Co., 23 Mo. App. 216. See Gibbs and Sterrett's Appeal, 100 Pa. St. 528.</p> <p>7. 1 Parsons on Contracts 101; Gravatt v. State, 25 Ohio St. 168; Morgan v. Bowman, 22 Mo. 545; Boniface v. Scott, 3 S. & R. (Pa.) 353; <i>Ex parte</i> Meason, 5 Binn. (Pa.) 167; Heygood v. State, 59 Ala. 51.</p> <p>8. 1 Comm. 425; Poor, IV, 8.</p> |
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either before or at the end of his term, without a quarter's warning, unless upon reasonable cause, to be allowed by a justice of the peace.¹

Another species of servants were called laborers, who were only hired by the day or week, concerning whom statutes were enacted, making many good regulations, such as defining how long they must continue at work in summer and winter, punishing such as left or deserted their work; and others of a similar character.

Another species of servants were of a superior character, such as stewards, factors and bailiffs. They were considered by the law as servants *pro tempore*, with regard to such of their acts as affected their masters' property.²

Classification.—Blackstone comprehends under this head slaves, menial servants, apprentices, hired laborers, and servants *pro tempore*.³

Reeve carries the discussion still further, as to factors, brokers, attorneys, and agents generally.⁴

Kent, writing for later readers, classifies servants as slaves, hired servants and apprentices.⁵

1. Stat. 5 Eliz., ch. 6.

2. Jacob's Law Dict. 51.

3. 1 Bl. Com., ch. 16.

4. Reeve Dom. Rel. 339.

5. 2 Kent Com. 32.

In the Affirmative—Convicts.—A convict is the servant of the person employing him, even though his wages go to the county in which he is imprisoned. *Hartwig v. Bay State S. & L. Co.*, 43 Hun (N. Y.) 425.

A convict placed in charge of penitentiary premises by the lessee thereof, who instructs him to keep the same free from trespassers, is the servant of the lessee. *Ward v. Young*, 42 Ark. 542. Compare *Cunningham v. Bay State S. & L. Co.*, 25 Hun (N. Y.) 210.

Employee on Poor Farm.—An employee on a town farm maintained for the support of paupers and under the management of the overseers of the poor, is the servant of the town. *Neff v. Wellesley*, 148 Mass. 487.

Toll Gate Keeper.—Likewise a toll gate keeper after business hours. *Noblesville etc. R. Co. v. Gause*, 76 Ind. 142; 40 Am. Rep. 224.

Driver of Horse Car.—Likewise the driver of a horse car after yielding up the reins to the substitute who ordinarily takes his place to allow him to go to his meals. *Com. v. Brockton St. R. Co.*, 143 Mass. 501.

Engine Wiper.—Likewise an engine wiper employed in a railroad company's

round house, while passing through the yards on his way to work. *Ewald v. Chicago etc. R. Co.*, 70 Wis. 420; 33 Am. & Eng. R. Cas. 326; *McQueen v. Central Branch U. P. R. Co.*, 15 Am. & Eng. R. Cas. 226; 30 Kan. 689.

Station Agent.—The defendant made a contract with one M, by which he was to take entire charge and control of defendant's freight business at the St. Louis station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for defendant; to prepare, execute and receive all necessary freight bills; to keep all necessary books of accounts, collect freight money, and generally act as, and discharge all duties of, a station agent. To enable him to properly discharge his duties, he was to have control over the grounds, yards and buildings, engines and cars of defendant at the station. Defendant was to furnish the necessary engines, and keep them in repair, and supplied with fuel, etc., and to employ the engineers and firemen, who were to be under M's control, and were to be paid by him. For his services M was to be paid monthly, at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car

hauled from the levee. The contract was to continue for five years. The business was to be under control of defendant's superintendent, and done to his satisfaction, and if not so done, defendant could revoke the contract on twenty-four hours' notice. M performed no service for any other person than defendant. In an action to recover damages for injuries alleged to have been occasioned through the negligence of train men in the employ of M, it was held that he was not an independent contractor but a servant of the company. *Speed v. Atlantic etc. R. Co.*, 2 Am. & Eng. R. Cas. 77; 71 Mo. 303.

Civil Engineer.—A civil engineer, employed by a railroad company at a fixed salary, and subject in his duties to the company's orders, is a servant of the company within a statute declaring stockholders liable for debts to laborers and servants. *Conant v. Vanschaick*, 24 Barb. (N. Y.) 87; *Williamson v. Wadsworth*, 42 Barb. (N. Y.) 294; and see *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162; *Aiken v. Wasson*, 24 N. Y. 462.

Railroad Engineer.—A railroad company employed M, a contractor, to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train and an engineer to run the same. The company prohibited the running of this train at a greater rate of speed than thirteen miles per hour, and required that it should be on a side-track fifteen minutes before the schedule time for each of the company's trains. Subject to these regulations, the control, management and direction of the construction train was given wholly to M. The engineer was selected by the company, and it alone had the right to discharge him, though bound to go so upon the complaint of M, and to supply his place. The company paid the engineer's wages, but charged the same to M, and deducted the amount thereof from the sum due him for his work. A mule having been killed by the negligent running of this construction train, the owner sued the railroad company for the value thereof. The defendant resisted the action on the ground that the train was not run by its servant, but by M's. Held, that such engineer was the servant of the railroad company. *New Orleans etc. R. Co. v. Norwood*, 62 Miss. 565; 52 Am. Rep. 191.

Porter.—The porter and other employes of the Pullman Palace Car Company, where a car of such company forms a part of a regular train, will be considered as the servants of the company running such train. *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 414; s. c., 40 La. An. 417; *Pennsylvania Co. v. Roy*, 1 Am. & Eng. R. Cas. 225; 102 U. S. 451; *Thorpe v. New York Cent. etc. R. Co.*, 76 N. Y. 402.

Detective.—A detective employed by a railroad company is its servant. *Pool v. Chicago etc. R. Co.*, 53 Wis. 657; 3 Am. & Eng. R. Cas. 332; 8 Am. & Eng. R. Cas. 360; 56 Wis. 227.

Working Overseer.—One who was employed by a manufacturing company to perform a variety of services, who was an overseer and yet worked with the men, who worked in the mills of the company, and had a general supervision of their business, and kept their books, was held entitled to recover against stockholders as a servant of the company on the ground that, while the word laborer must probably be restricted to mean manual work, servant cannot be confined to mere menial service. *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 315; *Vincent v. Bainford*, 12 Abb. R., N. S. (N. Y.) 252. See MANUFACTURING CORPORATIONS, vol. 14.

Surveyors' Assistants.—It has been held in Minnesota that the employment of a chief engineer to "survey and establish" a railroad line, clothes him on behalf of the railroad company, with authority to employ such subordinates as are reasonably suitable to that end, and such subordinates will become, by such act of hiring, the servants of the company. *New Orleans etc. R. Co. v. Reese*, 18 Am. & Eng. R. Cas., 110; 61 Miss. 581; *Gillis v. Duluth etc. R. Co. (Minn.)*, 25 N. W. Rep. 603.

Coal Shovellers.—Whether shovellers engaged in transferring coal from a vessel at a dock into the cars of a railroad company, the apparatus used belonging to such company and controlled by its servants, and the shovellers being paid from money received by the company from the shipowners for unloading, are servants of such company, held a question of fact to be decided by the jury. *Daley v. Boston etc. R. Co. (Mass.)*, 33 Am. & Eng. R. Cas. 208; 47 Mass. 101; and see *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. Cas. 234; 96 Pa. St. 256.

Driver of Team Supplied by Hirer.—

Where the hirer of a team supplies his own driver, such driver is his servant. *Hafer v. Hodge*, 52 Mich. 372; 50 Am. Rep. 256.

—Supplied by Owner.—Where a person hires the personal property of another who furnishes a servant to manage the same, though the hirer acquires the right to superintend and direct the conduct of the servant, the latter continues to be the servant of the owner of the property, who is responsible for any negligence of the servant in the performance of his service for the hirer, even where the hirer only is interested in such service. *Hafer v. Hodge*, 52 Mich. 372; 50 Am. Rep. 256; *New Orleans etc. R. Co. v. Norwood*, 62 Miss. 565; 52 Am. Rep. 191; *Huff v. Ford*, 126 Mass. 24; 30 Am. Rep. 645.

Ferryman.—A ferryman, transferring a stage and its passengers across a stream, is, as to a passenger contracting with the stage owner only to be carried over its route, to be considered the servant of the stage owner. *McLean v. Burbank*, 11 Minn. 277; and see *McElroy v. Nashua R. Co.*, 4 Cush. (Mass.) 402; *Hooper v. Wells*, 27 Cal. 11; *Campbell v. Perkins*, 8 N. Y. 433; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 331.

Stage Driver.—A stage driver, entrusted by his employers to carry money from one place to another, is a "servant, who has obtained possession of property by virtue of his employment," within the meaning of an act making embezzlement of property punishable as for felonious stealing. *People v. Sherman*, 10 Wend. (N. Y.) 299.

Crew of Vessel Chartered by the Day.—Where a vessel and crew are chartered by the day or for a voyage the crew are the servants of the owner, even though, as a part of the contract, the hirer is to pay to the owner the wages of the crew. *Dalyell v. Tyrer*, El. Bl. & El. 899; *Fenton v. Dublin Packet Co.*, 8 Ad. & Ell. 825.

Pilot.—A pilot, while he has charge of a vessel, although he holds a commission under public authority, is the servant of the owner who employs him. *Yates v. Brown*, 25 Mass. 23.

Master and Crew of Steam Tug.—But where a vessel is being towed by a steam tug, its master and crew are not the servants of the owner of the vessel. *Spraul v. Hemmingway*, 31 Mass. 1.

Stevedore.—Neither is a stevedore employed in part to unload a vessel for

a gross sum the servant of the owner. *Sinton v. Street*, 26 Mass. 147; *Pingree v. Leyland*, 135 Mass. 398.

Workman Engaged in Removing Debris.—Workmen employed in removing debris after a fire, by the owner of the building injured, are his servants. *Dillon v. Hunt*, 82 Mo. 150.

Minor Child Living with Parent.—The presumption is that a minor son living with his father and using his team and conveyance, in and about the business of the father, is acting in his behalf and upon his direction until the contrary is made to appear by the evidence. *Schaefer v. Osterbrink*, 67 Wis. 495.

Agent of Insurance Company—Employee of.—In an action for money had and received the facts were as follows: Defendant was employed as agent for plaintiff, in the city of New York, under a contract, by which he was to receive a certain sum in full for his services. The company provided an office, and the contract contained this clause. "Rent of desk room equivalent of clerk hire." Defendant employed a clerk, who abstracted \$939.13. Defendant took a note from him, upon which small amounts were paid. Defendant, in July, 1867, being about to retire from the company's service, rendered an account and credited himself with the balance of the note. In August, 1867, he took a new note in the company's name and sent it to the company. The latter immediately returned it and notified defendant to pay the loss. Defendant claimed that the clerk was plaintiff's servant and that the July account was an account stated. Held, that the clerk was servant of defendant, who was responsible for the sum embezzled; that even if the July account was an account stated, it simply imposed upon the plaintiff the onus of proving the charge erroneous, and this having been done the right of recovery was established. *The M. M. L. I. Co. v. Carpenter*, 49 N. Y. 668.

Agricultural Laborer.—An employee who is to receive a part of the crop as compensation for his services is a laborer for hire. *Richey v. DuPre*, 20 S. Car. 6; *Daniel v. Swearengen*, 6 Rich. (S. Car.) 297; *McCutcheon v. Taylor*, 11 Lea (Tenn.) 259. Compare *Burgess v. Carpenter*, 2 S. Car. 7; *Huff v. Watkins*, 5 S. Car. 82; 40 Am. Rep. 680.

Wharf Contractor.—A contractor agreed to build a new wharf for a rail-

way company and rebuild an old one. He agreed to furnish all materials and labor, to put in piles and posts, etc., as the company should require, to make the old wharf as good as new and build the new one in the most substantial manner, to submit to the directions of the company's engineer, and do all work to his satisfaction. *Held*, that under the contract the contractor was the agent and servant of the company, and that it was liable for his negligence. *R. R. Co. v. Hanning*, 15 Wall. (U. S.) 656.

Change in Grade of Employment.—And where a servant accepted a different employment from the one first entered upon, he is his employer's servant, in the new employment, the same as in the old. *May v. Ontario etc. R. Co.*, 26 Am. & Eng. R. Cas. 337; 10 Ont. Rep. 70.

Free Transportation.—Free transportation to and from work where part of employee's contract of service included the same, does not affect his standing as a servant. *Vick v. New York etc. R. Co.*, 95 N. Y. 267; 17 Am. & Eng. R. Cas. 609; *McQueen v. Central Branch M. F. R. Co.*, 30 Kan. 689; 15 Am. & Eng. R. Cas. 226; *McKinney on Fellow Servants*, § 142, and cases cited.

Gateman.—A company accepting services of gateman employed by company owning road used by it, recognizes such person as its servant. *Cleveland etc. R. Co. v. Schneider*, 45 Ohio St. 678; 35 Am. & Eng. R. Cas. 334.

Teamster.—A teamster hauling iron to cars and injured at crossing, held, under Pennsylvania statute, to be in same position as an employe and bound to exercise care proportionate to risks. *Baltimore R. Co. v. Colvin*, 118 Pa. St. 230; 32 Am. & Eng. R. Cas. 160.

Passenger Assisting.—Passenger assisting to push street car on side track and injured through carelessness of driver of another car, held not to have engaged in service as a mere volunteer. *McIntire R. Co. v. Bolton*, 43 Ohio St. 224; 21 Am. & Eng. R. Cas. 501.

In the Negative—Boy Fifteen Years Old.—A boy fifteen years old not having sufficient discretion to comprehend and guard against dangers when fully explained to him is not a servant. *Hamilton v. Galveston etc. R. Co.*, 54 Tex. 556; 4 Am. & Eng. R. Cas. 528.

Newsboys on Car.—Newsboys permitted to pass in and out of a car not engaged or employed by company is

not an employe on or about the road within the meaning of the Philadelphia statute. *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37; 34 Am. & Eng. R. Cas. 432.

Contractor Agreeing to Furnish Certain Work.—A contractor agreeing to furnish certain work was to be paid what work and materials cost and certain per cent in addition. *Held*, that he was not a servant of the company so that latter was liable for his torts. *New Orleans etc. R. Co. v. Reese*, 61 Miss. 581; 18 Am. & Eng. R. Cas. 110. And see *Hittle v. Republican V. R. Co.*, 19 Neb. 620; 29 Am. & Eng. R. Cas. 586; *Hughes v. Railway Co.*, 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 495; *McCafferty v. Spuyten Duyvil etc. R. Co.*, 61 N. Y. 178.

Order of Party Having No Authority.—An order of a party having no authority over injured employee will not serve as basis on which to consider the latter the former's servant. *Nashville etc. R. Co. v. McDaniel*, 12 Lea (Tenn.) 386; 17 Am. & Eng. R. Cas. 604.

Postal Clerks.—A postal clerk is not the servant of the road on whose trains he runs. *Muster v. Chicago etc. R. Co.*, 61 Wis. 325; 18 Am. & Eng. R. Cas. 113. See MAIL.

Secretary of Corporation.—The secretary of a corporation, being an officer or agent of the company, is not a servant. *Caffin v. Reynolds*, 37 N. Y. 640. Compare *Richardson v. Abendrath*, 43 Barb. (N. Y.) 162. See MANUFACTURING CORPORATIONS, vol. 14.

Police Officer.—Nor is a police officer, in any such sense as to take away his right of action, against the city which appoints him, for an injury sustained by reason of a defective highway. *Kimball v. Boston*, 1 Allen (Mass.) 417.

Conductor on Another Road.—The mere fact that defendant company paid the conductor of a train belonging to another company, running over its road under contracts, does not necessarily make him its servant. *Sullivan v. Oregon R. & M. Co.*, 12 Oregon 392; 21 Am. & Eng. R. Cas. 391.

Superintendent.—Nor is one employed as a superintendent or boss. *Bryan v. State*, 44 Ga. 328.

Licencee of Right to Sell Lunches.—A lessee or licensee of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation, so as to render it liable for

Scope of the Present Article.—An attempt will be made in the present article to treat generally of the relations of employers and employees of every description.

1. Menial Servants—English Rule.—Servants are menial or not so, the term meaning such as are employed about the house of the employer or within its walls.¹ This doctrine, however, has obtained but the slightest hold in this country.²

an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers. *Fluker v. Georgia R. & B. Co.*, 81 Ga. 461.

Teamster in Certain Cases.—A teamster, through whose negligence in delivering coal one falls into a coal hole and is injured, is, in an action therefor, to be considered as the servant of the occupant of the building, if such occupant had the right to control the manner of delivery. *Clapp v. Kemp*, 122 Mass. 481.

Driver of Coach.—*New York etc. R. Co. v. Steinbrenner*, 47 N. J. L. 161; 23 Am. & Eng. R. Cas. 330; 54 Am. Rep. 126.

Licensed Carman.—*McMullen v. Hoyt*, 2 Daly. (N. Y.) 221.

Drover.—*Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268; *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409; *Gulf etc. R. Co. v. McGowan*, 26 Am. & Eng. R. Cas. 274; 65 Tex. 643.

Employee of Mine Contractor as to Owner.—*Plymouth Coal Co. v. Kominsky*, 116 Pa. St. 365; *Haddock v. Rodkalfaki*, 9 Atl. Rep. (Pa.) 653.

Employees of Corporation as to its Members.—*Bullock v. Gaffigan*, 100 Pa. St. 276.

Inmate of Hospital as to its Superintendent.—*Schraffe v. Connell*, 65 Wis. 476.

Servant of One Merchant as to Another.—*McCullough v. Shoneman*, 105 Pa. St. 169; 51 Am. Rep. 194; *Stevens v. Armstrong*, 6 N. Y. 435.

Municipal Contractor as to Third Person.—*Corbin v. The American Mills*, 27 Conn. 274.

Overseer of Roads as to County.—*Crowell v. Sonoma Co.*, 25 Cal. 313. And see *Sherburne v. Yuba Co.*, 21 Cal. 113; *Hoffman v. Sangooquin Co.*, 21 Cal. 426.

Laborers as to Chairman of Street Committee.—*McGuire v. Grant*, 1 Dutch. N. Y. 357.

Health and Police Officers as to Town.—*Mitchell v. Rockland*, 52 Me. 118; *Morgan v. Hallowell*, 57 Me. 375.

Or Lamp Lighters.—*Eaton v. Woburn*, 127 Mass. 170; *Kimball v. Cushman*, 103 Mass. 194; *Galman v. Boston*, 118 Mass. 114.

Parties to Speculative Venture.—H made an agreement with E whereby he was to lock up desirable lands and bid them in at tax sales, E furnishing the money to pay for them. Both were to control alike the subsequent disposition of the lands, and after E had been repaid what he had advanced, they were to divide the profits equally. Their community of interest extended to both profit and loss. On a bill by H to wind up the partnership, this arrangement was admitted by demurrer. *Held*, that it constituted a partnership, if the parties stood to each other in the relation of principals, and not of master and servant, and the fact that the title was taken in E's name was immaterial. *Hunt v. Erikson*, 57 Mich. 330.

1. *Wood's Inst.*, 51; *Heygood v. State*, 59 Ala. 51; *Long v. Simmons*, 64 Wis. 529; *Boniface v. Scott*, 4 S. & R. (Pa.) 351; *Turner v. Mason*, 14 M. & W. 112; *Rex v. Buckingham*, 3 N. & M. 72; *Nowlan v. Ablett*, 2 C. M. & R. 54; *Nicholl v. Greaves*, 17 C. B. & N. S. 27. *Compare Todd v. Kerrick*, 8 Exch. 15.

2. *Burgess v. Carpenter*, 2 S. Car. 7; *Haskins v. Rayster*, 70 N. Car. 601; *Ex parte Meason*, 5 Binn. (Pa.) 167.

Domestic Servant—Burglary by.—Burglary by a domestic servant means burglary by a servant who resides in the house with the master he serves, and does not include a servant whose employment is outside, and not in the house. A farm hand, who sleeps and eats outside of the master's house, though he performs chores inside of the house, when directed, does not come within the meaning of the term. *Waterhouse v. State*, 21 Tex. App. 663. And see *Wakefield v. State*, 41 Tex. 558.

2. Presumption from Appearance.—The presumption is that a person found doing service for another is the latter's servant.¹

3. Volunteers.—Where a person undertakes voluntarily to perform service for another, who assents thereto, he stands in the relation of a servant to the latter.²

4. Independent Contractors.—An independent contractor is not a servant.³ Neither are his assistants servants of the party with whom he contracts.⁴

5. Persons Engaging in Work Upon False Representations.—Where a servant engages in a temporary work for another, on the false representation that the master had directed it, he does not become the servant of that other so as to be remediless for an injury by the negligence of the latter's servant.⁵

6. Signification of Term Servant in Bequests.—It is well settled that the word *servants* in bequests ordinarily means only those that are employed in and immediately around the homestead of the deviser.⁶

1. *Perry v. Ford*, 17 Mo. App. 212.
2. *Barstow v. Old Colony R. Co.*, 143 Mass. 535; 28 Am. & Eng. R. Cas. 473; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728; 11 Am. & Eng. R. Cas. 145; *Union R. & T. Co. v. Gallaher*, 114 Ill. 325; *St. Louis etc. Co. v. Hendricks*, 48 Ark. 177; *McIntire R. Co. v. Balton* (Ohio), 21 Am. & Eng. R. Cas. 501. *McKinney on Fellow Servants*, § 19, and cases cited.

3. *McCafferty v. Spuyten Duyvil etc. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Blake v. Ferris*, 1 Seld. (N. Y.) 267; *Allen v. Haywood*, 7 A. & E. (N. S.) 974; *Laugher v. Painter*, 5 B. & C. 547; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244; *Habbitt v. London & N. W. R. Co.*, 4 Exch. 253; *Peck v. Mayor etc. of New York*, 8 N. Y. 222; *Kelley v. Mayor etc. of New York*, 11 N. Y. 432; *King v. N. Y. C. & H. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 321; *McCafferty v. Spuyten Duyvil etc. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Storrs v. Utica*, 17 N. Y. 104; *Coughly v. Globe Woolen Co.*, 56 N. Y. 124; *Corby v. Hill*, 4 C. B., N. S. 586; *Chapman v. Rothwell, El. Bl. & El.*, 168; *Haunsell v. Smith*, 7 C. B., N. S. 738; *Addison on Torts* 197. See **CONTRACTOR.**

4. *Coughly v. Globe Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387; *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.) 545; *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 108; *Devlin v. Smith*, 89 N. Y. 470; 42 Am. Rep. 311; *Smith v. New York etc. R. Co.*, 19 N. Y. 127; *Hass v. Philadelphia etc. S. Co.*, 88

Pa. St. 269; 32 Am. Rep. 462; *Cunningham v. International R. Co.*, 51 Tex. 503; 32 Am. Rep. 632; *Riley v. State Line S. S. Co.*, 29 La. An. 791; *Goodfellow v. Boston etc. R. Co.*, 106 Mass. 461; *Burke v. Norwich etc. R. Co.*, 34 Conn. 474; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 402; *Coggin v. Central etc. R. Co.*, 62 Ga. 685; *McKinney on Fellow Servants*, § 17.

Service of Contractor for Driving Logs.—A provision in a contract under which T was to drive the logs of W, that his men were to be paid off by W or his agent at the end of the drive, does not make the men employees of W. *Wright v. Terry*, 23 Fla. 160.

5. *Kelly v. Johnson*, 128 Mass. 530.
6. *Nicoll v. Greaves*, 17 C. B., N. S. 27; *Rex v. Buckingham*, 2 N. & M. 72; *Nowlan v. Ablett*, 2 C. M. & R. 54; *Todd v. Kerrick*, 8 Exch. 151; *Turner v. Mason*, 14 M. & W. 112; *Townsend v. Windham*, 2 Vern. 546; *Chilcoth v. Bromley*, 12 Ves. 114; *Howard v. Wilson*, 4 Hagg. 107; *Ogle v. Morgan*, 19 L. J., N. S. 531; *Blackwell v. Pen-nant*, 9 Hare 551; 16 Jur. 420; *Booth v. Dean*, 1 Myl. & K. 560; *Herbert v. Reid*, 16 Ves. 481; *Vaughan v. Booth*, 16 Jur. 808; 1 De G. M. & G. 359; 16 Jur. 277.

Rule in Pennsylvania.—It was held in an early Pennsylvania case that the term *servants* whose wages were by a legislative act to be paid out of an intestate's estate, in the same rank with physic and funeral expenses, embraced those only who, in common parlance, were domestics, persons who made a part of a man's family, and whose

III. THE RELATION—ITS INCEPTION—CONTRACT OF SERVICE—

1. How Relation Is Created.—The relation of master and servant is created by contract, either express or implied, where both parties have the requisite qualifications for entering into a valid contract. The most usual mode is by an express contract for services, usually termed a hiring.¹

2. When It Exists.—The relation exists only where the person sought to be charged as master employs or controls the person in question, or has the right of control over him at the time in question, or expressly or tacitly assents to the rendition of the particular service by him. He must, at the time, have the right to direct the action of the servant, and to accept or reject its rendition by him.² Such relation does not cease so long as the master retains his control or right of control over the methods and manner of doing the work or the agencies by which it is effected.³ Furthermore the relation exists where the latter is employed, not by the master directly, but by an employee in charge of a part of the master's business, with authority to engage assistance therein; and the fact that the subordinate employee receives compensation proportioned to the work done does not alter the case.⁴

3. Question of Law and Fact.—Where the question as to the existence of the relation is a mixed one of law and fact, it must be left to the jury.⁵ Likewise when a question of fact alone.⁶

business it is to assist in the economy of the family, or in matters connected with it, and that it did not comprehend *workmen*, employed at iron works, and the like. *Ex parte Meason*, 5 Binn. (Pa.) 167, and see *Hart v. Aldridge*, Cowp. 54.

1. Rapalje, & Lawrence's L. Dict. 801; Browne's Dom. Rel. 122. See in this connection prize essay, *The Legal Relations of Capital and Labor*, by Walter Howe, Esq., 1 N. Y. St. Bar Assoc. 105; Addison on Contracts 52; Minno v. Walker, 14 La. An. 581; *Baxter v. Gray*, 4 Scott H. R. 374.

2. *Mound City Paint and Color Co. v. Conlon*, 92 Mo. 221.

An agreed understanding is not essential to create the relation, it may be implied from circumstances; as where the master induces the belief that a certain person is his servant and thereby leads another to act upon such belief to his injury. *Growcock v. Hall*, 82 Ind. 202.

Evidence Admissible to Prove Existence.—Ordinarily any evidence tending to throw light on the question whether the master exercised control over the servant is competent, where the employment is not such as establishes the same as a matter of law. *Fink v. Mis-*

souri Furnace Co., 10 Mo. App. 61.

The mode of payment is a circumstance of much weight in solving the question. *New Orleans etc. R. Co. v. Reese*, 61 Miss. 581; *Corbin v. American Mills*, 27 Conn. 274.

3. *Fell v. Rich Hill Coal Mining Co.*, 23 Mo. App. 434.

4. *Rummel Admr. v. Dilworth*, 3 Pa. St. 343.

5. *Brophy v. Bartlett*, 108 N. Y. 632, reversing 37 Hun (N. Y.) 642.

6. Where a person was injured while leaving a boat on which he had been employed, held, it was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the relation of master and servant had or had not ceased at the time of the accident. *North Western etc. Packet Co. v. McCue*, 17 Wall. (U. S.) 508.

While in Charge of Horse.—And whether one in charge of a horse, with the owner's assent, and engaged on his business, but in the general employment of a third person, is the servant of the former or of the latter, depends upon the question whether the relation of the latter to the business was such

4. **Rule as to Public Officers.**—A public officer elected in a city or town, or appointed by the authorities thereof, pursuant to a statute, to perform duties of a public character, prescribed by the statute and not for the benefit of the city or town in its corporate capacity, is neither servant nor agent of the city or town.¹

5. **Municipal Employees.**—On the other hand, persons employed by municipalities to perform services in furtherance of the objects for which they were constituted, are their servants.²

IV. **APPRENTICES**—(See 1 Am. & Eng. Encyc. of Law, p. 636).

V. **PARTIES—WHO MAY ENTER INTO RELATION**—1. **Generally.**—As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant.³ But where either of the parties entering into a contract for services is laboring under any legal disability, such as infancy, idiocy, lunacy, or, in case of a female the married relation, the contract cannot ordinarily be enforced, and the relation of master and servant in its full sense does not exist.⁴

2. **Infants**—(a) *Generally—Common Law Rule.*—According to the English rule, contracts of hiring and service by infants—that is, by persons who have not attained the age of twenty-one—are voidable at their option, unless they be for necessities or for their benefit.⁵ Contracts of hiring and service and apprenticeship are *prima facie* regarded as for the benefit of

as to give him exclusive control and direction; and upon that question the jury are to pass. *Kimball v. Cushman*, 103 Mass. 194; *Preston v. Knight*, 120 Mass. 5.

1. See **PUBLIC OFFICERS AND AGENTS.**

Hafford v. New Bedford, 82 Mass. 297; *Walcott v. Swamp Scott*, 83 Mass. 101; *D. v. Boston*, 112 Mass. 75; *Alger v. Easton*, 119 Mass. 77; *Sikes v. Hatfield*, 79 Mass. 347; *White v. Philipston*, 51 Mass. 108; *Buttrick v. Lowell*, 83 Mass. 172; *Trimball v. Boston*, 83 Mass. 417; *Baker v. Allen*, 38 Mass. 382; *Rossire v. Boston*, 86 Mass. 57; *Loud v. Charlestown*, 99 Mass. 208.

Public Office—True Test.—The true test of a public office is that it is as parcel of the administration of government or is itself created by a law making power. *Eliason v. Coleman*, 86 N. Car. 235; 9 Am. & Eng. R. Cas. 433. See generally **PUBLIC OFFICERS AND AGENTS.**

2. *Lloyd v. Mayor etc. of New York*, 1 Seld. (N. Y.) 369; *McCullough v. Mayor etc. of Brooklyn*, 23 Wend. (N. Y.) 458; *Clayburg v. Chicago*, 25 Ill. 535; *Sexton v. St. Joseph*, 60 Mo. 153;

Sterrett v. Houston, 14 Tex. 153; *McLaughlin v. Municipality*, 5 La. An. 504; *Richmond v. Long*, 17 Pratt (Va.) 230; *Lacour v. Mayor*, 3 Duer (N. Y.) 406; *Conrad v. Ithica*, 16 N. Y. 158; *Boston v. Syracuse*, 36 N. Y. 54; *Mayor v. Thompson*, 29 Ark. 569; *Franklin Mfg. Co. v. Portland*, 67 Me. 46; *Skinkle v. Covington*, 1 Bush (Ky.) 617; *Carleton v. Iron Co.*, 99 Mass. 216; *Pittsburg v. Grier*, 22 Pa. St. 54; *Farrrell v. Mayor*, 12 Up. Can. Q. B. 313; *Reeves v. Toronto*, 21 Up. Can. Q. B. 157; *Perdue v. Corporation etc.*, 25 Up. Can. 61. See **PUBLIC OFFICERS AND AGENTS**, this work.

3. *Smith's Master and Servant* 1; *Fraser's Master and Servant* 3; *McDonell's Master and Servant* 83.

4. *Wood's Master and Servant*, § 5.
5. *Coke on Litt.* 786.

Necessary Meats and Drink.—"And an infant shall be bounden by all acts done by him during his nonage, which acts are for his advantage, if not in some special cases; and therefore, if an infant, at the years of discretion, make a bond for his necessary meats and drink, or for his necessary apparel, or for his

infants.¹ If, however, a contract of hiring and service between a minor and a person of full age be inequitable and prejudicial to the former, it will not bind him,² such as a contract which subjects an infant to a penalty or forfeiture.³

(b) *The American Rule*.—But such is not the law in this country; for it is certain that here an infant is not bound by a contract of hiring for a term, whether the same is beneficial to him or not, but such contract is voidable if he chooses so to regard it.⁴ Even should an infant decline to carry out a contract entered into by him, he may recover compensation for what he did, the same as if no contract had been made,⁵

schooling, he shall not avoid the same." Perkins C. I. S. 14.

1. Pollock on Contracts, p. 65.

Where Servant Has Bound Himself as Apprentice.—An infant who has bound himself as apprentice to one master cannot before the expiration of the period of service transfer his services to another. *R. v. Arundel*, 5 M. & S. 257; *R. v. Chilesford*, 4 B. & C. 102; *Wood v. Fenwick*, 10 M. & W. 195; *Cooper v. Simmons*, 31 L. G., M. C. 138; *R. v. Wigston*, 3 B. & C. 484.

2. Where a Servant Bargains Away All Rights.—As where an infant binds himself for twelve months not to engage in any other service or business during the whole time; the master free to stop work and wages when he thought fit; the servant liable to be dismissed for misconduct or disobedience, and in the event of dismissal to forfeit his wages. *Taylor on Infancy and Coverture* 43; *Leslie v. Fitzpatrick*, L. R., 3 Q. B. D. 229; 47 L. G., M. C. 22; 37 L. T. 461; *Keene v. Boycott*, 2 H. B. R. 515. See also *R. v. St. Petrax*, 4 T. R. 196; *R. v. Ripon*, 9 East 295; *R. v. Cromford*, 8 East 25; *R. v. Arnesley*, 3 B. & A. 584; *R. v. Lyngnar*, 4 B. & Ad. 647.

3. Co. Litt. 172 a; Bacon's Abridg., Infancy I, 1, 356; *Ayliff v. Archdale*, Cro. Eliz. 920; *Russell v. Lee*, 1 Lev. 86; *Fisher v. Mawbray*, 8 East 330; *Baylis v. Dineley*, 3 M. & S. 477.

4. *Noxie v. Lincoln*, 25 Vt. 206; *Thomas v. Dike*, 11 Vt. 273; *Oaks v. Oaks*, 27 Vt. 410; *Judkins v. Walker*, 17 Me. 38; *Lowe v. Sinklear*, 27 Mo. 308; *Craighead v. Wells*, 21 Mo. 404; *Harine v. Harine*, 11 Mo. 649; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Thompson v. Hamilton*, 12 Pick. (Mass.) 424; *Arnold v. Richmond I. Works*, 1 Gray (Mass.) 434; *Sloan v. Hayden*, 110 Mass. 161; *Francis v. Felmit*, 4

Dev. & B. (N. Car.) 498; *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375; *Boal v. Mix*, 17 Wend. (N. Y.) 119; *Matter of McDowle*, 8 Johns. (N. Y.) 328; *Ray v. Haines*, 52 Ill. 485; *Ingraham v. Baldwin*, 9 N. Y. 45; *Wheatly v. Miscal*, 5 Ind. 142; *Crouse v. Halman*, 19 Ind. 30; *Lufkin v. Mayall*, 25 N. H. 82; *Balch v. Smith*, 12 N. H. 437; *Hanson v. Cooper*, 3 N. J. L. 866; *Ivins v. Norcross*, 2 N. J. L. 977; *Oliver v. Hondlett*, 13 Mass. 237; *Pitcher v. Plank Road Co.*, 10 Barb. (N. Y.) 436; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Bradford v. Westcott*, 1 Dessaus. (S. Car.) 596; *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Bryan v. Walton*, 14 Ga. 185; *Baker v. Lovett*, 6 Mass. 48; *Jenkins v. Jenkins*, 12 Ga. 895; *State v. Plaisted*, 43 N. H. 413; *Hardy v. Waters*, 38 Me. 450; *Slocum v. Hooker*, 13 Barb. (N. Y.) 536; *Van Pelt v. Corwine*, 6 Ind. 363; *Garner v. Board*, 27 Ind. 323; *Lufkin v. Mayall*, 25 N. H. 82; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Corpe v. Overton*, 10 Bing. 252; *Breed v. Judd*, 1 Gray (Mass.) 655; *Taft v. Pike*, 14 Vt. 405; *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Francis v. Felmit*, 4 D. & B. (N. Car.) 408; *Defrance v. Austin*, 9 Pa. St. 309; *Wilhelm v. Hardman*, 13 Md. 40; *Com. v. Moore*, 1 Ashm. (Pa.) 123; *Cook v. Parker*, 5 Phil. (Pa.) 265; *Pierce v. Massenburg*, 4 Leigh (Va.) 493; *Clark v. Godard*, 39 Ala. 164. *Wood's Master and Servant*, p. 7, n.

5. *Rex v. Hindringham*, 6 T. R. 557; *Rex v. Wooton*, 9 East 206; *Rex v. Beaulieu*, 3 M. & S. 229; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84; *Van Pelt v. Corwine*, 6 Ind. 363; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Weeks v. Leighton*, 5 N. H. 343; *Derocher v. Continental Mills*, 58 Me. 217; *Noxie v. Lincoln*, 25 Vt. 206, 4 Am. Rep. 286;

and without deduction for damages for breach of the contract.¹

(c) *Avoiding Contract*.—While a contract entered into by an infant with an adult may be avoided by the former, the latter is bound until such act of avoidance occurs.²

(d) *Consent or Contract of Parents*.—A contract for services made with a minor is not invalid simply because it is not entered into with the parent or guardian; it is only voidable at the election of the parent or guardian.³ Employment of a minor without the parent's consent will, in the absence of other evidence, be presumed to be against the parent's will.⁴

A contract of service made by the father of an infant to be rendered by such infant to a third person, may be repudiated by him if the same is only partially carried out upon the death of his parent, or it may be carried out, in which event he can recover the whole amount due thereunder.⁵

(e) *Ratification After Majority*.—Where an infant enters into a contract for services, which will not expire until after he becomes of age, and he continues to perform his duties under the same after he has attained his majority, such continuance is looked upon by the law as an affirmation, and he cannot in such case recover anything whatever for his services, should he decline to carry out the contract to completion.⁶

(f) *Existence of Relation Between Parent and Child*.—The duty of a father to educate and maintain his minor children entitles him to their services, and creates the relation of master and servant between them.⁷ And this, though the child may be in the actual service of another, provided the father has the right at any time to reclaim his services.⁸

Thomas v. Dike, 11 Vt. 273; Nones v. Homer, 2 Hilt. (N. Y.) 116.

1. Meeker v. Hurd, 31 Vt. 639.

2. Nightingale v. Withington, 15 Mass. 272; Thompson v. Hamilton, 12 Pick. (Mass.) 425; Warwick v. Bruce, 2 M. & S. 205; Bruce v. Warwick, 6 Taunt. 118; Holt v. Clarencieux, 2 Stra. 937.

3. See Johnson v. Bicknell, 23 Me. 54; Nashville etc. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611; Houston etc. R. Co. v. Miller, 49 Tex. 322.

4. Pennsylvania Co v. Long, 94 Ind. 250.

Necessary Employment, Minor May Contract for.—While it may be wrongful as to the parent to employ a minor aged eighteen years in a business contrary to the wish of the parent, yet this does not deprive the son of the power to make a contract by which he may obtain necessary employment, and a contract so made creates between a railway company making it, with the son, and the son, the relation of master and

servant. The duty of the former, however, in reference to care towards the latter, increases in proportion to his want of capacity. Texas etc. R. Co. v. Carlton, 60 Tex. 397, following 15 Am. & Eng. R. Cas. 350; R. Co. v. Miller, 51 Tex. 274; Hamilton v. Galveston etc. R. Co., 54 Tex. 556, 562; 4 Am. & Eng. R. Cas. 528.

5. Campbell v. Cooper, 34 N. H. 49.

6. Forsyth v. Hastings, 27 Vt. 646; Nashville etc. R. Co. v. Elliott, 1 Cold. (Tenn.) 611.

7. Louisville R. Co. v. Willis, 83 Ky. 58. In this case it was held that a father is entitled to recover of a railroad company for an injury received by his minor son while rendering the company services as brakeman on a train, under the direction of the conductor, although the son was not employed for wages.

8. Bolton v. Miller, 6 Ind. 262. And see The Ætna, Ware (U. S.) 674; McGinnis v. The Grand Turk, Ware (U. S.) 474; Coffin v. Shaw, 3 Ware (U. S.) 82; Plummer v. Webb, 4 Mas.

The parent cannot, however, recover on the contract entered into by his minor son the wages therein specified unless the same was carried out, or broken for good reason. And where an infant enters into a contract unknown to his father, the parent, upon discovery of the same, must either prohibit its continuance, in which event he may recover what the services were worth, or he must see that the contract is carried out; which done, the compensation agreed upon may be recovered.¹

(g) *Emancipation, Generally.*—The father may sell his infant children their time during minority, either in writing or by parol, or may give them their time, or may authorize them to make contracts for their services, and receive their pay therefor; and when such authority is once given it cannot be withdrawn so as to affect a contract made in pursuance of it, and in such cases the minor may sue for and recover his wages.² Or the parent may authorize his infant son to have half his earnings, in which case they may be paid to or recovered by him.³

(U. S.) 360; Gifford v. Hallock, 3 Ware (U. S.) 45; Roby v. Lyndall, 4 Cranch, C. C. (U. S.) 351; Stone v. Pulsipher, 16 Vt. 428; Luscom v. Osgood, 1 Sprague (U. S.) 82; Shute v. Dorr, 5 Wend. (N. Y.) 204; Latts v. Brooks, H. & D.'s Sup. (N. Y.) 36.

Mother's Rights.—A mother who discharges her parental duties toward her children according to her means is entitled, if a widow, to the earnings of her minor children. *Matthewson v. Perry*, 37 Conn. 435; *Simpson v. Buck*, 5 Lans. (N. Y.) 337; *Cain v. De Vilt*, 8 Iowa 116; *Kerwin v. Wright*, 59 Ind. 369; *Hammond v. Corbett*, 50 N. H. 501.

But a mother may part with the custody and control of her child by written contract, which will bind her although the child may not itself be bound. *Dumain v. Gwynne*, 10 Allen (Mass.) 272; *Curtis v. Curtis*, 5 Gray (Mass.) 535; *Osborn v. Allen*, 2 Dutch. (N. J.) 388.

1. *Rogers v. Steele*, 24 Vt. 513.

2. *Wood's Master and Servant* (2nd ed.), § 25; *Chase v. Elkins*, 2 Vt. 290; *Chase v. Smith*, 5 Vt. 556; *Tillotson v. McCrellis*, 11 Vt. 477; *Winn v. Sprague*, 35 Vt. 243; *Jenny v. Alden*, 12 Mass. 375; *Wood v. Corcoran*, 1 Allen (Mass.) 405; *Abbott v. Converse*, 4 Allen (Mass.) 530; *McCay v. Huffman*, 8 Cow. (N. Y.) 84; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Luscom v. Osgood*, 1 Sprague (U. S.) 82; *Gifford v. Hallock*, 3 Ware (U. S.) 45; *Coffin v. Shaw*, 3 Ware (U. S.) 82; *Roby v. Lyndall*, 4 Cranch (U. S.) 351; *Plummer v. Webb*,

4 Mass. 380; *McGinnis v. The Grand Trunk*, 9 Pittsb. L. J. (Pa.) 257; *Stone v. Pulsipher*, 16 Vt. 428; *Farrell v. Farrell*, 3 Houst. (Del.) 633; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *White v. Henry*, 24 Me. 531.

Where Parent is a Pauper.—Where, however, the parent is a pauper, his minor child is considered by the law to be emancipated. *Jenness v. Emerson*, 15 N. H. 486; *Sanford v. Lebanon*, 31 Me. 240.

See generally *Conover v. Cooper*, 3 Barb. (N. Y.) 115; *Rush v. Vaught*, 55 Pa. St. 437; *McCloskey v. Cyphert*, 3 Casey (Pa.) 220; *McGinnis v. The Grand Trunk R. Co.*, 9 Pittsb. L. J. (Pa.) 257; *U. S. v. Mertz*, 2 Watts (Pa.) 406; *Ream v. Watkins*, 27 Mo. 516; *Smith v. Knowlton*, 11 N. H. 191; *Gale v. Parrott*, 1 N. H. 28; *Lord v. Poor*, 23 Me. 569; *Atwood v. Holcomb*, 39 Conn. 270; *Marse v. Welton*, 6 Conn. 547; *Bobo v. Bryson*, 21 Ark. 387; *Fairhurst v. Lewis*, 23 Ark. 435; *Lyon v. Balling*, 14 Ala. 753; *Everett v. Sherply*, 1 Iowa 356; *Eubanks v. Peak*, 2 Bailey (S. Car.) 497; *Nightingale v. Withington*, 15 Mass. 272; *Wodell v. Coggeshall*, 2 Metc. (Mass.) 89; *Abbott v. Converse*, 4 Allen (Mass.) 530; *Dumain v. Gwynne*, 10 Allen (Mass.) 270; *The Ætina*, 1 Ware (U. S.) 462; *Stansbury v. Bertron*, 7 W. & S. (Pa.) 362; *West v. Platt*, 127 Mass. 367; *Ford v. Ford*, 143 Mass. 577; *O'Donnell v. Clinton*, 145 Mass. 461.

3. *Winn v. Sprague*, 35 Vt. 243.

Emancipation in Consideration of Certain Sum per Annum.—An agreement

(4) *How Emancipation Is Effected*.—A parent may emancipate his child by refusing him support, or denying him a home, or compelling him to labor abroad for his own living, as well as by selling him his time.¹ The emancipation may be by writing or by parol.² It is furthermore true that there may be emancipation by implication.³

It has been held in some States that the legal marriage of a minor operates as an emancipation.⁴

between father and son, by which the former agrees to relinquish his right to the services of the latter during his minority, for a certain sum per annum, reserving a claim upon his wages to that amount, and the right to treat the agreement as void in case that sum is not paid, and also to have the care of the son, and the control of his affairs during his minority, so far as to see that he gets his pay from those for whom he works, and that his wages are kept for his use and benefit, is not such an agreement of emancipation as divests the father of his right to sue and collect pay for his son's services. *Mason v. Hutchins*, 32 Vt. 780.

1. *Tyler's Infancy and Coverture* 201, citing *Lochman v. Wood*, 25 Cal. 167; *Campbell v. Campbell*, 3 Stock. (Md.) 218; *Galbraith v. Black*, 4 S. & R. Pa. 209, 211; *Monaghan v. School Dist.*, 38 Wis. 100; *Wambald v. Vick*, 50 Wis. 456; *Jenison v. Granes*, 2 Blackf. (Ind.) 449; *Atwood v. Holcomb*, 39 Conn. 270; *Morse v. Welton*, 6 Conn. 543; *Tillotson v. McCrellis*, 11 Vt. 477; *Gale v. Parrot*, 1 N. H. 28; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *King v. Brown*, 2 Hilt. (N. Y.) 485; *Eubanks v. Peak*, 2 Bailey (S. Car.) 497; *Wood v. Corcoran*, 1 Allen (Mass.) 605.

Legislative Emancipation.—As to legislation in Louisiana see *Succession of Lyne*, 12 La. An. 155. *Gordon v. Gilfoil*, 99 U. S. 168; *State v. Bunce*, 65 Mo. 349.

2. *Ream v. Watkins*, 27 Mo. 516; *Farrell v. Farrell*, 3 Houst. (Del.) 633; *Shute v. Dorr*, 5 Wend. (N. Y.) 206; *Chase v. Elkins*, 2 Vt. 290; *Chase v. Smith*, 5 Vt. 556; *Hall v. Hall*, 44 N. H. 293; *Dennysville v. Tuscott*, 30 Me. 470.

3. *Dodge v. Favor*, 15 Gray (Mass.) 82. This was an action brought by a parent to recover for the services of a minor son. There was evidence that the son began to work for the defendants against the father's wishes, and that he requested his son to tell the defendants

that he claimed the son's wages, but that neither of these facts was known to the defendants; that the father knew that his son was in the defendant's employ, and never demanded his wages of them, did not offer to pay for his board, and furnished him with only inconsiderable sums of money. *Held*, that the plaintiff had no ground for exception, because the judge declined to instruct the jury that there was no evidence that he had waived his right to his son's wages, and that the law would not raise a presumption that the father had emancipated his son, or waived his right to his wages, against the father's positive declarations to the contrary.

Likewise where a parent does not in any way interfere with them or their contracts. *Farrell v. Farrell*, 3 Houst. (Del.) 633. See also *Manchester v. Smith*, 72 Pick. (Mass.) 115; *Nightingale v. Withington*, 15 Mass. 272; *Benson v. Remington*, 2 Mass. 113; *Whiting v. Erle*, 3 Pick. (Mass.) 201; *Galbraith v. Black*, 4 S. & R. (Pa.) 207; *Sumner v. Sebec*, 3 Me. 223; *The Ætna, Ware* (U. S.) 474; *Steele v. Thatcher, Ware* (U. S.) 91; *Godfrey v. Hays*, 6 Ala. 501; *Lord v. Poor*, 23 Me. 569; *Stone v. Pulsifer*, 16 Vt. 428; *Benson v. Remington*, 2 Mass. 113; *Jenney v. Alden*, 12 Mass. 375; *Angel v. McClellan*, 16 Mass. 28; *Woodell v. Coggeshall*, 2 Metc. (Mass.) 89; *Dierker v. Hess*, 54 Mo. 246.

4. *Dicks v. Grisson*, 1 Freem. (Miss.) Ch. 428; *Burr v. Wilson*, 18 Tex. 367; *Sherburne v. Hartland*, 37 Vt. 528; *Northfield v. Brookfield*, 50 Vt. 62.

We find it laid down in one State, however, that such would not be the effect unless the parent consented to the ceremony. *White v. Henry*, 24 Me. 531; *Bucksport v. Rockland*, 56 Me. 22.

Marriage of Female Minor.—And a female minor is emancipated by marriage on the ground that her husband is in law entitled to her society. *Woods Inst.* 64. *Jenney v. Alden*, 12 Mass.

(i) *Contract of Emancipated Minor*.—A minor, therefore, who is released from his father's service stands, as to his contracts for labor either with strangers or with him, upon the same footing as if he had arrived at full age; and the father may himself contract to employ and pay the child for his services, and be bound in consequence like any stranger to fulfil his agreement.¹

(j) *Revocation of Emancipation*.—It is furthermore true that where the emancipation arises from neglect on the part of the parent, he may subsequently offer to provide for the wants of the minor and reclaim his services.²

For the consent of a parent that his minor child may work and receive pay for himself, is but a licence, revocable at will, as between him and the child. It is only when the implied emancipation has been acted upon by some third party, dealing with the child in good faith, that the parent will be estopped to assert his customary right against such third person.³ And furthermore, when the emancipation is by parol and without consideration it may be revoked before it is acted upon.⁴

(k) *Duty and Liability of Hirer of Infant*.—A person hires and pays a minor at his peril. If he fails to ascertain the *status* of the child he must take what consequence may arise.⁵ But where a minor absconds from his father's house and enters the service of one who, for his labor, furnishes the infant a reasonable support, the father can only recover in an action against the employer the value of the services rendered less the worth of the necessities supplied.⁶

375; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84; *Rush v. Vought*, 55 Pa. St. 437; *McCloskey v. Cyphert*, 3 Casey (Pa.) 220; *Steele v. Thatcher*, Ware (U. S.) 91; *Roby v. Lyndall*, 4 Cranch (U. S.) 351; *McGinnis v. The Grand Trunk*, 9 Pittsb. L. J., 257; *Conover v. Cooper*, 3 Barb. (N. Y.) 115; *Dicks v. Grisson*, 1 Freem. (Miss.) Ch. 428; *Aldrich v. Bennett*, 63 N. H. 415.

Enlistment.—It has been held in England that a minor was not emancipated by his enlistment. *Rex v. Rotherfield*, Grays 1 B. & C. 347.

The Parent's Intention—Question of.—And where a parent by his acts shows an implied emancipation he cannot afterwards testify in a suit brought by him for damages for loss of his son's wages, that it had not been his intention to emancipate the son. *McCarthy v. Boston etc. R. Co.*, 148 Mass. 550.

1. *Schouler's Dom. Rel.*, § 268.

2. *Keen v. Sprague*, 3 Me. 77; *Sumner v. Sebec*, 3 Me. 223; *State v. Smith*, 6 Me. 462; *Johnson v. Terry*, 34 Conn. 259; *Com. v. Demott*, 7 Phila. (Pa.) 624.

3. *Saldanels v. Mo. Pac. R. Co.*, 23 Mo. App. 516.

4. *Abbott v. Converse*, 6 Allen (Mass.) 530. And see *Jenney v. Alden*, 12 Mass. 375; *Nightingale v. Withington*, 15 Mass. 271; *Whiting v. Earle*, 3 Pick. (Mass.) 29; *Cahill v. Bigelow*, 18 Pick. (Mass.) 268; *Sumner v. Sebec*, 3 Greenl. (Me.) 167; *Bray v. Wheeler*, 29 Vt. 514; *Kauffelt v. Moderswell*, 21 Pa. St. 222; *Stimson's Am. Stat. Law*, §§ 4110-4147-6600.

5. *James v. Le Roy*, 6 Johns. (N. Y.) 274; *Conaub v. Raymond*, 2 Aiken (Vt.) 243; *Munsey v. Goodwin*, 3 N. H. 272; *Bowes v. Tibbetts*, 7 Me. 457; *Roby v. Lyndall*, 4 Cranch, C. C. (U. S.) 351; *Dufield v. Cross*, 12 Ill. 397; *Shute v. Dorr*, 5 Wend. (N. Y.) 206; *Benson v. Remington*, 2 Mass. 113; *White v. Henry*, 26 Me. 531.

Wages Earned by Minor in Unlawful Employment.—A father may recover wages earned by his infant son in an unlawful business if he knew nothing of its nature during the continuance of such employment. *Emery v. Kempton*, 2 Gray (Mass.) 257.

6. *Huntoon v. Hazleton*, 20 N. H. 388; *Pidgin v. Cram*, 8 N. H. 352; *Rawlins v. Van Dyke*, 3 Esp. 250.

A false statement, made by a son to his employer that he has been emancipated by his father, will not estop a recovery by the father of the wages of the son, where the employer did, or neglected to do, anything on the faith of the communication.¹

(*l*) *Step, Adopted and Illegitimate Children*.—A stepfather has no control over the earnings of his stepchildren.²

In default of a legislative enactment giving persons adopting children the rights of parents, such persons have no claim to the earnings of infants as against parents.³

The mother of an illegitimate child is entitled to its earnings so long as she has the right to its custody or control, and discharges her parental duties toward it.⁴

(*m*) *Infant, as a Master*.—There is no reason why an infant should not be a master.⁵

3. Married Women.—At common law a married woman could not enter into a contract of hiring and service which would bind her.⁶ But statutes both in England and America have done much to qualify the above doctrine. And where, under the law, a married woman may manage her own property, carry on trades in her own name and upon her own account, there can be no question that she may hire servants and bind herself for the payment of their wages.⁷

4. Persons of Unsound Mind.—The position of a lunatic or person of unsound mind is considered in general to bear same analogy to that of an infant in regard to his liability upon contracts. For although, strictly speaking, a person of unsound mind is incompetent to contract, yet there can be no doubt that a lunatic would be held liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered *necessary* for a person in his station in life. In such a case the

1. *Mason v. Hutchins*, 32 Vt. 780.

2. *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *Com. v. Hamilton*, 6 Mass. 273; *Freto v. Brown*, 4 Mass. 675; *Williams v. Hutchinson*, 3 N. Y. 312.

3. *Rives v. Sneed*, 25 Ga. 612.

4. *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247; *People v. Kling*, 6 Barb. (N. Y.) 366; *Carpenter v. Whitman*, 15 Johns. (N. Y.) 208; *People v. Landt*, 2 Johns. (N. Y.) 375; *Matter of Dodge*, 1 Clark's Ch. (N. Y.) 184; *Wright v. Wright*, 2 Mass. 109; *Com. v. Fee*, 6 S. & R. (Pa.) 255; *Com. v. Anderson*, 1 Ashm. (Pa.) 55; *Matter of Celina*, 7 La. An. 162.

5. *Macdonell's Master and Servant* 80; *Hands v. Slaney*, 8 T. R. 578; *Chapple v. Cooper*, 13 M. & W. 252, 258; *Rex v. St. Petrax*, 4 T. R. 196; 2 Batt. 377; and *Cald. 444*. See generally *Titman v. Titman*, 64 Pa. St. 480;

Hall v. Hall, 44 N. H. 293; *Eustace v. Peak*, 2 Bailey (S. Car.) 497; *Dunley v. Rector*, 5 Eng. (Ark.) 211; *Dierker v. Hess*, 54 Mo. 246; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Reg. v. Selborne*, 2 El. & Cl. 275; *The King v. Wilmington*, 5 B. & Ald. 525; *Rex v. Hardwick*, 5 B. & Ald. 179. See also *INFANCY*.

6. *Bidgood v. Way*, 2 W. Bl. 12, 36; *Marshall v. Rutton*, 8 T. R. 545; *Lambert v. Atkins*, 2 Camp. 272; *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Exch. 422.

7. *Wood's Master and Servant*, § 35; See *HUSBAND AND WIFE*, 9 Am. & Eng. Encyc. of Law 289; *Stimson's Stat. Law; Liabilities of Married Women*, §§ 1974, 6402-4, 6410-4; *Powers of Married Women*, §§ 1869, 2607, 3245, 4110, 6353, 6450-6, 6470-1, 6480-3, 6500-1, 6520-2; *Rights of Married Women*, §§ 27, 6017, 6350-9.

law would imply a promise to pay for them. And modern cases show that when a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to an action on the contract, especially in a case where the contract was not merely executory, but executed in the whole or in part, and the parties could not be restored altogether to their original position.¹ A lunatic may also be bound by contracts involving services suitable to his rank and station.²

5. Corporations.—Corporations, municipal, public or private may ordinarily employ and discharge servants the same as a private individual.³

The president and superintendent of a corporation have, unless restrained by the articles or bylaws, the authority to hire men to carry on the company's business.⁴

6. Partners.—Each partner, in the prosecution of this business, has the implied power to employ labor or engage services, such as are necessary to conduct the ordinary business of joint enterprise.⁵

1. *Smith's Master and Servant* 16; *Macdonell's Master and Servant*, § 106. And see *Wentworth v. Tubb*, 1 Y. & C. N. C. 171; *Malton v. Camroux*, 2 Exch. 487; *Read v. Legard*, 6 Exch. 626; *Beavan v. M'Donnell*, 9 Exch. 309; *Hassard v. Smith*, 6 Ir. Eq. 429; *Maddox v. Simmons*, 31 Ga. 512; *Ingraham v. Baldwin*, 9 N. Y. 45; *Crowther v. Rowlandson*, 27 Cal. 376.

2. *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

In this case carriages were furnished a man of rank. And see *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Richardson v. Strong*, 13 Ired. (N. Car.) 106; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; *Crowther v. Rowlandson*, 27 Cal. 376; *Lincoln v. Buckminster*, 32 Vt. 652; *Maddox v. Simmons*, 31 Ga. 512; *Ingraham v. Baldwin*, 9 N. Y. 45; *Sims v. McClure*, 8 Rich. Eq. (S. Car.) 286; *Dodds v. Wilson*, 1 Treadw. (S. Car.) 448; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; *Richardson v. Strong*, 13 Ired. (N. Car.) 106; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122.

3. See CORPORATIONS, 4 Am. & Eng. Encyc. of Law 184.

4. *Hardy v. Tittabawassee Boom Co. (Mich.)*, 1 Am. & Eng. Corp. Cas. 228.

And it was likewise held in above case that a resolution by the board of directors authorizing the employment of a certain class of men at a certain

rate of compensation was in no sense a restriction of the power of the company through its officers to hire other men than those alluded to on the same terms. See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

5. *Beckham v. Drake*, 9 M. & W. 79; *Carley v. Jenkins*, 46 Vt. 721; *Mead v. Shepard*, 54 Barb. (N. Y.) 474; *Smith v. Cisson*, 1 Colo. 29.

Members of Mining Partnership.—*Nolan v. Lavelock*, 1 Mont. 224; *Burgan v. Lyell*, 2 Mich. 102; *Potter v. Moses*, 1 R. I. 430. And see *Charles v. Eshelman*, 5 Colo. 107.

Of Partnership to Cut Timber.—*Mead v. Shepard*, 54 Barb. (N. Y.) 474; *Coons v. Renick*, 11 Tex. 134, 138. See generally *Durgin v. Somers*, 117 Mass. 55; *Tobacco Co. v. Jenison*, 48 Mich. 459; *Wheatley v. Tutt*, 4 Kan. 240; *Frye v. Sanders*, 21 Kan. 26; *Swan v. Stedman*, 4 Metc. (Mass.) 548; *Wills v. Cutler*, 61 N. H. 405; *Harvey v. McAdams*, 32 Mich. 472; *Bank v. Embury*, 21 How. (N. Y.) Pr. 14; *Tillier v. Whitehead*, 1 Dall. (U. S.) 269; *Emerson v. Hat Co.*, 12 Mass. 237. See *Bates on Partnership*, 334-5. See also article PARTNERSHIP.

One partner may incur the necessary expenses for the employment of assistants in the closing up of the partnership relation. 2 *Bates on Partnership* 692; *Holloway v. Turner*, 61 Md. 217; *Bradley v. Camp, Kirby (Conn.)* 77.

7. Agents.—An agent, like any other person, may act by the hand of a servant as well as by his own hand, in cases where the act is merely physical, or where *mind* enters into it so little that it would be absurd to say that the difference between one mind and another could be of any moment.¹

VI. THE CONTRACT OF SERVICE—1. Generally.—The contract of employment is a contract by which one who is called the employer engages another, who is called the employee, to do something for the benefit of the employer or of a third person. The authority to employ an agent or servant includes, in the absence of restrictive words, authority to make a complete contract, definite as to amount of wages, as well as to all other terms.²

2. The Consideration.—The ordinary presumption of law is that contracts are based upon a full and sufficient consideration.³ But in many contracts of service the consideration is not expressed. The parties have in mind certain usages. They do not state that which they assume need not be stated, and they are content to take for granted many of the terms of their agreement. Questions of difficulty frequently arise as to whether there exists a contract the consideration of which is implied, or may be fairly inferred, or whether there is a mere promise which is not binding owing to the absence of consideration.⁴

3. Necessity for Mutual Obligations.—The courts will not allow

And he can retain a person already in charge of partnership property, although the other partner orders his discharge. *Holloway v. Turner*, 61 Md. 217. See *PARTNERSHIP*.

1. *Mason v. Joseph*, 1 Smith (Pa.) 406; *Powell v. Tuttle*, 3 Comst. (N. Y.) 396; *Moore v. Wilson*, 6 Fost. (N. H.) 332; *Com. Bank of Pa. v. Union Bank of N. Y.*, 1 Kern (N. Y.) 203; *Williams v. Woods*, 16 Md. 220. See *AGENCY*, 1 Am. & Eng. Encyc. of Law 331.

The assent of the minds of both parties is necessary to constitute a contract, and, if one makes a proposition, he may recall it at any time before its acceptance; but it is not necessary that the mutual consent of the two minds should occur at the same time. *Sanford v. Howard*, 29 Ala. 684; *Haltzman v. Millaudon*, 18 La. An. 29.

Construction of Contracts.—A contract for service is construed and governed only by the general principles of the law of contracts. 1 *Parsons on Contracts* 112.

2. AGENCY, 1 Am. & Eng. Encyc. of Law 364, which see for all the cases.

Party Hiring Primarily Liable.—A party who employs another to do work is primarily liable to the em-

ployee for his wages, although he was under contract with others to do the same work. *McFadden v. Crawford*, 39 Cal. 662.

3. Macdonell's Master and Servant 126.

As to what constitutes a valid consideration, see *CONTRACTS*, vol. 3, p. 831.

Need Not be Adequate.—The consideration need not be such as in fairness would be adequate; that is a matter for the parties to the agreement. The courts will not, for example, enquire whether a servant's wages are too low, or whether the agreement of hiring is too much to the advantage of one of the parties. *Hitchcock v. Coker*, 6 A. & E. 438.

4. Whittle v. Frankland, 2 B. & S. 55; *Mayor of Kidderminster v. Hardwick*, L. R., 9 Ex. 13; *Arnold v. Mayor of Poole*, 4 M. & G. 896.

Time and Wages Not Stated.—Where one person enters into the employment of another without an express agreement as to the time of service or measure of compensation, in the absence of any proof of usage, it is to be considered as a general hiring. *Matter of Application of Gardner*, 103 N. Y. 533.

an action where A is not bound to serve, and B to retain him in service, although it is well settled that if A enter upon certain duties and performs them, the law will in some cases imply a promise by B to pay, and A will be entitled under those circumstances to recover.¹ But where B seeks to compel A to fulfil an agreement to work, it must be shown that there is an obligation on the part of B to retain him in service.²

4. Term of Service.—A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.³ But such fact does not, in the absence of other evidence, fix the period of hiring.⁴

1. *Elsee v. Gatward*, 5 T. R. 143.

2. *Thorn v. Mayor of London*, L. R., 10 Ex. 123; 44 L. J., Ex. 70; *Lees v. Whitcomb*, 5 Bing. 34; *Sykes v. Dixon*, 9 A. & E. 963; *Aspdin v. Austin*, 2 Q. B. 671; *Dunn v. Sayles*, 5 Q. B. 685.

See, however, *McIntyre v. Belcher*, 32 L. J., C. P. 254; *Worthington v. Ludlaw*, 31 L. J., Q. B. 134; *Emmens v. Elderton*, H. of L. Cas. 624.

Agreement with Owner of Colliery.—Defendants, owners of a colliery, hired plaintiff to hew coals at certain rates, according to work done, and plaintiff agreed to continue defendant's servant all the time the pit should be laid off work, and when required to do a full day's work on every working day. *Held*, defendants were not obliged to employ plaintiff for a reasonable number of working days during the term. *Williamson v. Taylor*, 5 Q. B. 175.

Lack of Obligation to Serve.—Defendants agreed that plaintiffs should have defendant's ship brokerage business at Sydney upon certain terms, and that defendants would provide plaintiffs with free passage to that port. *Held* void, plaintiffs not being bound to serve defendants. *Payne v. New South Wales etc. Co.*, 10 Ex. 283.

Undertaking to Employ for Seven Years.—Where plaintiff agreed with L that he should serve them for seven years; that he should not during that term work for any other person without the licence of the plaintiff; that it should be lawful for the plaintiffs to deduct from his wages any fines, etc., and that the plaintiffs should have the option of dismissing him on giving a month's notice or a month's wages; it was *held* that, looking to the provisions of the agreement, there was an undertaking to

employ L for seven years. *Pickington v. Scott*, 15 M. & W. 657.

Agreement to Serve Exclusively—Restraint of Trade—Mutuality.—Where there was an agreement between plaintiff and A, that A should serve for seven years at a given rate of wages, and not work for or serve any other person without his master's consent, in consideration of which plaintiff agreed to pay A 24s. per week for certain work; plaintiff to be at liberty, if Q were sick, or if A discontinued the trade, to retain any other person in A's place, without paying him wages. The court *held* the agreement not void for want of mutuality, or for being in unreasonable restraint of trade. *Hartley v. Cummings*, 5 C. B. 247.

And where one R. Whittaker, in consideration of £3, lent or advanced to him by certain persons mentioned in the agreement and of wages to be paid by them, agreed to serve them and no one else with their consent for twelve months, and during and until the expiration of three months from notice of his desire to terminate the service. The employers agreed to pay on Saturday night in every week during the term all such wages as the articles made by Whittaker amounted to. There was a proviso that either party to the agreement might, after twelve months give three months' notice. *Held*, that the contract was not void for want of mutuality. *Rex v. Welch*, 2 E. & B. 357.

3. *Beach v. Mullin*, 34 N. J. L. 343; Cal. Civ. Code, 2010.

4. *Patterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Evans v. St. Louis I. M. & S. R. Co.*, 24 Mo. App. 114; *Prentiss v. Ledyard*, 28 Wis. 131; *Thomas v. Hatch*, 53 Wis. 206.

An offer was made by letter to give

5. Written Contract—Parol Proof.—Where the contract is in writing, parol proof is inadmissible to vary the terms thereof.¹ But upon all questions bearing upon the interpretation of contracts, custom has a strong bearing.²

Where one is hired to work by the week or month, the burden of proof is upon him to show any change in the contract of hiring, as to the term of service.³

6. Fixed Compensation—Entire Time.—Where one enters into a contract of service for a fixed compensation, he, *prima facie*, agrees to give his employer his entire time.⁴ But this, it seems, is not an inflexible rule.⁵

VII. STATUTE OF FRAUDS.—1. Written and Parol Contracts Generally.—By the common law, a servant might be hired, either by deed or by a parol contract;⁶ and when hired or retained by deed, he could only be discharged from the contract by an equally

employment to the person to whom the letter was addressed, upon terms which were fully stated; and the letter concluded, "and if you give me satisfaction at the end of the first year, I will increase your salary accordingly." The proposal contained in the letter was accepted. *Held*, that the letter, and its acceptance, by legal construction, constituted a contract of hiring for one year. *Norton v. Cornell*, 65 Md. 359.

Salary for a Year Payable Weekly.—A general engagement of a servant "at a salary of \$1,500 a year, payable weekly," unaffected by any other considerations growing out of the custom of the place, the conduct of the parties, or other extraneous evidence disclosing a contrary intention, constitutes a contract of hiring for the year. *Bleeker v. Johnson*, 51 How. (N. Y.) Pr. 380.

Contract Providing for Semi-annual Payments.—Where one was under monthly employment, and told his employer that he wished it more permanent, and an amount per year was agreed upon payable semi-annually, a hiring for a year may be inferred. *Bascom v. Shillito*, 37 Ohio St. 431.

Salary Payable Quarterly.—A hiring for personal services, for which payment is made quarterly, is not necessarily a hiring by the quarter, or terminable by a quarter's notice. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56.

Continuance in Business Under Agreement.—A agreed to work for B for a year, and for a second year at an advanced rate if B should continue in the business. *Held*, that if B continued with A as partner he continued in business within the meaning of the contract. *Collett v. Smith*, 143 Mass. 473.

Contract for Certain Sum per Annum.—A contract for service "at a salary of \$2,500 per annum," is not a contract for any definite time, and at a fixed price, the complete performance of which is a condition precedent to the right of compensation. The employee is not bound to serve for any definite time to entitle him to compensation. *Haney v. Caldwell*, 35 Ark. 156.

Contract Conditioned Upon Servants Suiting.—D was employed by S for a week, and if she suited to continue during the summer months. Before the end of the week S declared that D suited, and D said, "Then as long as I suit you there is no fear for the summer months;" to which S replied affirmatively. *Held*, that the employment remained conditional on D's continuing to suit S. *Daveny v. Shattuck*, 9 Daly (N. Y.) 66.

1. A written contract to labor at \$90 per month cannot be varied by parol proof that board was included. *Lennard v. Vischer*, 2 Cal. 37.

2. *Lyon v. George*, 44 Md. 295.

3. *State v. Fisher Varnish Co.*, 43 N. J. L. 151.

4. *Leach v. Hannibal etc., R. Co.*, 86 Mo. 27.

An insurance agent contracting to devote his entire time and energy to the company's business is bound to devote his time and energies with that degree of diligence and attention usual among industrious business men engaged in like business and pursuing no other occupation. *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249.

5. See *Goffroy v. King*, 34 Md. 207; *Geiger v. Harris*, 19 Md. 209.

6. *Beckham v. Drake*, 9 M. & W. 79.

formal instrument,¹ but when hired by parol he could, of course, be discharged by parol.²

Since the passing of the statute of frauds, however, it has become necessary, in many cases, that contracts of hiring should be in writing.³

2. Contract for More than One Year.—A contract for service running for a longer term than one year is within the statute and to be valid must be in writing;⁴ and a verbal contract involving services of one to another for a year to commence in the future is void; for such contract is operative from the day when made, and the year ends with the ending of one year from that day.⁵

1. *Pawlet v. Burnham*, 1 Sess. Ca. 71, 2 Batt. 424.

2. *Dalt. Just.*, ch. 58; *R. v. Daniel*, 6 Mod. 182.

3. In interpretation of the English statute of frauds see *Carrington v. Roots*, 2 M. & W. 248; *Reade v. Lamb*, 28 M. & P. 67, 69. Compare *Leroux v. Brown*, 17 C. B. 801; also see *Souch v. Strawberrybridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East 142; *Peter v. Compton*, 1 Sm. L. C. 296 and note; *Cherry v. Heming*, 4 Exch. 631; 19 L. J. Exch. 63. See FRAUDS, STATUTE OF, 8 Am. & Eng. Encyc. of Law 686.

Oral Contracts Made Abroad.—No oral contract made abroad can be enforced in this country, if such contract is within the statute of frauds. It was so held in an English case, where an oral agreement was entered into at Calais, France, between the plaintiff and defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of £100 per annum, to collect poultry and eggs in that neighborhood for transmission to England, the employment to commence at a future day, and to continue for one year certain, the contract being broken by the defendant. *Leroux v. Brown*, 12 C. B. 801.

4. *McElroy v. Ludlum*, 32 N. Y. Eq. 828; *Dickson v. Frisbee*, 52 Ala. 165. And see *Owen v. Slatter*, 26 Ala. 547; *Cawthorne v. Cowdrey*, 13 Com. Bench Rep. (N. S.) 406; *Levison v. Stix*, 10 Daly (N. Y.) 229; *Britain v. Rossiter*, 11 L. R., Q. B. Div. 123; 48 L. J., Exch. Div. 262; 40 L. J., N. S. 240; 27 W. R. 482 C. A.; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Dobson v. Collins*, 1 H. & N. 81; *Cawthorn v. Cowdrey*, 32 L. J., C. P. 125; *Barstow v. Gray*, 3 Moe. 409; *Getchell v. Jewett*, 4 Me. 35, 366; *Atwood v. Cobb*, 16 Pick. (Mass.) 227;

Bernier v. Cabot Manuf. Co., 71 Me. 506; 36 Am. Rep. 343; *Doyle v. Dixon*, 97 Mass. 208; *Drummond v. Burrell*, 13 Wend. (N. Y.) 358.

Labor to be Begun as Soon as Convenient.—August 20th an oral contract was made between A and B by which A was to enter B's service for one year, A to begin the term of service as soon as he could. A began work August 27th. *Held*, that the contract was within the statute, being an oral contract not to be performed within a year. *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; 43 Am. Rep. 39. See *Russell v. Slade*, 12 Conn. 455; *Snelling v. Lord Huntingfield*, 1 Crompt. M. & R. 19.

Or to be Terminated After Eleven Months by Three Months' Notice.—Also where a verbal agreement on the 2nd October, 1854, between A and B, provided that A should employ B as a traveller, until the 1st of September, 1855, and for a year thereafter, unless the employment were determined by three months' notice. *Dobson v. Collins*, 1 H. & N. 81. See *Langbon v. Carleton*, L. R., 9 Exch. 57; *Brown v. Symons*, 8 C. B. (N. S.) 208; *Thompson v. Maberly*, 3 Camp. 573.

5. *McAleer v. Corning*, 50 N. Y. Super. Ct. 63. And see *Scoggin v. Blackwell*, 36 Ala. 351; *Crommelin v. Thiess*, 31 Ala. 412; *Philbrook v. Belknap*, 6 Vt. 383; *Amburger v. Marvin*, 4 E. D. Smith (N. Y.) 393; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 111; *Little v. Wilson*, 4 E. D. Smith (N. Y.) 422; *Frank v. Miller*, 38 Md. 450; *Long v. Henry*, 54 N. H. 57; *Squire v. Whipple*, 1 Vt. 69; *Hinckley v. Southgate*, 11 Vt. 429; *Tuttle v. Sweet*, 31 Me. 555. And see generally *Currie v. McLean*, 2 Macph. (Sc.) 1076; *Halloway v. Hampton*, 4 B. Mon. (Ky.) 415; *Kleeman v. Collins*, 9 Bush (Ky.) 460; *Hinckley v. Southgate*, 11 Vt. 428; *Footte v. Emerson*, 10 Vt. 738; *Comstock v. Ward*, 22

But where one person orally agrees to labor for another for a year, does so, and begins a new year without a new bargain, the original contract is competent evidence of the terms of an implied new contract, and the statute of frauds does not bar the action.¹ And where the contract is such that the whole *may* be performed within a year, the statute does not apply.²

Ill. 248; *Herrin v. Butters*, 20 Me. 119; *Norris v. Porter*, 2 Har. (Del.) 27; *Nones v. Homer*, 2 Hilt. (N. Y.) 116; *Scoggin v. Blackwell*, 36 Ala. 351; *Little v. Wilson*, 4 E. D. S. (N. Y.) 422; *Amburger v. Marvin*, 4 E. D. S. (N. Y.) 393; *Taggard v. Roosevelt*, 4 E. D. S. (N. Y.) 422; *Squire v. Whipple*, 1 Vt. 69; *Kelly v. Terrell*, 26 Ga. 551; *Frank v. Miller*, 38 Md. 450; *Long v. Neury*, 54 N. H. 57; *Wilson v. Martin*, 1 Den. (N. Y.) 602; *Comas v. Lamson*, 16 Conn. 246; *Tuttle v. Sweet*, 31 Me. 555; *Drummond v. Burrell*, 13 Wend. (N. Y.) 307; *Russell v. Slade*, 12 Conn. 455.

But where there were negotiations between a company and one T, for his employment as superintendent prior to April 1st, 1884, and subsequently he commenced work for the company as superintendent, and on April 10th, 1884, entered into a verbal contract with the company to serve as superintendent for the period of one year from April 1st, 1884, for \$1,200, payable monthly; *held*, that the contract need not be in writing. *Franklin Sugar Co. v. Taylor*, 37 Kan. 435.

Discharge Within Twelve Months from Date of Contract.—Where the defendant, on 20th July, proposed to hire the plaintiff as bailiff for one year, to commence on the 24th July, but before the expiration of the year the defendant, being displeased with the plaintiff, gave him a month's warning to quit his service and the plaintiff left before the expiration of the year, it was held that he could not maintain an action against the defendant for not continuing the plaintiff for the year. *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20.

Contract to Employ Infant.—Where one verbally agrees to employ an infant five years, and to pay his father certain sums semi-annually for his services, the contract is within the statute. *Hill v. Hooper*, 1 Gray (Mass.) 131. And see *Birch v. Earl of Liverpool*, 9 B. & C. 392; *Sweet v. Lee*, 4 Scott N. R. 77; *Roberts v. Tucker*, 3 Exchequer Rep. 632; *Girard v. Richmond*, 2 C. B. 835; *Drummond v. Burrell*, 13 Wend. (N. Y.) 307; *Mavor v. Pyne*, 2 Car. & P.

71; 3 Bing. 285; *Shute v. Dorr*, 5 Wend. (N. Y.) 204.

Likewise where by a parol agreement by a parent that his child, aged sixteen, shall serve a third person until he arrives at the age of twenty-one, when his master is to pay him one hundred dollars. *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *citing* 1 Comyn on Contracts 87; *Boydell v. Drummond*, 11 East 142.

Contract to Run One Year After Date.—And where a contract is to be performed "one year after date" it is within the statute. *Kimmius v. Oldham*, 27 W. Va. 258; *citing* *Lower v. Winters*, 7 Cow. (N. Y.) 203; *Hendrick v. Hern*, 4 W. Va. 626; *Lowry v. Buffington*, 6 W. Va. 255; *Tracy v. Tracy*, 14 W. Va. 243; *Marcy v. Marcy*, 9 Allen (Mass.) 8; *Young v. Drake*, 1 Seld. 463; *Pierce v. Paine*, 28 Vt. 34.

Contracts Which May be Completed Within One Year.—And where the parties to a verbal contract knew at the time it was made that it was not to be carried out within one year, though it might, and was in fact, partially performed within that time, it cannot be enforced. *Tuttle v. Sweet*, 31 Me. 555; *Boydell v. Drummond*, 11 East 142; *Mavor v. Payne*, 11 Moore 2.

Promise to Employ—Inability to Accept Within Year.—Where an agreement by one to employ another is made as a part of the compromise of an action, the promisee having been disabled at the time of the promise by reason of injuries for which the action compromised was brought, a demand for employment, made as soon as he is able to discharge the duties of it, is in time, though made more than two years after the promise. *East Line etc. R. Co. v. Scott*, 68 Tex. 694; 38 Am. & Eng. R. Cas. 16.

1. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Lines v. Supt. of Poor*, 58 Mich. 503; *Leroux v. Brown*, 12 C. B. 801.

2. *Souch v. Strawbridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East 142; *McPherson v. Cox*, 6 Otto (96 U. S.) 404; *Walker v. Johnson*, 6 Otto (96 U. S.) 424; *Roberts v. Rock-bottom Co.*, 7 Metc. (Mass.) 46; *Rus-*

3. **Presumption as to Commencement of Contract.**—When no time is fixed for the commencement of a contract of service, the presumption is that it is to begin at once.¹ But evidence will be admitted to prove that such service was not to commence immediately but at a future date.²

4. **The Memorandum.**—The note or memorandum of the oral contract which the statute requires is some writing authenticated by the signature of the party to be charged, or his agent, and containing, either in terms or by incorporation of other writings referred to in it, a statement of the terms of the contract of the parties to it.³ A note, letter or telegram may be sufficient to bring a case within the provisions of the statute.⁴

sell *v.* Slade, 12 Conn. 455; Clark *v.* Pendleton, 20 Conn. 508; Barney *v.* Ball, 24 Ga. 505; Linscott *v.* McIntire, 15 Me. 201; Ellicott *v.* Peterson, 4 Md. 476; Foster *v.* McO'Brien, 18 Mo. 88; Loggins *v.* Heard, 31 Miss. 426; Moore *v.* Fox, 10 Johns. (N. Y.) 244; Esty *v.* Holdrich, 46 N. H. 127; Thouvenin *v.* Lea, 26 Tex. 612; Sherman *v.* Champ, Trans. Co., 31 Vt. 162; Blanchard *v.* Weeks, 34 Vt. 589; Smith *v.* Conlin, 19 Hun (N. Y.) 234; Greene *v.* Harris, 9 R. I. 401; Jilson *v.* Gilbert, 26 Wis. 637; Fenton *v.* Emblers, 3 Burr. 1278; Hutchinson *v.* Hutchinson, 46 Me. 154; Updike *v.* Ten Broeck, 32 N. J. L. 105; Riddle *v.* Backus, 38 Iowa 81; Smith *v.* Smith, 4 Dutch. (N. J.) 216.

1. *Boydell v. Drummond*, 11 East 142; *Moore v. Fox*, 10 Johns. (N. Y.) 244; *Lower v. Winter*, 7 Cow. (N. Y.) 263; *McLees v. Hale*, 10 Wend. (N. Y.) 426; *Williams v. Jones*, 5 Barn. & Ald. 103; *Thomas v. Williams*, 10 B. & C. 664; *Charter v. Beckett*, 7 T. R. 201; *Wood v. Benson*, 2 Cr. & J. 95; *Russell v. Slade*, 12 Conn. 455; *Hearne v. Chadbourne*, 65 Me. 302.

Where one agreed to labor in a woolen mill for another for one year, it was held that the person so contracting had a right to proffer his services at once. *Russell v. Slade*, 12 Conn. 455; see *Bacon v. Page*, 1 Conn. 404; *Williams v. Jones*, 5 Barn. & Ald. 108.

2. Thus, where a verbal contract was made, Friday, that the plaintiff, who was then in the employment of defendant, should work a year for him at an increase of wages, and was silent as to the time when the year was to commence, it was held that the fact that the defendant credited the plaintiff with wages at the increased rate from the subsequent Monday only, and that partial settlements were made by the

parties on that basis, was admissible in evidence, and sufficient to warrant the inference that the understanding was that the year was to commence on Monday, and not on Friday, and that the contract, therefore, being one not to be performed within a year from the making thereof, was within the statute of frauds. *Hearne v. Chadbourne*, 65 Me. 303. See *Herrin v. Butters*, 20 Me. 119; *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Williams v. Jones*, 5 Barn. & Cres. 108.

3. See FRAUDS, STATUTE OF, vol. 8, p. 710, *et seq.*

4. *Barry v. Coombe*, 1 Pet. (U. S.) 640; *Case v. Worthington*, 1 Root (Conn.) 172; *Trevor v. Woods*, 36 N. Y. 207; *Macher v. Fritz*, 6 Wend. (N. Y.) 103; *Vassar v. Camp*, 1 Kern (N. Y.) 432; *Foster v. Lepper*, 29 Ga. 294; *Smith v. Jones*, 66 Ga. 328; 42 Am. Rep. 72; *Kleeman v. Collins*, 9 Bush (Ky.) 460.

Contract with Clergyman.—The secretary of a religious society communicated in writing to a minister the vote of the parish inviting him to become their pastor on certain terms at a salary at \$1,200 per annum, to begin on the first day of January. The minister accepted the proposition in a letter, but proposed that the year should begin February 1st, and his salary should be paid quarterly and entered upon his duties. Subsequently, in December, a vote was passed by the parish, and recorded, requesting him to withdraw, and enumerating, among other things, that, on the first of October preceding, "the society were not indebted to him in the least, and would not become so indebted to him by the terms of the agreement until November following." The letter was held to be a sufficient memorandum of the contract as be-

The memorandum should state the term of service.¹

VIII. IMPLIED CONTRACTS—1. Generally.—In default of a contract of hiring, a person may recover compensation for services, where the same were rendered under such circumstances as to show that he looks to be paid as a matter of right, and such that the person for whom they were rendered was bound to know that he claimed compensation therefor or was legally entitled thereto.²

And where one person performs labor for another, the law presumes a request, and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or it is performed under circumstances which repel the presumption of a promise that compensation shall be made.³

ginning and ending February 1st.
Johnson v. Trinity Church, 11 Allen (Mass.) 123.

1. A telegram reading as follows:

"Chicago, Aug. 7, 1872.

To Dwight Palmer: You may come on at once at salary of two thousand, conditional only upon satisfactory discharge of business.

(Signed) H. A. BURT, Agent.

was held insufficient as fixing no time for the continuance of the employment. *Palmer v. Marquette & Pacific Rolling Mill Co.*, 32 Mich. 274. See *Hall v. Soule*, 11 Mich. 494; *Abell v. Munson*, 18 Mich. 306.

2. *Wiggins v. Hopkins*, 3 Exch. 166; *Angulo v. Sunoe*, 16 Cal. 402; *Fraylor v. Sonora etc. Co.*, 17 Cal. 594; *Schwartz*, 26 Ill. 81; *Chiniquy v. Deliere*, 37 Ill. 237; *Bennett v. Robinson*, 18 La. An. 204; *Dougherty v. Whitehead*, 31 Mo. 255; *Morris v. Barnes*, 35 Mo. 412; *Watkins v. Richmond College*, 41 Mo. 302; *Hart v. Hess*, 41 Mo. 441; *Ryan v. Lynch*, 9 Mo. App. 18; *Robinson v. Cushman*, 2 Den. (N. Y.) 169; *Woodward v. Busbee*, 4 T. & C. (N. Y.) 393; *Lipe v. Eisenlard*, 32 N. Y. 229; *Tucker v. Virginia*, 4 Nev. 20; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Ames v. Potter*, 2 R. I. 265; *Ross v. Mitchell*, 28 Tex. 150.

Plaintiff, when a young girl, entered defendant's house as a hired servant for a fixed period, and for years afterward remained in his family, and performed heavy work in the house and in the field without receiving other compensation than board and clothing. *Held*, that the law would imply a promise by defendant to pay what her services were reasonably worth, in the absence of an express agreement that the services were to be rendered in return for a home and support

only. *McMillan v. Page*, 71 Wis. 655.

Where an action for compensation for services rendered has, to support it, no evidence of any promise to pay except the plaintiff's own testimony, it must be clear and explicit. *Pennsylvania R. Co. v. Flanigan*, 112 Pa. St. 558; 26 Am. & Eng. R. Cas. 88.

Person Laboring Round Railroad Station.—Plaintiff testified that before a railroad company's station agent was appointed, he was told by its civil engineer to look after the freight and about the station until the company discharged him, that he delivered goods and collected freight until the agent was appointed; that the agent did not agree to employ him, but said that he would write to, the company and have his name put on the pay roll. Plaintiff remained and worked about the depot. There was no evidence that the superintendent knew that plaintiff was at work, except that he was in the pay car when plaintiff demanded pay. *Held*, insufficient to show a cause of action against the company. *Willis v. Toledo etc. R. Co.*, 72 Mich. 160.

8. *Lewis v. Trickey*, 20 Barb. (N. Y.) 387; *Weston v. Davis*, 24 Me. 374; *Martin v. Fox & Co.*, 19 Wis. 552; *Mooreland v. Davidson*, 71 Pa. St. 371; *Hurley v. Van Wagner*, 28 Barb. (N. Y.) 109; *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Law v. Connecticut etc. R. Co.*, 45 N. H. 370; *Hughes v. Lenny*, 5 M. & W. 183.

It is well settled that if one man labors for another, or renders him service in his business, and that other, knowing all the facts, stands by and sees what is done, and makes no objection, he is estopped to deny that such services were rendered at his request. *Academy v. Allen*, 14 Mass. 176; *Guild v. Guild*, 15 Pick. (Mass.) 130.

But if the party benefited knew nothing

2. Gratuitous Services.—A person rendering services with no intention of charging for the time cannot subsequently recover, the party benefited having accepted them upon the understanding that they were gratuitous; for all contracts must be good or valid at their original creation, and must not depend upon subsequent contingencies.¹

3. Members of a Family.—The law does not imply a contract to pay for services between members of a family, unless such was the expectation of the parties concerned.²

The family relation necessary to rebut the presumption of a contract may exist between grandparents and grandchildren;³

ing of the work while the same was being done he is not liable. *Caldwell v. Eneas*, 2 Mill (S. Car.) 348; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Watson v. Ladoux*, 8 La. An. 68; *Fox v. Sloo*, 10 La. An. 11; *Morris v. Barnes*, 35 Mo. 412; *Belt v. Cook*, Cr. C. C. (U. S.) 666.

Gratuitous Services.—*McAtee v. United States*, 15 Leg. Int. 355; *Godard v. Foster*, 17 Wall. (U. S.) 123.

1. *James v. O'Driscoll*, 2 Bay (S. Car.) 101. But where the plaintiff, when a young girl, entered defendant's home as a hired servant for a fixed period, and for years afterward remained in his family, and performed heavy work in the house and in the field, receiving only board and clothing in way of compensation, it was held that the law would imply a reasonable compensation in the absence of an agreement to the contrary. *McMillan v. Page*, 71 Wis. 655.

Person Set to Work Through Charity.

—If a destitute person is received from charity, provided with necessities and set to work, he is under no obligation to remain, nor has he any claim for wages, unless there be some express agreement, or one may be implied from the peculiar circumstances of the case. 2 *Parsons on Contracts* 52.

Guests.—Neither can a guest ordinarily recover for services rendered while in the home of another. *Moulin v. Columbit*, 22 Cal. 508.

2. *Murdock v. Murdock*, 7 Cal. 511; *Guenther v. Birkicht*, 22 Mo. 439; *Angalo v. Sunal*, 14 Cal. 402; *Moulin v. Columbit*, 22 Cal. 509; *Friermuth v. Friermuth*, 46 Cal. 42; *Ryan v. Lynch*, 9 Mo. An. 18; *Cowell v. Roberts*, 79 Mo. 218; *Andrews v. Foster*, 17 Vt. 560; *Williams v. Hutchinson*, 5 Barb. (N. Y.) 122; *Dye v. Kerr*, 15 Barb. (N. Y.) 444; *Defranc v. Austin*, 9

Penn. 310; *Keegan v. Melone*, 62 Iowa 208.

A stepmother *in loco parentis* cannot recover for services. *Murdock v. Murdock*, 7 Cal. 511. Nor anyone treated as a member of the family. *Moulin v. Columbit*, 22 Cal. 510.

In an action against her father by a daughter who, though of age, was living with him, for compensation for domestic services, evidence that the defendant expressly agreed to pay for such services, though no rate of wages was agreed upon, is sufficient to support a verdict for plaintiff. *Geary v. Geary*, 67 Wis. 248; *Tyler v. Burrington*, 39 Wis. 376; *Burgess v. Burgess*, 109 Pa. St. 312; *Faloon v. McIntyre*, 118 Ill. 292; *Geary v. Geary*, 67 Wis. 248; *Byrnes v. Clark*, 57 Wis. 13; *Chadwick v. Devore*, 69 Iowa 637; *Traver v. Slimmer*, 65 Iowa 57; *Allen v. Allen*, 60 Mich. 635; *Johnson v. Ghost*, 11 Neb. 414; *Hillebrands v. Nibbelink*, 44 Mich. 413; *Wall's Appeal*, 111 Pa. St. 460; *Moyer's Appeal*, 112 Pa. St. 290; *Bonney v. Haydock*, 40 N. J. Eq. 513; *Sawyer v. Hebard*, 58 Vt. 375; *Heegan v. Malone*, 62 Iowa 208; *Coe v. Wager*, 42 Mich. 49.

Stepdaughter and Divorced Stepmother.—Where a woman of twenty-five years of age lives for six years with her stepmother, from whom her father had been divorced, working as a dressmaker, and was in the habit of giving some of her earnings to her stepmother, and doing some of the household work; held, she could not recover from her stepmother for services rendered. *Feiertag v. Feiertag*, 73 Mich. 297; See *Bostwick v. Bostwick*, 71 Wis. 273; *Cooper v. Cooper*, 147 Mass. 370; *Havens v. Havens*, 3 N. Y. Supp. 219.

3. *Moyer's Appeal*, 112 Pa. St. 290. Where the facts were as follows—A

also between a father or mother in law and son in law;¹ or uncle and niece by marriage.²

A stepfather who receives his stepchildren into his family stands *in loco parentis* to them, and in default of an agreement no presumption will arise that he is under obligations to pay them for services rendered by them.³

But the relationship of brother and sister does not overcome the legal presumption that a promise to pay is intended when personal services are rendered.⁴ An action in cases of this sort, however, may be maintained on an express promise.⁵

went to live with B as a domestic in 1872, at certain wages per week; in 1875 she married C, a grandson of B, who had lived with and been cared for by B, since he had been a boy; A continued to serve B until his death in 1881, and after his death C brought suit to recover from the estate of B the wages due his wife from 1877 to 1881;—the question as to whether or not there was a contract was left to the jury. *Neale v. Engle* (Pa.), 7 Atl. Rep. 60.

1. *Bonney v. Haydock*, 40 N. J. Eq. 513; *Sawyer v. Hebard*, 58 Vt. 375; *Coe v. Wager*, 42 Mich. 49.

2. *Wall's Appeal*, 111 Pa. St. 460.

Where a girl came from another State, at the request of her uncle to stay in his family and work for him, under a promise that she should be taught to play the organ and sent to school, and she came and performed not only the ordinary duties of the household, but other work in addition thereto for her uncle, the usual presumption that where a near relative is taken into the family of another no compensation was intended to be made for services by one to the other, beyond that received during the time they were rendered, was held to be overcome by such promise. *Shane v. Smith*, 37 Kan. 55. See *Stone v. Stone*, 43 Vt. 180; *Ayres v. Hull*, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 413, 675; *Hall v. Finch*, 29 Wis. 278; *Williams v. Hutchinson*, 3 N. Y. 319.

Where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child, and he lived and worked for him above eleven years, and the uncle said that the nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any-

thing to the nephew or making him any compensation, it was held that he could recover for his work and labor. *Jacobson v. Le Grange*, 3 Johns. (N. Y.) 199.

3. *Brown's Appeal*, 112 Pa. St. 18; *Gerdes v. Weiser*, 54 Iowa 591.

4. *Smith v. Milligan*, 43 Pa. St. 107; *Curry v. Curry*, 114 Pa. St. 367. But see *Taintly v. Taintly*, 13 Mo. Ann. 444.

Brother and Deaf Mute Sister.—But in a Missouri case, where a deaf mute sister resided with a brother for twenty years, and upon his death filed a claim for services, it was held there could be no recovery. *Morris v. Barnes*, 35 Mo. 412. See *Hertzog v. Hertzog*, 29 Pa. St. 465; *Tascott v. Grace*, 12 Ill. App. 639. 5. *Brown's Appeal*, 112 Pa. St. 18; *Price v. Jones*, 105 Ind. 543; *Damell v. Applegate*, 15 Fed. Rep. 419; *Collier v. French*, 64 Iowa 577; *Wence v. Wykoff*, 52 Iowa 644; *Howard v. Rynearson*, 50 Mich. 307; *Hillebrands v. Nibelink*, 44 Mich. 413.

Express contracts under this rule can be established only by direct, clear and positive evidence. *Burgess v. Burgess*, 109 Pa. St. 312; *Geary v. Geary*, 67 Wis. 248.

Though it is immaterial that there was no agreement as to rate of wages or time of payment. *Byrnes v. Clark*, 57 Wis. 13; *Geary v. Geary*, 67 Wis. 248.

Where decedent lived with claimant and his family for a long time before her death, during which time she was an invalid, requiring much care and attention, which she received from claimant's wife (her sister), and from other members of the family, she repeatedly said to claimant and his wife that she had no money then, but that they were to be paid for all their work; it was held sufficient to support an implied promise to pay. *Appeal of Lindsey* (Pa.), 15 Atl. Rep. 434.

4. Services with View to Legacy.—No action will lie to recover compensation for services performed where, with a view to a voluntary legacy, the services were rendered by the plaintiff without any expectation of being paid the value thereof, or any promise of remuneration, express or implied.¹ Yet, although a person serves another from expectation of a legacy, in which he is disappointed, if the person for whom the service was done promises to pay for it, an action can be maintained for the value of such service, whether the promise be made before or after the service was performed.² But if one does service for another *at his request*, no matter what his expectations were, *assumpsit* may be brought to recover compensation.³

5. Unsolicited Services.—The mere acceptance of services rendered by another without the request of the party to be charged, and without any subsequent promise to pay for the same, creates no obligation to pay, even though the services rendered be beneficial to the person accepting them. There must be either a previous request or a subsequent promise, express or implied, to create a liability.⁴

6. Compulsory Service.—Where one does work for another by compulsion, whom he is under no legal or moral obligation to serve, the law will imply and raise a promise on the part of the person benefited thereby to make him a reasonable compensation.⁵

7. Termination of Contract—Continuance in Service.—Where parties have entered into a contract of service for a certain period, which has elapsed, and their connection still continues, *et sic de anno in annum*

1. *Lee v. Lee*, 6 G. & J. (Md.) 316; *Le Sage v. Coussmaker*, 1 Esp. Rep. 108; *Little v. Dawson*, 4 Dall. (Pa.) 111; *Walker's Estate*, 3 Rawle (Pa.) 243; *Neal v. Gilmore*, 79 Pa. St. 421; *Hartman's Appeal*, 3 Grant (Up. Can.) 271; *O'Kane's Estate*, 2 W. N. C. (Pa.) 115; *Thompson v. Stevens*, 71 Pa. St. 161; *Pollock v. Ray*, 85 Pa. St. 428; *Osborn v. Governors of Guy's Hospital*, 2 Stra. 728; *Davison v. Davison*, 13 N. J. Eq. 246; *Dougherty v. Whitehead*, 31 Mo. 255; *Grandin v. Reading*, 10 N. Y. Eq. 370; *Campbell v. Campbell*, 65 Barb. (N. Y.) 645; *Eaton v. Benton*, 2 Hill (N. Y.) 576; *Martin v. Wright*, 13 Wend. (N. Y.) 460; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379.

2. *Snyder v. Castor*, 4 Yeates (Pa.) 358; *Allen v. Richmond College*, 41 Mo. 302; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379; *Le Sage v. Coussmaker*, 1 Esp. N. P. 187; *Bowen v. Bowen*, 4 C. & P. 93; *Bryant v. Flight*, 5 M. & W. 114; *Alsager v. Rowley*, 6 Ves. 748; *Platamore v. Staple*, *Cooper's Ch. Cas.* 252.

3. *Roberts v. Swift*, 1 Yeates (Pa.) 209; *Van Annan v. Byington*, 38 Ill. 443; *Weeks v. Holmes*, 12 Cush. (Mass.) 215.

4. *Tascoit v. Grace*, 12 Ill. App. 641; *DeWolf v. Chicago*, 26 Ill. 443; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Caldwell v. Eneas*, 2 Const. Rep. (S. Car.) 348; *Doane v. Badger*, 12 Mass. 65; *Loring v. Bacon*, 4 Mass. 575; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Pinchon v. Delaney*, 2 Yeates (Pa.) 22; *Hort v. Norton*, 1 McCord (S. Car.) 22; *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Roberts v. Swift*, 1 Yeates (Pa.) 209; *Long v. Kaiser*, 34 Mich. 317; *Stakes v. Lewis*, 1 T. R. 20; *B. E. Shipping Co. v. Somes*, E. B. & E. 353; 30 L. J., Q. B. 229; *Nicholson v. Chapman*, 2 H. Bl. 354; 1 Esp. 86; *Peake's Ad. C.* 226; 1 C. & P. 434; *Taylor v. Brewer*, 1 M. & S. 290; *Roberts v. Smith*, 4 H. & N. 315; 28 L. J., Exch. 164. See *supra*, 1, generally.

5. *Peter v. Steel*, 3 Yeates (Pa.) 250; *Cook v. Husted*, 12 Johns. (N. Y.) 188; *Phillip v. Kirkpatrick*, 2 Yeates (Pa.)

quandiu ambabus partibus placuerit, they are held to have renewed the contract by tacit relocation, without any new agreement being entered into. But of course, as has been before observed, the period of renewal cannot be longer than one year, because the implied contract is a verbal, not a written one.¹

IX. EXPRESS CONTRACTS—1. Obligation to Furnish Work.—Work must be furnished by the master during the period covered by the contract.²

2. Wages—When Due and Payable.—Where by contract one is employed by another to do work by the day or month or year, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day, month or year, as the case may be.³

But a contract to serve a year at a fixed sum, payable in regular weekly instalments, is divisible as to the remedy; the stipulations as to payments are several obligations.⁴

Payment Depending on Contingency.—Where under the agreement payment is to depend upon the arising of a certain contingency, there can be no recovery if the contingency does not occur.⁵

3. Failure to Demand Wages.—Where a person serves in the capacity of a domestic servant, and no demand for wages is made until a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made.⁶ But this presumption may be rebutted.⁷

444; *Black v. Meaux*, 4 Dana (Ky.) 188; *Patterson v. Crawford*, 12 Ind. 241.

1. *Fraser's Master and Servant* 17; *Moline Plow Co. v. Booth*, 17 Ill. App. 574; *McCullough Iron Co. v. Carpenter*, 67 Md. 554; *Nicholson v. Patchin*, 5 Cal. 476; *Reed v. Swift*, 45 Cal. 255; *Machine Co. v. Buckley*, 48 Ill. 189; *Sinco v. Supt. of Poor*, 58 Mich. 503; *Heise v. Milwaukee Co.*, 51 Wis. 564.

In a contract between a planter and an overseer, under which the latter was employed for a series of years at a stipulated salary, the fact that the overseer begins a new year without express agreement or renewal of terms will be held as a tacit reconstruction of the contract for the same term, and at the same salary. *Leland v. Aldrich* (La.), 6 So. Rep. 28.

County Physician's Failure to Appoint Successor.—A county physician employed for a year at a fixed salary, who renders services for some time after his year is up, his successor not being promptly appointed, can recover for such additional period of service only

at the rate of compensation fixed by his contract of the previous year. *Weise v. Milwaukee Co. Supervisors*, 51 Wis. 564.

2. *Bromley v. School Dist.*, 47 Vt. 381. See also *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Nations v. Cudd*, 22 Tex. 550.

3. *Delappe v. Sullivan*, 7 Colo. 182; *Jennings v. Lyons*, 35 Wis. 553.

4. *Chiles v. Belleville Nail Mill Co.*, 68 Ill. 123.

5. *Zerrahn v. Ditson*, 117 Mass. 553.

6. *Houck v. Houck*, 99 Pa. St. 552.

7. *McConnell's Appeal*, 97 Pa. St. 31. And see *Gough v. Findon*, 7 Exch. 49; *Sellen v. Norman*, 4 C. & P. 80; *Couch v. Ingersoll*, 2 Pick. (Mass.) 292; *White v. Atkins*, 8 Cush. (Mass.) 367; *Kane v. Hood*, 13 Pick. (Mass.) 281.

Under the *Louisiana* code domestics must demand their wages within one year from the time they leave their service. Sec. 320, 5-70.

Demand for Increase of Wages—Implication from Silence.—The plaintiff, an employee of the defendant, demanded

4. Destruction of Building.—Where one is employed to do work in a particular building for a series of days, the burning of the building by inevitable accident will stop the employer's liability for wages. In such cases wages can only be recovered for the work actually performed.¹

5. Extra Pay and Extra Work.—An employee must show an express agreement in order to recover extra pay.²

6. Payment for Services Rendered Another.—Where a person is sought to be charged with liability for services rendered for and under the employment of another, upon a parol promise to pay therefor, the promise must be shown to have been made as an original undertaking, and the labor must have been rendered upon his promise and credit.³ No transfer of liability, however, can be made subsequent to the entering upon the service. B's promise to pay C what may become due to him from A must be in writing to bind him.⁴

an increase of wages, to commence January 1st, 1885, and gave due notice to defendant's agent that he would leave unless such increase was made. The agent promised to give an answer in two or three days, but failed to do so for several months, allowing the plaintiff in the meanwhile to continue work. The plaintiff was finally told that his salary would be increased as demanded, but to commence May 1st, 1885. It was held that the silence of the agent did not raise the implication of assent on the part of the defendant, and that plaintiff was not entitled to the increase from January 1st to May 1st, 1885. *Raysor v. Berkeley Co. Ry. & Lumber Co.*, 26 S. Car. 610.

1. *Hall v. School Dist.* No 10, 24 Mo. App. 213. And see *Lord Raym.* 1477; *Davis v. Smith*, 15 Mo. 469; *School Dist. v. Dauchy*, 25 Conn. 530; *Adams v. Nichols*, 19 Pick. (Mass.) 275; *Taylor v. Caldwell*, 113 E. C. R. 824; *Dexter v. Norton*, 47 N. Y. 65; *Wharton on Contracts*, § 322.

2. *Cany v. Holleck*, 9 Cal. 198. And see *Gill v. New York Cab Co.*, 55 Hun (N. Y.) 524; *Bradbury v. Helms*, 92 Ill. 35; *Turnell's succession*, 34 La. An. 888; *Fraser v. U. S.*, 16 Ct. of Cl. 507; *Case of Bell v. Drummond*, Peake 45.

Voluntary performance by a servant of extra work does not entitle him to extra pay. *Kablitz v. Rowell*, 56 Wis. 671; *E. T. V. & G. R. Co. v. McKnight*, 15 Lea (Tenn.) 336; 26 Am. & Eng. R. Cas. 355; *Best v. Byrne*, 51 Wis. 531.

New York Eight Hour Law.—An employer is not made liable, under and by the "Eight Hour Law" (ch. 385, Laws

of 1870), to an employee hired by the day, for labor beyond the statutory time, unless it was provided for in the contract of employment. The intent of the act was to place the control of the hours of labor within the discretion of the employee, giving him the privilege, at his option, to refuse to work beyond the eight hours, or to secure extra compensation for extra work by stipulation in the contract of employment. In the absence of any such stipulation the language of the act repels any inference of an intent to confer a right upon an employee to charge for more than one day's labor for services rendered in any calendar day; and for such services he may not demand any extra compensation. *McCarthy v. Mayor etc.*, 96 N. Y. 1; 48 Am. Rep. 601.

Where an employee in the public service works twelve hours a day, is paid by the day, and accepts the payment, he is excluded from maintaining that every eight hours constituted a day's work under the provisions of the eight hour law, and that he is entitled to extra pay. *Averill v. U. S.*, 14 Ct. of Cl. 200.

Extra for Labor Done on Sunday.—Where a party is employed at a certain price per month to work on a farm, and his employment contemplates certain work to be done by him on Sunday, and he afterwards makes a final settlement without claiming additional pay for his Sunday work, he cannot then recover for such work. *Lowe v. Marlowe*, 4 Ill. App. 420.

3. *Wood's Master and Servant*, § 197.

4. *Gill v. Herrick*, 111 Mass. 501;

7. Husband and Wife.—A wife is not responsible for the wages of an employee of her husband, although such wages are sometimes paid by her.¹

A man can contract to furnish his own services and those of his wife, and, if his wife makes no separate claim, can sue for them. And if the wife gives evidence in support of his demand, upon the trial, it is a sufficient ratification of his contract, if necessary to ratify it.²

8. Agreement to Pay Reasonable Worth.—An agreement to pay a servant what the master considers him to be reasonably worth binds the master to pay what his services are worth.³

9. Agreement to Pay Same Wages as Paid to Others.—Where an employer contracts to pay an employee "the same wages as shall be paid to other men in his employ, filling similar positions, and the laborer sues for compensation, and there is no showing that the company has other employees in similar positions, plaintiff is entitled to prove what his services are worth.⁴

10. Disagreement as to Wages.—Where master and servant agree as to the existence of a contract, but differ as to the wages to be paid, the question of compensation must be left to the jury.⁵

Thatcher v. Rockwell, 4 Colo. 375; Ames v. Foster, 106 Mass. 400; Brightman v. Hicks, 108 Mass. 246; Morrissey v. Kinsey, 16 Neb. 17; Aldrich v. Jewell, 12 Vt. 125.

In Skinner v. Conant, 2 Vt. 453, the defendant in error, Conant, went into the employ of one Andrus, under the following circumstances: Andrus was running a distillery belonging to the plaintiffs in error, and being in need of help, they told the defendant that if Andrus employed him they would see him paid. The court held that this was not an original but a collateral undertaking, and not being in writing was within the statute of frauds.

Payment by Foreman.—Where a foreman in a mine, charged with the employment, management and discharge of laborers in such mine, pays such laborers out of his own funds, in an action against his employer to recover the amounts thus advanced, the time account of the laborers thus paid by the foreman, and the receipts given by them to him therefor, are admissible in evidence. Martin v. Victor M. & M. Co., 19 Nev. 197. And see Bartlett v. Smith, 13 Fed. Rep. 263; Minnesota Linseed Oil Co. v. Montague, 32 Minn. 193.

1. State etc. v. Brokaw, 43 N. J. Law 587; Wilson v. Herbert, 12 Vroom (N. J. L.) 454.

2. Harrington v. Gils, 45 Mich. 374. See Gay v. Rogers, 18 Vt. 343; Bickley v. Collier, 4 Mod. 156.

3. Millar v. Cuddy, 43 Mich. 273; Butler v. Winona Mill Co., 28 Minn. 205.

Under such a contract the measure fixed by the master is presumptively the measure of compensation, and although considerably less than the reasonable value of the services, it is still conclusive in the absence of proof of fraud. Butler v. Winona Mill Co., 28 Minn. 205; 41 Am. Rep. 277. And see Millar v. Cuddy, 43 Mich. 273; 38 Am. Rep. 181.

Resolution Limiting Pay Unknown to Servant.—A resolution of a board of directors, limiting the pay of an employee, not made known to him, and there being no express agreement for compensation, will not prevent the recovery on a *quantum meruit*. Darach v. Hanover Junction etc. R. Co., 9 L. Bar. (Penn.) 141.

4. Kent Furniture Mfg. Co. v. Ransom, 46 Mich. 416. And see Jordan v. Foxworth, 48 Miss. 607.

5. Rocco v. Parczyx, 9 Lea (Tenn.) 328.

And it is immaterial that, about the time of the hiring, plaintiff offered to work for some other person at the same price that defendant contends was agreed on between him and plaintiff. Roles

11. Disposal of Business Unknown to Employee.—Where a master disposes of his business, and his employee, in ignorance thereof, continues his labors, the master is liable for the wages earned by him so long as he knows nothing of the change.¹

12. Employer's Partnership Relations.—Where a merchant employs a clerk, and pending his term of service the merchant forms a partnership in the same character of business, and the clerk enters the service of the firm, the contract with the original employer as an individual is at an end.²

An action lies against a surviving partner for work and labor performed for the firm, both before and after the decease of a copartner.³ And where the contract of an employee with a firm is for a specified time, dissolution does not release the partnership.⁴ Contracts of employment by the firm have been held to be conditioned on the firm not being dissolved by death, and in case of the death of a partner the survivor is not obliged to carry out the contract.⁵

If the contract is a personal one in reliance upon a particular partner, his disability or retirement will release the other contracting party.⁶ Likewise, where the dissolution disables the firm to carry out its contract.⁷

v. Wintzer, 27 Minn. 31; *citing* *Kumler v. Ferguson*, 7 Minn. 351; *Schwerin v. De Graff*, 21 Minn. 354; *Miller v. Lamb*, 22 Minn. 43.

1. *Perry v. S. W. Mfg. Co.*, 37 Conn. 533.

Where the agent of the Marietta and North Georgia Railroad employed one to act as a guard for convicts, and subsequently hired the convicts to a firm, the latter assuming the responsibility of guarding them, the employee having no notice or knowledge of such change, the company was not thereby discharged from its liability to him, and he would be entitled to recover from the company for his services until he was notified of the change in the contract. And it would make no difference that the agent of the company who contracted with plaintiff afterwards became the agent of the firm. *Marietta & N. Ga. R. Co. v. Hilburn*, 75 Ga. 379.

2. *Anderson v. Freeman*, 75 Ga. 93. It is also laid down in above case that if under these circumstances he has been paid by the original employer up to the formation of the firm and after entering the service of the firm he refuses to continue his employment with them at the same rate, but retains as payment to himself funds of the firm at a higher rate and is discharged, he cannot recover from the original employer.

Continuance in Business.—In a suit on a mutual written agreement, by which plaintiff was to work for defendant for a year at a certain rate per day, and for a second year at an increased rate, if defendant "continued the business," plaintiff is entitled to recover, if defendant in fact carried on the same business during the second year, but with a partner. *Collett v. Smith*, 143 Mass. 473.

3. *Friermuth v. Friermuth*, 46 Cal. 42.

4. 2 *Bates on Partnership* 709. Thus a contract with an employee is not rescinded by the employment of a receiver, and the transfer of all the assets to him. *Bird v. Austin*, 8 Jones & Sp. (N. Y.) 109.

5. *Tasker v. Shepard*, 6 H. & N. 575; *Burnett v. Hope*, 9 Ontario Rep. 10; *Hoey v. McEwan*, 5 McPher. (S. Car.) 814. *Compare Ferreira v. Sayres*, 40 Am. Dec. 496.

6. *Robson v. Drummond*, 2 B. & Ad. 303; *Stevens v. Benning*, 1 K. & J. 168; *Fulton v. Thompson*, 18 Tex. 278.

7. Refusal of Employee to Work.—Thus a contract to work for a firm for a year as an employee is not broken by the employee's refusal to work after the retirement of one partner and the addition of another, for the contract is not assignable, and he can recover a pro-

But persons not partners performing separate work under joint contract must pay laborers employed by each separately.¹

13. Employers' Insolvency.—The fact that employers, who have agreed to hire an employee for a year, and pay him a certain salary, become insolvent, and are obliged to cease business, and notify the employee that his services will not be required thereafter, does not absolve them from their obligation to pay according to the terms of the agreement, unless the employee assents thereto.²

Where the master dies, but the servant keeps on until the termination of the contractual period, he can recover full compensation.³

14. Services Rendered a Third Person.—A servant may recover for services rendered another during business hours, with the consent of his master, when entitled to his entire time.⁴

15. Cumulative Compensations—Different Positions.—Two compensations provided by contract are cumulative, unless the contract shows that one is in lieu of the other.⁵

But where an employee entitled to certain pay obeys an order directing him to perform the duties of an inferior position at less pay, he is estopped from claiming the pay attached to his original position.⁶

16. Notice of Reduction of Wages.—Where a master notifies his servant that he will thereafter pay him less, and the servant continues work without notifying his master that he will claim more, it constitutes a new arrangement.⁷

17. Absence of Servant.—A servant who is kept away from his labor through sickness may recover for the work he has done, if he is willing to return when able.⁸

A public officer whose salary is fixed cannot be deprived thereof without sufficient cause. While sickness may, in some cases, be a good ground for his removal, yet where it appears that his absence on account thereof has been permitted, his right to the salary is not affected thereby until some action is taken by the proper authorities.⁹

portion of the compensation. *Red-heffer v. Leather*, 15 Mo. App. 12.

1. *Smith v. Moynihan*, 44 Cal. 54. See PARTNERSHIP.

2. *Fanaxem v. Bostwick* (Pa.), 7 Atl. Rep. 598.

Nor would a servant in such case be justified in leaving the employment, when the contract he was under was in nowise affected, as where the master becomes insolvent during the term of an entire contract. *Pritchard v. Martin*, 27 Miss. 305; *Frazer's Master and Servant* 240.

3. *Hill v. Robeson*, 2 S. & M. (Miss.) 541.

4. *Wallace v. De Young*, 98 Ill. 638; 38 Am. Rep. 108.

Servants' Fees as Notary.—On a contract for services for a fixed compensation, as agent in settling claims, the master is *prima facie* entitled to notary's fees earned by the servant in the employment. *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27; 56 Am. Rep. 408.

5. *Brady v. Wilcoxson*, 46 Colo. 239.

6. *O'Brien v. N. Y. City*, 28 Hun (N. Y.) 258; *Monroe v. N. Y. City*, 28 Hun (N. Y.) 258; *People's Co-operative Assoc. v. Lloyd*, 77 Ala. 387.

7. *Spicer v. Earl*, 41 Mich. 191.

8. *Fuller v. Brown* (11 Metc.), 52 Mass. 440; *Harrington v. Fall R. I. Works*, 119 Mass. 82.

9. *O'Leary v. Board of Education*,

18. Contract Depending on Satisfaction or Discretion.—One who agrees to work for another at a fixed rate per month, only so long as both are satisfied with the arrangement, may quit at any time, and recover at the contract rates for the time he has worked.¹

Where services are rendered upon an understanding that the remuneration is to be at the entire discretion of the employer, no action is maintainable.²

19. Abandonment by Servant—(a) *Quantum Meruit*.—Where parties enter into a contract by which the amount of labor to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, such a contract cannot be apportioned, and if in such a case the employee leaves before completing his term of service, he is not entitled to recover anything *on the contract*.³ But an employee is not in all cases of this sort without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract and give him a remedy on a *quantum meruit*.⁴

93 N. Y. 1. See *People v. Jackson*, 85 N. Y. 541.

Upon the trial of an action brought to recover the salary of James Devlin, the plaintiff's intestate, for the years 1879 and 1880, it appeared that Devlin was employed in the finance department of the city of New York as doorkeeper, and that from the commencement of his employment until the end of the year 1878, he was regularly paid, although he was absent by reason of sickness and on leave for some months of that year. During the years 1879 and 1880 he was sick and only occasionally appeared at the office. His name, however, appeared upon the pay roll each month, but the amount of the salary was erased by having a line drawn through it in red ink, pursuant to an order of the comptroller, and on the margin of the roll were written the words "absent all the month, sick without pay." This fact was not communicated to Devlin, nor was he ever notified that his services were no longer required. *Held*, that he was entitled to receive his salary for the years named. *Devlin v. Mayor*, 41 Hun (N. Y.) 281.

1. *Evans v. Bennett*, 7 Wis. 404.

2. *Taylor v. Brewer*, 1 Maule & Selwyn 290.

3. 2 Parsons on Contracts 521.

4. Until the last fifty years it was quite generally held to be the law, both in England and America, that where a person, having agreed to work for another for a definite period of time, vol-

untarily leaves such service without any fault on the part of the employer, and without his consent, before the expiration of the term, he could not recover in any form of action for the services actually rendered; the ground being taken that the plaintiff could not recover on his express contract, because he had not executed it on his part, and that performance was a condition precedent to the payment, and that no recovery could be had under a *quantum meruit*, because an express contract always excludes an implied one in relation to the same matter. *Olmstead v. Beale*, 19 Pick. (Mass.) 528.

But in a New Hampshire case decided in 1834, *Britton v. Turner*, 6 N. H. 481, the doctrine of which has quite generally been adopted, a marked departure was taken from the former line of decisions. In that case it was held that where a contract is made of such a character a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party. The labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. See *Parcell v. McComber*, 11 Neb. 209.

The stern rule of the common law has been relaxed in many of the States, and the doctrine now generally recognized is, that if the employer accepts of

In none of the cases on either side of the question is the integrity of the original contract and the rights and obligations of the parties thereunder assailed. All the courts disclaim any purpose of making contracts for the parties. But the difference in the result is owing chiefly, if not entirely, to the diverse views of facts and circumstances relating to the performance, or part performance, of the contract, as a waiver of strict compliance therewith, and to a difference in construction of the original contract.¹

But a servant who agrees to work for a definite term at an entire price and leaves before his time is up has no claim against his master.² Sickness or death is an act of God in such a sense as generally to excuse full performance of an entire contract, and

the benefit of what has been done, whether voluntarily or from the necessity of the case, the employee may recover according to the contract price for what has been done; or if he was to receive a fixed sum for the whole work, then in the proportion which the work done bears to the whole work; or where there is no price fixed, then upon a *quantum meruit*, from which, however, there must be deducted whatever damages may have resulted to the employer from the failure to fully perform the contract by the employee. *Duncan v. Baker*, 21 Kan. 99; *Pixler v. Nichols*, 8 Iowa 106; *McCloy v. Hedge*, 18 Iowa 66; *McCafferty v. Hale*, 24 Iowa 356; *Byerlee v. Mendel*, 39 Iowa 382; *Wolf v. Gerr*, 43 Iowa 339; *Burkholder v. Burkholder*, 25 Neb. 270; *Hillyard v. Crabtree*, 11 Tex. 264; *Carroll v. Welch*, 26 Tex. 149; *Hollis v. Chapman*, 36 Tex. 1, 5; *Lamb v. Brolaski*, 38 Mo. 51, 53; *Ryan v. Dayton*, 25 Conn. 188; *Epperly v. Bailey*, 3 Ind. 73; *Coe v. Smith*, 4 Ind. 82; *Ricks v. Yates*, 5 Ind. 115; *Prentiss v. Ledyard*, 28 Wis. 131; *Bennett v. Stephens*, 8 Oreg. 444; *Carter v. Lilbman*, 26 Daily Reg. 853; *Powers v. Wilson*, 47 Iowa 666; *Chamblee v. Baker*, 95 N. Car. 98; *Wiley v. School Dist.*, 25 Mich. 419; *Bishop v. Price*, 24 Wis. 580; *Trowbridge v. Barrett*, 30 Wis. 661. Compare *Diefenback v. Stark*, 56 Wis. 462; and see *Jones v. Jones*, 2 Swan (Tenn.) 605; *Edgington v. Pickle*, 1 Smed. (Tenn.) 122; *Allen v. McKibbin*, 5 Mich. 449; *Davis v. Barrington*, 10 Fost. (N. H.) 517; *Sinclair v. Talmadge*, 35 Barb. (N. Y.) 602; *Nibbe v. Brauhn*, 24 Ill. 268; *McKinney v. Springer*, 3 Ind. 59; *Dermott v. Jones*, 23 How. (U. S.) 220; *Western v. Sharp*, 14 B. Mon. (Kv.) 177; *Newman v. McGregor*, 5 Ohio

349. Compare *Allen v. Curles*, 6 Ohio St. 505.

1. Field on Damages, § 334. See Wood's Master and Servant, § 147, in support of the ancient rule.

Where Servant Leaves for Being Reprimanded.—A foreman at a tailor's shop who goes on a spree has no cause of action for future wages if he is discharged or reprimanded so that he leaves. *Physioc v. Shea*, 75 Ga. 466.

Desire of Master that Servant Quit.—It has been held in Indiana that an apparent desire on the master's part that the servant leave, does not justify such action on his part. *DeCamp v. Stevens*, 4 Blackf. (Ind.) 24; and see *Parcell v. McComber*, 11 Neb. 209.

Breach of Contract by Master, as Cause for Abandonment.—Though an employer's breach of a contract of service for one year at a stated price per month may justify the employee in abandoning the work, and entitle him to recover for the services performed, it will not authorize recovery for the work unperformed. *Weber v. Union Mut. L. Ins. Co.*, 5 Mo. App. 51. Compare *Brent v. Shelley*, 5 Mo. App. 580.

2. *Nelichka v. Esterly*, 29 Minn. 146; *Kahn v. Fandel*, 29 Minn. 470.

Seamen Employed in Harbor Navigation.—Though the practice in New York harbor upon hiring a seaman "by the month" in harbor navigation permits an employer to discharge, or the employed to leave, at the termination of any trip during the month on *pro rata* wages, neither can terminate the employment in the midst of a trip without legal cause, and an employee so quitting forfeits his wages. *Disleraw et al. v. The Walsh Brothers* (N. Y.), 36 Fed. Rep. 607; and see *The Minna*, 11 Fed. Rep. 759; *Moore v. Neapie*, 3

permit a recovery on a *quantum meruit*; but otherwise where the sickness is one which should have been foreseen and provided against by the party in default.¹

(b) *Justification*.—An assault without a battery may or may not be a sufficient justification for a servant in leaving his master's service; but where a master, without any provocation, commits an assault upon his servant, and thereby causes him to fear injury, it is a justification.²

Sufficiency of Ill Usage Question for the Jury.—Where ill usage is set up as a justification for such abandonment, its sufficiency is a question for the jury, under proper instructions from the court.³

A servant is justified in leaving his master, when the latter refuses to allow him to carry out his contract.⁴

(c) *Imprisonment of Employee*.—Where an employee is imprisoned the employer has a right to treat the contract as abandoned.⁵

(d) *Return of Servant—Condonation*.—Where an employee for a fixed period, without any fault of his employer, absents himself for a short time, and then the employer, with knowledge of the fact, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered.⁶ But no recovery can be had for the time he was absent.⁷

Fed. Rep. 650; The City of New Orleans, 33 Fed. Rep. 683.

1. *Confinement of Female Servant*.—Jennings v. Lyons, 39 Wis. 554. In this case plaintiff contracted to render to defendant the domestic services of himself and wife for one year at a specified price. Four months and ten days thereafter the wife left the service in anticipation of her confinement; both were then discharged from the service, and the wife was confined four or six weeks thereafter. *Held*, that plaintiff was not excused by such sickness, which he should have foreseen.

2. Bishop v. Ranney, 59 Vt. 316.

Assault Unconnected with Employment.—The fact that an employer, in a quarrel unconnected with the contract of service, struck the laborer and knocked him down, was held not to justify the latter in abandoning his engagement, so that he could recover wages up to that time. Morgan v. Shelton, 28 La. An. 822.

Assault Upon Child of Employee by Third Person Unknown.—An assault upon child of an employee not residing on the employer's premises—by one not under control of employer, and not by

his direction, knowledge or consent—is not a justifiable cause for leaving the employment before the expiration of the term for which he was employed. Mathew v. Brokaw, 43 N. J. L. 587.

3. Erving v. Ingram, 24 N. J. L. 520.

4. Butts v. Huntley, 1 Scam. (Ill.) 410; James v. Graham, 21 Ala. 654; Johnson v. Trinity Church, 11 Allen (Mass.) 173; Carroll v. Welch, 26 Tex. 147; Lemp v. Streiblein, 12 Mo. 456.

5. Leopold v. Salkey, 89 Ill. 413. In the above case the imprisonment was for two weeks.

6. Ridgway v. Hungerford Market Co., 3 Adol. & El. 171; Prentiss v. Ledyard, 28 Wis. 131; McGrath v. Bell, 33 N. Y. Super. Ct. 195.

7. Thwing v. United States, 16 Ct. of Cl. 13.

Continued Retention Evidence of Condonation.—If there has been an actual forgiveness of a breach of contract on the part of a master to a defaulting servant, he cannot afterwards rely upon such breach in discharging the servant; and furthermore such condonation can in no respect extend to subsequent offences, or to a continued deficiency. And it is also true that such breach is

(e) *Leaving Without Notice.*—If the terms of a contract of hiring require that a written notice must be given by the servant before leaving, failing which he is not entitled to the wages due him on the next pay day, and the servant leaves without notice, he cannot recover any of the wages then unpaid, although there is no corresponding provision that he shall not be discharged without notice.¹

A person entering into a contract of service is not bound by the usage of a particular business in this respect unless it is so general as to furnish a presumption of knowledge, or it is proved that he was acquainted with it.²

prima facie condoned by the continued retention of the servant; but the question is one of fact, to be determined by a jury. *Leatherberry v. Odell* (N. Car.). 7 Fed. Rep. 642.

1. *Preston v. American Linen Co.*, 119 Mass. 400. Also see *Noon v. Salisbury Mills*, 85 Mass. 340; *Potter v. Cain*, 117 Mass. 238; and see *Gregon v. Watson*, 34 L. T., N. S. 143, decided under Factory act; *Walsh v. Walley*, L. R., 9 Q. B. 367; *Saunders v. Whittle*, 33 L. T., N. S. 816; *Fowler v. Gt. Falls Ice Co.*, 1 McA. (D. C.) 14. But see *Warburton v. Hayworth*, 44 J. P. 298; 45 J. P. 138; *Margerison v. Bertwhistle*, 36 J. P. 100.

But an arrest, conviction and imprisonment for crime will exonerate a workman from this duty. *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201. See *Fuller v. Brown*, 11 Metc. (Mass.) 440.

2. *Stevens v. Reeves*, 9 Pick. (Mass.) 197. Also see *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *Naylor v. Semmes*, 4 G. & J. (Md.) 274; *Donnell v. Columbian Ins. Co.*, 2 Sumn. 366.

Employee Having Knowledge of Regulation.—Where one enters into the service of employers under no express agreement to continue in their service for any definite time, but with a knowledge of a regulation adopted by them requiring that all persons employed by them shall give a certain number of days' notice of an intention to quit their service, he does not forfeit his wages by quitting their service without giving such notice; but he is liable to them for all damages caused by his not giving the notice; and in a suit against them for his wages the amount of such damage may be deducted therefrom. *Hunt v. The Otis Co.*, 4 Metc. (45 Mass.) 464; *Batterman v. Pierce*, 3 Hill (N. Y.) 174.

Regulation Printed on Pay Envelope.—

Where such a provision was not expressly made in a contract of hiring in a mill, but was printed on an envelope, in which the plaintiff regularly received his pay for a long time, the question whether he assented to it is for the jury. *Preston v. American Linen Co.*, 119 Mass. 400; *Noon v. Salisbury Mills*, 3 Allen (Mass.) 340; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201; *Potter v. Cain*, 117 Mass. 238; *Com. v. Galavan*, 9 Allen (Mass.) 271; *Brigham v. Clark*, 100 Mass. 430.

Printed Notice Hung Up in Shop.—And likewise where such a provision is contained in a printed notice hung up in a shop. *Collins v. N. E. Iron Co.*, 115 Mass. 23; *Stevens v. Reeves*, 9 Pick. (Mass.) 198; *Dodge v. Favor*, 15 Gray (Mass.) 82.

Regulation in Receipt for Pay.—A was employed by B at a fixed sum per week, but for no definite time. When the first payment of wages was made A signed a receipt containing the following provision: "Employees must give fourteen days' notice when they want to leave our employ. If they do not give the notice required it is agreed and understood that they forfeit all that is due them at the time they so quit work without the required fourteen days' notice." A left upon giving one and a half days' notice. *Held*, that A having notice of the regulation was bound thereby. *Pottsville Iron & Steel Co. v. Good*, 116 Pa. St. 385.

Absence Longer than Stated in Notice.—In an English case the facts were as follows: One of the rules of a cotton mill stated that any person absenting himself on account of sickness or any other cause was immediately to give notice to the overlooker, and in default thereof all wages then earned were to be forfeited. A female weaver in the mill in the middle of the day asked the overlooker for leave of absence for half

A minor servant, however, under a contract for a specified time who agrees not to leave his employment without giving previous notice of his intention to do so, but does leave without giving such notice, is not liable to have the damages sustained deducted from the amount he would otherwise have been entitled to recover for his labor.¹ But where a servant quits his employment with the consent of his employer, such act cannot be construed as a breach of the contract.²

An agreement to give notice before quitting does not apply to a temporary absence; for such absence an operative may be discharged but his wages are not forfeited.³

(f) *Disablement Through Accident.*—A person contracting to render personal services after part performance becomes disabled by inevitable casualty, and is thereby prevented from fully completing his contract, is entitled to recover for the services actually rendered on a *quantum meruit*.⁴

a day, promising to return to work the next morning at six. The weaver did not return the next day till half-past one in the afternoon. The court held that she did not forfeit her wages under the rule, for she could not be said to be absent without notice merely by continuing her absence longer than the period which she had mentioned. *Taylor v. Carr*, 30 L. J. (U. C.) 201.

Forfeiture of Wages Due as Liquidated Damages.—A clause in a contract of employment by which the servant agrees to give two weeks' notice of his intention to quit, and that if he fails to do so "whatever may be due at the time of leaving is an indebtedness to the company to be considered as liquidated damages for such failure" is void. *Schimpf v. Tenn. Mfg. Co.* (Tenn.), 6 S. W. Rep. 131.

Notification of Proposed Reduction of Pay.—A master who notifies his servant that on the next day he shall cut down his wages, whereupon the servant leaves at once, cannot avail himself of a rule that servants leaving without giving two weeks' notice forfeit their wages. *Schietenger v. Bridgeport Knife Co.*, 54 Conn. 64.

1. *Derschero Continental Mills*, 58 Me. 217; 4 Am. Rep. 286; citing *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Vent. v. Osgood*, 19 Pick. (Mass.) 572; *Robinson v. Weeks*, 56 Me. 102.

2. *Boyles v. Parker*, 46 Vt. 343. And see *De Camp v. Stevens*, 4 Blackf. (Ind.) 24.

3. *Heber v. United States Flax Mfg. Co.*, 13 R. I. 303.

Yet where the servant leaves without notice, and remains away so long as to warrant the master in regarding his absence as an abandonment of his work, and procured another person to supply his place, although his intention is to be absent only temporarily, he forfeits all that may be due him at the time. *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317; *Partington v. Wamsutta Mills*, 110 Mass. 467.

4. *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Dickey v. Linscott*, 20 Me. 453; *Wolfe v. Howes*, 20 N. Y. 197; *Mounsey v. Drake*, 10 Johns. (N. Y.) 27, 29; 1 *Shep. Touchstone* 180; *Gilbert on Covenants* 472; *People v. Manning*, 8 Cow. (N. Y.) 297; *People v. Bartlett*, 3 Hill (N. Y.) 570; *Parsons on Contracts* 524; *Story on Bailments*, § 36 and notes; *Jones v. Judd*, 4 N. Y. 412; *Beebe v. Johnson*, 19 Wend. (N. Y.) 502.

Death of Employee.—It was held in Pennsylvania that an old contract between employer and employee, providing for the payment to the latter of a per cent. of the profits of each year as wages, and, in case of the death of either during the year, at the rate for the expired term of a certain sum per annum, having been found by the jury to have been in force at the death of the employee, his executrix might recover the proportionate part of the sum agreed to the date of his death, though by reason of sickness he stopped work some time before. *Dunlap v. Montgomery* (Pa.) 1888, 16 Atl. Rep. 41.

20. Services Under Void Contract.—The fact that a servant has fully performed a contract for services void under the statute of frauds does not entitle him to recover upon the contract, but his remedy is upon a *quantum meruit*, and in most States the measure of his recovery would be the contract price, the law implying a promise to pay according to the terms of the agreement.¹ And notwithstanding the ancient rule to the contrary.²

A recovery may be had for services rendered by a servant up to the time of his death, although the same occur before the termination of the contract of employment.³ And generally the value of services rendered under a void or unauthorized contract may be recovered.⁴

21. Unskilful Employee.—The unskilfulness of an employee does not prevent his recovering the real value of his services.⁵

22. Payment in Particular Way.—Where one performs services for another, to be paid for in a particular way, upon refusal to pay in the manner agreed upon, the one performing such services is entitled to compensation in money for what such services are reasonably worth.⁶

1. Wood's Master and Servant, § 193; Stone v. Dennison, 13 Pick. (Mass.) 1; King v. Brown, 2 Hill (N. Y.) 485; *overruling* 7 Cow. (N. Y.) 92; La Du Mfg. Co. v. La Du, 36 Minn. 473. See Browne St. Frauds, § 131; King v. Welcome, 5 Gray (Mass.) 41; Stone v. Dennison, 13 Pick. (Mass.) 1; Shute v. Door, 5 Wend. (N. Y.) 204; Cornes v. Lamson, 16 Conn. 246; Coughlin v. Knowles, 7 Metc. (Mass.) 57; Collier v. Coates, 17 Barb. (N. Y.) 471; Abbott v. Draper, 4 Den. (N. Y.) 51; Clark v. Gilbert, 26 N. Y. 279; Wolfe v. Howes, 20 N. Y. 197; Clark v. Terry, 25 Conn. 395; Ryan v. Dayton, 25 Conn. 188; Philbrook v. Belknap, 6 Vt. 383; Seymour v. Cogger, 13 Hun (N. Y.) 32; Fuller v. Brown, 11 Metc. (Mass.) 440.

2. Countess of Plymouth v. Throgmorton, Salk. 67.

3. Wolfe v. Howes, 20 N. Y. 197; Clark v. Gilbert, 26 N. Y. 279; Yerrington v. Greene, 7 R. I. 589. *Compare* Givhan v. Dailey, 4 Ala. 336; Towsley v. Moor, 30 Ohio St. 185; 27 Am. Rep. 434; Hidden v. Gordon, 21 Colo. 92; Sandfoss v. Flausburg, 35 Colo. 481; Stone v. Dennison, 13 Pick. (Mass.) 1; King v. Welcome, 5 Gray (Mass.) 41; Davenport v. Mason, 15 Mass. 85; Lapham v. Whipple, 8 Metc. (Mass.) 59; Marcy v. Marcy, 9 Allen (Mass.) 8; Frary v. Sterling, 99 Mass. 461; Hill v. Hooper, 1 Gray (Mass.) 131; Shute v. Dorr, 5 Wend. 204; Pierce v. Paine, 28 Vt. 34; Noyes

v. Moor, 1 Root (Conn., 142; Randall v. Turner, 17 Ohio St. 262; Abbott v. Inskip, 29 Ohio St. 59; Sturges v. Burton, 8 Ohio St. 423; Souch v. Strawbridge, 2 C. B. 808; Whipple v. Parker, 29 Mich. 374; Patten v. Hicks, 43 Cal. 509; Moore v. Aldrich, 25 Tex. 276; Swanzey v. Moore, 22 Ill. 63; Sherman v. Transportation Co., 31 Vt. 182; Suggett v. Cason, 26 Mo. 221; Emery v. Smith, 46 N. H. 151; Green v. Saddington, 7 El. & Bl. 593; Lane v. Shackford, 5 N. H. 130; Thomas v. Dickinson, 14 Barb. (N. Y.) 90; McCue v. Smith, 9 Minn. 252; Watrous v. Chalker, 7 Conn. 224; Ray v. Young, 3 Tex. 550.

4. As where a deceit was practiced on the servant, one company hiring him to work for another of similar name, he believing both to be the same. In such case there could be no recovery under the contract but for work and labor. Morrison v. Bradley, 5 Cal. 503; S. F. Gas Co. v. S. Francisco, 9 Cal. 453; Argenti v. S. Francisco, 16 Cal. 256; Pixley v. Western Pacific R. Co., 33 Cal. 195; Fuller v. Reed, 38 Cal. 99; Patten v. Hicks, 43 Cal. 509; Wetmore v. S. Francisco, 44 Cal. 295; Foulke v. San Diego S. P. R. Co., 51 Cal. 365.

5. McCormick v. Ketchum, 48 Wis. 643; Cole v. Clarke, 3 Wis. 323; Taylor v. Williams, 6 Wis. 363; Jackson v. Cleveland, 15 Wis. 108.

6. Shane v. Smith, 37 Kan. 56; Stone v. Stone, 43 Vt. 180.

23. Payment to Third Person.—Where an employer agrees to render an equivalent for services performed, it is no defence to an action against him to recover compensation that he agreed to pay some third party, who has no legal claim to the service or right to the compensation; especially where the defendant does not show that he has in fact paid such third person; for where payment for labor is to be made, the law will give it to him who performs the labor, unless some other person can show better title.¹

24. Running Account—Statute of Limitations.—Where a servant continues in an employment many years, without any express agreement as to the term of service or the compensation, payments being made from time to time in various sums, the presumption is that the payments apply on the balance unpaid, and not upon the wages of any particular year; thus taking the entire balance out of the statute of limitations.²

25. Set-off and Defences in Action for Wages.—In an action for wages defendant may set off damages occasioned him by negligence of the plaintiff in his employment, and may have judgment for any balance due him;³ or any loss of custom caused by the servant's bad conduct;⁴ or lack of diligence on the part of the servant may be shown in reduction or bar of damages;⁵ and expressions of confidence in an employee based on his own reports may be shown in an action by him upon his contract of employment, but they do not estop the employer from showing his default, or explaining what he did or neglected.⁶ The master may also recoup damages for the seduction of his daughter by his servant.⁷ But it is no defence that the employee had misconducted himself in his employment by negligently injuring a third

1. *Lewis v. Trickey*, 20 Barb. (N.Y.) 387.

2. *Smith v. Velie*, 60 N. Y. 106.

Long Term of Service—Absence of Mutual Accounts.—But in such a case no agreement can be implied that compensation shall be postponed until the termination of the employment; and where the employment has continued for a long space of time, and there are no mutual accounts between the parties, the statute of limitations is a bar to a claim for more than six years of service in such employment, unless it appear that payments have been made to apply thereon within the six years, in which case a recovery is proper for a period beginning six years prior to the first of said payments. Matter of application of Gardner, 103 N. Y. 533; *Davis v. Gorton*, 16 N. Y. 255; *Gilbert v. Comstock*, 93 N. Y. 484.

3. *Harlan v. St. Paul etc. R. Co.*, 15 Am. & Eng. R. Cas. 130; *Eaton v. Wooly*, 28 Wis. 628. And see *Emery v.*

St. Louis etc. R. Co., 77 Mo. 339; 15 Am. & Eng. R. Cas. 122.

4. *Newman v. Reagan*, 63 Ga. 755.

In Case of Seamen.—Debts or liabilities of seamen to the master or owner of a vessel for other cause than for misfeasance or nonperformance in the duties of their position, cannot be set up against their demand of wages. Admiralty does not take cognizance of set off; but allowances may be made to the master or owner by rebate of wages in compensation of losses or injuries incurred by them in consequence of negligence or fault of the mariner in the performance of his duties. The *Steamboat Hudson, Olc.* (U. S. C. C. N. Y.) 396.

5. *Alberts v. Stearns*, 50 Mich. 349.

6. *Alberts v. Stearns*, 50 Mich. 349.

7. *Bixby v. Parsons*, 49 Conn. 483; 44 Am. Rep. 246. See article SEDUCTION, this work.

Attempt to Ravish Female Servant.—

It has been held in England that the

person, thereby exposing the employer to liability for damages; unless the employer has actually paid, or at least has been adjudged liable to pay, damages for such negligence of the employee.¹ While flagrant acts of dishonesty seriously affecting the master's interest might bar a recovery in such an action, although the amount fraudulently appropriated was much less than the amount of wages, a failure to pay over caused by mistake or neglect, in the absence of any provision in the contract covering it, will not defeat a recovery of the contract price less the sum retained.²

Where a servant, whose wages are due and payable periodically, refuses to serve in the manner contracted for, or is rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing for that portion of time during which he has served since the last periodical payment.³

26. Services Rendered in Obstruction of Justice.—An action will not lie for a claim based upon services rendered in obstruction of public justice.⁴

master is absolved from payment of wages due a male servant who has attempted to ravish his female servant. *Atkins v. Acton*, 4 C. & P. 208.

1. *Merlette v. North & East R. St. Co.*, 13 Daly (N. Y.) 114; *Green v. New River Co.*, 4 Tenn. 589; *Zulker v. Wing*, 20 Wis. 408; *Thompson on Neg.* 1061.

But faithful service is a condition precedent to the right of a servant to recover his wages; and if during the time for which he agrees to serve he commits a criminal offence, although not immediately injurious to the person or property of his master, he will not be entitled to recover any part of his wages. *Callo v. Brouncker*, 4 C. & P. 518; *Ridgway v. Market Co.*, 3 Ad. & El. 171; *Turner v. Robinson*, 6 C. & P. 15; *Spain v. Arnot*, 2 Stark. 256; *Wise v. Wilson*, 1 Car. & Kir. 662; *Lomax v. Arding*, 10 Exch. 734; *Libhart v. Wood*, 1 W. & S. 265; *Singer v. McCormick*, 4 W. & S. 265; *Bixby v. Parsons*, 49 Conn. 483; 44 Am. Rep. 246; *Britton v. Turner*, 6 N. H. 481; *Kearney v. Holmes*, 6 La. An. 323.

2. *Turner v. Kouwenhoven*, 100 N. Y. 115; *Brown v. Craft*, 6 C. & P. 16, 17; *Libhart v. Wood*, 1 Watts & Serg. (Pa.) 265.

Teller of Bank Under Bond to Pay Over.—A bank teller being dismissed from his office in March, retained of the funds in his hands \$1,500, claimed by him as his salary for the whole year. In April the bank, claiming that his

salary had been reduced to \$1,000 per annum, brought suit upon the teller's official bond, alleging refusal to turn over \$1,250 of the funds of the bank, and the only issue raised by the answer was that defendant was entitled to retain the said sum of \$1,250 for his salary as teller. *Held*, that defendant had treated the contract as entire, and could not, therefore, assert his claim until the time when it became payable. That the teller having given bond to deliver up to the bank all moneys, etc., when required to do so, the bank might demand of him at any time, with or without dismissal, the assets in his hands; and a refusal to deliver was a breach of the bond, and that against the demand of the bank the defendant could set off nothing more than was due him by the bank at the time of action brought. See *Union Bank v. Hayward*, 15 S. Car. 296; *Jennery v. Olmstead*, 90 N. Y. 363.

3. *Beach v. Mullen*, 34 N. J. L. 343; *Spain v. Arnot*, 2 Stark. 256; *Turner v. Robinson*, 6 C. & P. 15; *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171; *Lilley v. Elwin*, 11 Q. B. 742, 755, 757; *Turner v. Mason*, 14 M. & W. 112; *Libhart v. Wood*, 1 Watts & Serg. (Pa.) 265; *Singer v. McCormick*, 4 Watts & Serg. (Pa.) 266; *Blodgett v. Berlin Mills Co.*, 52 N. H. 215; 2 Parsons on Contracts 40; 2 Smith's Leading Cases 43.

4. *Bierbauer v. Wirth* (Wis.), 5 Fed. Rep. 336. A case where a book-keeper

27. Loss of Time—Additional Services.—One who contracts to labor for a limited time cannot be required, after the expiration of the period, to render additional services, merely because he has lost certain days during the term.¹

28. Servant Once Settled with.—A servant satisfied with what he had received upon leaving his employer cannot subsequently recover a further sum for services rendered.²

29. Passage Money.—A party employed to perform work at a place distant from that at which he was when employed cannot recover his passage money to such place on failure to show consideration for promise to pay therefor.³

30. Evidence as to Compensation.—In a suit for wages a conversation between one of the defendants and a third party is admissible if it belongs to the negotiation which led to hiring the defendant and tended to show that a fixed amount was to be paid him.⁴ Nor is it error in a suit for wages per contract to show in support of plaintiff's understanding of the contract, that when he went to work for defendant he was receiving from another person, whom he voluntarily left, a much larger sum than the amount defendant insisted he was to receive.⁵

The testimony of experts is admissible to prove the value of a servant's services.⁶ And what it is worth to put a certain quantity of lumber into a house may be shown by the opinion of a carpenter and builder.⁷

was sent away so as not to be reached by process, in anticipation of criminal prosecution for violation of revenue laws. And see, in the same line, *Wight v. Rindskopf*, 43 Wis. 348; *Badger v. Williams*, 1 Chip. (Vt.) 137; *Valentine v. Stewart*, 15 Cal. 387.

1. *Bast v. Byrne*, 51 Wis. 531; *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171; *Prentiss v. Ledyard*, 28 Wis. 131; *McGrath v. Bell*, 33 N. Y. Super. Ct. 195. But see *Pa. R. Co. v. Boot*, 104 Pa. St. 26, a case of a contract with a minor. And see *Gaudell v. Poutegny*, 4 Camp. 375; *Thompson v. Wood*, 1 Hilt. (N. Y.) 96; *Fowler v. Armour*, 24 Ala. 194; *Armfield v. Nash*, 31 Miss. 361; *Gordon v. Brewster*, 7 Wis. 355; *Booge v. P. R. Co.*, 33 Mo. 212.

2. *Stanley v. Barringer*, 74 Iowa 34.

In above action, brought to recover for services rendered on a farm, when plaintiff testified that during the time he worked for defendant he had a good home, good and sufficient clothing, medicine and doctor's attendance, and had spending money, and that when he left he was satisfied with what he had got, a verdict in favor of plaintiff is against the evidence.

3. *McFadden v. Crawford*, 39 Cal. 662.

4. *MiNar v. Cuddy*, 43 Mich. 273.

5. *Rocco v. Parczyk*, 9 Lea (Tenn.) 328.

6. *Hatton v. Weems*, 12 G. & J. 83; *Lee v. Pindle*, 12 G. & J. 288; *Eldridge v. Smith*, 13 Allen (Mass.) 140; *Kendall v. May*, 10 Allen (Mass.) 59; *Fitchburg R. Co. v. Freeman*, 12 Gray (Mass.) 401.

The admission of the opinion of a witness living in one place as to the value of services performed at another, is not error where there is nothing to show that he did not know the value of labor at the latter place, or the comparative value of wages at both. The *Kent Furn. Mfg. Co. v. Ransom*, 46 Mich. 416.

Labor of Mechanic or Builder.—The value of the services and labor of a mechanic may be proved by the opinion of another mechanic. *McCollum v. Seward*, 62 N. Y. 316; *Shafer v. Dean*, 29 Iowa 144; *Crawford v. Wolf*, 29 Iowa 568; *Eagle etc. Mfg. Co. v. Browne*, 58 Ga. 240; *Mercer v. Vose*, 67 N. Y. 36.

7. *Hough v. Cook*, 69 Ill. 581; *Moore v. Lea*, 32 Ala. 375.

Real Estate Broker.—Where a party sued for services in purchasing a mill for the defendant the opinion of a real estate broker as to the value of his services was admitted.¹

Book Keeper.—The value of services of a book keeper may be proved by another book keeper.²

31. Interest.—In an action to recover for work and labor interest can only be recovered from the time of filing the complaint.³

32. Wages Payable in Cash.—Unless otherwise agreed a servant must be paid in cash. The master has no right to handle or invest such compensation or apply it in any manner, whether beneficial to the servant or not.⁴

X. ILLEGAL CONTRACTS—1. Generally—Sunday Laws.—A contract to do what the law forbids cannot be enforced, whether it be *malum in se* or only *malum prohibitum*.⁵

But, to fall within the rule, contracts of service must be done directly in furtherance of an illegal or immoral object; it must be the inevitable result of the labor or the party must have done the act in furtherance of the illegal purpose.⁶

Where a statute prohibits labor of any sort on the Sabbath, no recovery can be had for work done on that day.⁷ Most, if not all, of the statutes, however, except from the prohibition matters of necessity, charity or mercy. Being in derogation of the common law these statutes must be construed strictly, and where all work save that of a *necessary* character is prohibited on that day, compensation can be recovered for doing that sort of work only.⁸

2. Requirement of Licences.—Where the law requires that a particular business shall be licenced, employees of unlicenced establishments can recover nothing for services rendered therein.⁹

1. Etting v. Sturtevant, 41 Conn. 176.

2. Scott v. Lillenthal, 9 Bosw. (N. Y.) 224.

3. McFadden v. Crawford, 39 Cal. 662.

4. Sellen v. Halt, 4 C. & P. 104. And see Hedgly v. Halt, 4 C. & P. 104.

A statute providing for the payment of miners in money has been held unconstitutional, as preventing parties from making their own contracts. Godcharles v. Migeman (Pa.), 6 Atl. Rep. 354.

Articles Broken—Deduction.—Nor deduction for articles broken unless in conformity with the terms of the contract. Leheair v. Bristow, 4 Camp. 134. See Still v. Hall, 20 Wend. (N. Y.) 51; Wilson v. Wall, 34 Ala. 301; Stoddard v. Treadwell, 26 Cal. 294; Pixler v. Nichols, 8 Iowa 106.

5. See ILLEGAL CONTRACTS, vol. 9, p. 879.

It makes no difference if the act is not prohibited in terms; it is enough if a penalty is prescribed for doing such act. Milton v. Haden, 32 Ala. 30; Coburn v. Odell, 30 N. H. 540; Mitchell v. Smith, 1 Binney (Pa.) 118; Elkins v. Parkhurst, 17 Vt. 105; Chitty on Contracts 694; Bartlett v. Vinor, Carth. 252; Laughton v. Hughes, 1 M. & S. 596; De Begnis v. Armistead, 10 Bing. N. C. 107; Ferguson v. Norman, 5 Bing. N. C. 86; Cope v. Rowlands, 2 M. & W. 149; Wheeler v. Russell, 17 Mass. 258; Mitchell v. Smith, 1 Binn. (Pa.) 118.

6. Wood's Master and Servant 210.

7. Bernard v. Luppig, 32 Mo. 341; State v. Goff, 20 Ark. 289; Jones v. Andover, 10 Allen (Mass.) 18. See SUNDAY.

8. State v. Goff, 20 Ark. 289.

As to what are works of necessity, charity or mercy, see SUNDAY.

9. As an actor in an unlicenced theatre. De Begnis v. Armistead, 10

Neither can an unlicensed steamboat engineer recover wages due, where the law requires such persons to be licensed.¹

3. Labor on Object of Illegal Character.—And while one cannot recover for labor upon an article or object of illegal character, the case is different where the same is susceptible of innocent use.² But the rule that mere knowledge by the servant of the master's intention to use the object in question for an unlawful purpose does not invalidate the contract, does not apply to a case where the contract is so connected with an illegal transaction or purpose as to be inseparable from it.³

4. Law Governing Contract—Change.—The validity of a contract rests upon the law as it existed at the time the same was entered into.⁴ But of course where, after a contract is closed, a legislative act is passed making that unlawful which before was innocent, the person contracting will be excused from carrying out his agreement.⁵ But if the contract has been partly performed, a recovery can be had for labor, etc., up to the time of the passage of the act, but for nothing done afterward.⁶

5. One of Several Considerations Is Illegal.—And it is furthermore

Bing. N. C. 107. Or a bar tender in an unlicensed saloon. *Badgley v. Beale*, 3 Watts (Pa.) 263.

1. *The Pioneer*, Deady (U. S.) 72.

2. Labor on House to be Used for Gambling.—It has been held in *Missouri* that it is no defence to an action for work and labor done and material furnished in fitting up a house that plaintiff knew at the time that the house was to be used for gambling purposes. *Michael v. Bacon*, 49 Mo. 476; *citing Hodgson v. Temple*, 5 Taunt. 181; *Cheney v. Duke*, 10 Gill & J. (Md.) 11; *Lightfoot v. Tennant*, 1 Bos. & Pul. 551; *Corenan v. Boyce*, 3 Barn. & Ald. 179; *McKendall v. Robinson*, 3 Mees. & W. 424; *Faikney v. Reynolds*, 4 Burr. 269; *Halman v. Johnson*, Cowp. 341; *Pellecot v. Angell*, 2 Cromp. Mees. & Rosc. 311; *Hodgson v. Temple*, 5 Taunt. 181; *Tracy v. Talmage*, 4 Kern. (N. Y.) 169; *Bowery v. Bennett*, 1 Camp. 348.

Bowling Alley.—And in *Ohio* it has been held that a carpenter is entitled to recover for time, labor and materials in erecting a building to be used as a bowling alley, where bowling alleys are prohibited by statute, because the building may be used for lawful purposes, and the mere fact that the carpenter knows that it is to be devoted to an unlawful purpose does not make his labor unlawful; but for labor and materials entered in building the *alley itself*, or the balls to be used therein, no

recovery could be had, for these are unlawful instruments *per se*, and produce the very elements that produce the violation of the law. *Spurgeon v. McElwain*, 6 Ohio 442.

3. *Tatum v. Kelley*, 25 Ark. 211; *The Branch Bank of Montgomery v. Cochran*, 5 Ala. 250; *Beach v. Kezar*, 1 N. H. 184; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *McGavock v. Puryear*, 6 Cold. (Tenn.) 35; *Steele v. Carll*, 4 Dana (N. Y.) 381; *Armstrong v. Toller*, 11 Wheat. (U. S.) 258; *Girardy v. Richardson*, 1 Esp. 13; *Langton v. Hughes*, 1 Maule & Selwyn 593; *Lightfoot v. Tennant*, 1 Bos. & Pull. 551; *Farmer v. Russell*, 1 Bos. & Pull. 295.

4. *McCauley v. Brooks*, 16 Cal. 11; *Murrill v. Jones*, 40 Miss. 565; *Brick Church v. Mayor of New York*, 5 Cow. (N. Y.) 538; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Curtis v. Leavitt*, 15 N. Y. 9; *Mays v. Williams*, 27 Ala. 267.

5. *Bradford v. Jenkins*, 21 Miss. 328. *Compare Mays v. Williams*, 27 Ala. 267.

6. *Mays v. Williams*, 27 Ala. 267; *McCauley v. Brooks*, 16 Cal. 11; *Bennett v. Woolfolk*, 15 Ga. 213; *Bailey v. Milner*, 35 Ga. 330; *Bogg v. Jerome*, 7 Mich. 145; *Judah v. Trustees*, 16 Ind. 56; *Brown v. Dillahunty*, 12 Miss. 713; *Bradford v. Jenkins*, 21 Miss. 328; *Darling v. Rogers*, 22 Wend. (N. Y.) 483.

true that where one of several considerations is illegal, the whole contract is void.¹

XI. IMMORAL CONTRACTS.—Contracts of hiring and service will not be enforced if they are entered into for immoral purposes.² Thus a contract for service and cohabitation would be void, and could not be enforced in a court of law.³ Parol evidence is admissible to show that the consideration of a contract is of an immoral character.⁴

XII. ENFORCEMENT OF CONTRACT FOR SERVICES.—Contracts for personal services are subject to the implied condition that the person shall be able at the time appointed to perform them; and if he dies, or, without fault on the part of the covenantor, becomes disabled, the obligation to perform becomes extinguished.⁵

As a general rule covenants for personal service cannot be specifically enforced either by common law or by statute; exceptional cases of apprentices depend on parental authority; that of soldiers and sailors on national policy.⁶ And contracts of hiring and service cannot be transferred or assigned without the consent of the parties thereto.⁷ Master and servant both contract with regard to the personal qualities of each other; the relation is one of per-

1. *Jones v. Waite*, 1 Bing. N. C. 656; *Schockell v. Rosier*, 2 Bing. N. C. 634; *Hopkins v. Prescott*, 4 C. B. 578; *Nichols v. Strelton*, 10 Q. B. 346.

2. *Woods' Master and Servant*, § 212. See *ILLEGAL CONTRACTS*, vol. 9, p. 921.

Expense of Printing Immoral Book.—Thus where the plaintiff sued for the expense of printing an immoral book called "The Memoirs of Harriette Wilson," containing the history of a celebrated prostitute, the court refused to assist the plaintiff, taking the ground that "every servant, to the lowest, engaged in such a transaction, is prevented from receiving compensation." *Poplett v. Stockdale*, R. & Moo. 377; 2 C. & P. 198.

3. *R. v. Northwingfield*, 1 B. & Ad. 912; *Bradshaw v. Hayward*, Carr. & M. 591.

4. *Collins v. Blantern*, 2 Wils. 350; *Holman v. Johnson*, Cowp. 341; *Abbott v. Hendricks*, 1 M. & G. 791; *Gas L. & Coke Co. v. Turner*, 6 Bing. N. C. 327.

5. *People v. Manning*, 8 Cow. (N. Y.) 297; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 Iowa 279; *Wolfe v. Howes*, 24 Barb. (N. Y.) 174; 20 N. Y. 197; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Robinson v. Davison*, L. R., 6 Exch. 269; *Boast v. Firth*, L. R., 4 Com. Pl. 1; see *Wise v. Wilson*, 1 C. & K. 662; *Hobson v. Cowley*, 27 L. J., Exch. 205.

Illness of Opera Singer.—The defendants agreed with the plaintiffs, proprietors of a theatre, to furnish the "Wachtel Opera Troupe" to give a number of performances in their theatre, the receipts to be provided in a specified manner. Wachtel, from whom the company took its name, and by whose name it was known, was the leader and chief attraction, and his connection with the company was the inducement that led the plaintiffs to make the agreement. Wachtel became unable to sing in consequence of illness, and the defendants consequently did not furnish the troupe. In an action for breach of the agreement, held, that Wachtel's appearance was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the company without him; and that his sickness and inability to sing constituted a good excuse for nonperformance of the agreement. *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7.

6. *Mary Clark's Case*, 1 Blackf. (Ind.) 122.

Agreement Between Actor and Manager of Theatre.—*Kemble v. Kean*, 6 Sim. 334; *Kimberly v. Jennings*, 6 Sim. 340; *Lumley v. Wagner*, 1 De G. M. & G. 604; *Owen v. Frink*, 24 Cal. 178.

7. *Addison on Contracts* 311; *Pollock on Contracts* 411; *Fitch v. Brockman*, 3 Cal. 348.

sonal confidence, and the one cannot compel the other to accept a third person in substitution.¹

XIII. MASTER'S RIGHT OF ACTION FOR INJURIES TO SERVANT.—The right of action to the master for personal injuries sustained by his servant is fully recognized.² This right grows out of the loss of service sustained by the master.³ The existence of the relation of master and servant must be shown in order to support the action.⁴

It was an ancient rule of law that the master could not recover where the injury in question caused the immediate death of the servant, on the ground that the civil remedy is merged in the felony.⁵ Yet the rule would have no application in cases where the injury resulted from a negligent act that did not amount to a felony; nor in America, where the felony is not regarded as swallowing or destroying the civil remedy.⁶ This is an action on the case, generally called a *per quod servitum amisit*.⁷

The servant may likewise maintain an action against the aggressor.⁸ And the action may likewise be enforced by a parent for injury to a minor child.⁹

XIV. TERMINATION OF THE RELATION BY THE WILL OF THE MASTER.
—1. **Rightful Discharge—Sufficient Cause.**—An employer may discharge his servant before the expiration of the term of service, for good and sufficient cause.¹⁰

1. *Campbell v. Price*, 9 S. 264; *Schmaling v. Tomlinson*, 6 Taunt. 147; *Stevens v. Benning*, 1 K. & J. 168; 6 D. M. & G. 223.

Contract to Do Housework.—A contract to do ordinary housework is one for personal service, and cannot be fulfilled by another. *Jennings v. Lyons*, 39 Wis. 553.

2. *Duel v. Harding*, Stra. 595; *Hall v. Hollander*, 4 B. & C. 660; *Hodsall v. Stallebrass*, 11 Ad. & El. 301; *Dixon v. Bell*, 1 Stark. 287; *Ames v. Union Co.*, 117 Mass. 541; *Kennedy v. Shea*, 110 Mass. 147; *Martin v. Payne*, 9 Johns. (N. Y.) 387; *Rice v. Nickerson*, 9 Allen (Mass.) 478; *Dennis v. Clark*, 2 Cush. (Mass.) 347; *McCarthy v. Guild*, 12 Metc. (Mass.) 291; *Woodward v. Washburn*, 3 Den. (N. Y.) 369.

3. *Voss v. Howard*, 1 Cr. (U. S.) 251; *Fluker v. Georgia R. & B. Co.*, 81 Ga. 461. *Compare* *Dennis v. Clark*, 2 Cush. (Mass.) 347.

4. *Smith on Master and Servant* 83, 85; and see *Bartley v. Richtmeyer*, 4 N. Y. 38; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661.

5. *Osborn v. Gillett*, L. R., 8 Ex. 88; *Reeves Dom. Rel.* 486; *Schouler's Dom. Rel.* 727.

6. *Reeves Dom. Rel.* 486.

7. 1 Comm. 429; 3 Comm. 142.

8. *Woodward v. Walton*, 2 N. R. 483; *Robert Mary's Case*, 9 Coke 113. See generally *Combes v. The Hundred*, Holt 27; *Savil v. Kirby*, 10 Mod. 386; *Rogers v. Smith*, 17 Ind. 323.

9. *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Durden v. Barnett*, 7 Ala. 169. See *INFANCY*, 10 Am. & Eng. Encyc. of L.

10. **Drunkennes**—Such as habit of becoming intoxicated. *Gonsolis v. Gearhart*, 31 Mo. 585; *Speck v. Phillips*, 5 M. & W. 279; *Huntington v. Clafflin*, 10 Bosw. (N. Y.) 262; *Beggs v. Fowler*, 82 Mo. 599; *McCormick v. Demary*, 10 Neb. 515; *Wise v. Wilson*, 1 Car. & K. 662.

But not where the duties of the employment are not affected thereby. 1 Hagg. Adm. 198; *McKellar v. McFarlane*, 15 D. (Sc.) 246. *Compare* *Bass Furnace Co. v. Glasscock*, 82 Ala. 452.

Improper Deportment Toward Patrons.—A master is justified in discharging a servant before the expiration of the term of the employment when his disposition and deportment are such as to seriously injure the custom and business of the master. But slight discourtesies, hasty words, and occasional exhi-

bitions of irritation, or even ill temper, are not sufficient cause for a discharge where there are many petty causes of annoyance and irritation in the business. *Leatherberry v. Odell* (N. Car.), 7 Fed. Rep. 642.

The conduct of an overseer, who impedes by rudeness, and otherwise reprehensible conduct, the inspection of the plantation under his charge by persons who are thereto authorized by his employer, and thereby jeopardizes the latter's interests, is a just cause for his discharge before the expiration of the term of his employment. *Lalande v. Aldrich* (La. 1889), 6 So. Rep. 28.

Insubordination.—Where one servant violates or fails to comply with any express or implied condition of the contract of service, which results in material injury to the business of the master, or which amounts to insubordination or disregard of his feelings and proper authority, the contract may be determined before the expiration of the term of service. *Leatherberry v. Odell*, 7 Fed. Rep. 642.

As where a farm servant was ordered to go with the horses a mile off just as dinner was ready, and he said he would not go until he had had his dinner. *Spain v. Arnott*, 2 Stark. 256.

Also where a farm servant refused to work during harvest without beer. *Lilly v. Elwin*, 11 Q. B. 742.

As to seamen, see *The Richard Mott*, 1 Biss. (U. S.) 440; *Johnson v. The Barque Crane*, 1 Saw. (U. S.) 150; *Smith v. Schooner J. C. King*, 10 Pitts. L. J. 274.

Also where a housemaid persisted in leaving the house without permission to visit a dying mother. *Turner v. Mason*, 14 M. & W. 112. And where a salesman wilfully sells goods at a loss. *Newman v. Reagan*, 65 Ga. 512.

It has also been held that the absence of a plantation overseer for one day warranted his discharge. *Ford v. Danks*, 16 La. An. 119. Also the following cases: *Edwards v. Levy*, 2 Fost. & Fin. 94; *Calls v. Brouncker*, 4 C. & P. 518; *Turner v. Mason*, 14 M. & W. 112; *Shaver v. Ingham*, 58 Mich. 649; *Drayton v. Reid*, 5 Daly (N. Y. C. P.) 442.

But an employer has no arbitrary power to dismiss his employee for a disobedience of orders that involves no serious consequences and is not wilful in the sense of being perverse, insubordinate or unreasonable; and its reasonableness is for the jury. Nor can disobedience be made a pretext for dis-

missal apart from the injury it causes. *Schouler's Dom. Rel.*, § 462; *Shaver v. Ingham*, 58 Mich. 649; 55 Am. Rep. 712; *citing Turner v. Mason*, 14 M. & W. 112; *Fillieul v. Armstrong*, 7 Ad. & El. 557; *Calls v. Brouncker*, 4 C. & P. 518; *Edwards v. Levy*, 2 Fost. & Fin. 94; *Cressons v. Skinner*, 11 M. & W. 161; *Smith v. Allen*, 3 Fost. & Fin. 157; *Jones v. Graham etc.* Trans. Co., 51 Mich. 539; *Ford v. Danks*, 16 La. An. 119.

Disrespectful Conduct.—If a servant is disrespectful in his conduct he may be discharged. *Railey v. Lanahan*, 34 La. An. 426.

Taking Bribes.—If a foreman takes bribes from workmen to obtain favors, he may be discharged. *Engel v. Schooherr*, 12 Daly (N. Y.) 417.

Unnecessarily Suing Master.—Or repeatedly sues his master for salary not due. *Brink v. Fay*, 7 Daly (N. Y.) 562; *McCormick v. Demary*, 10 Neb. 515.

Competing with Master in Business.—Or engages in a calling or business that tends to injure the business of the master. *Dieringer v. Meyer*, 42 Wis. 311; *Jaffray v. King*, 34 Md. 217; *Gower v. Andrews*, 59 Cal. 119.

Adams Ex. Co. v. Trega, 35 Md. 47; *Spencer v. Trafford*, 42 Md. 1. See *Nichol v. Martyn*, 2 Esp. 732; *Lacy v. Osbaldiston*, 8 C. & P. 80; *Jaffray v. King*, 34 Md. 220.

A servant, hired for a year to work in the lumber trade, engaged during the year in the same trade on his own account, without his master's consent, though he continued to give his time and attention to his master's business. *Held*, that this master could discharge him before the expiration of the year. *Dieringer v. Meyer*, 42 Wis. 311; 24 Am. Rep. 415; *citing Singer v. McCormick*, 4 W. & S. 265; *Jaffray v. King*, 34 Md. 217; *Adams Ex. Co. v. Trego*, 35 Md. 47; *Lacy v. Osbaldiston*, 8 Car. & P. 80; *Read v. Dunsmore*, 9 Car. & P. 588; *Nichol v. Martyn*, 2 Esp. 732; *Gardner v. McCutcheon*, 4 Beav. 534; *Ridgway v. Market Co.*, 3 Ad. & El. 171; *Amor v. Fearon*, 9 Ad. & E. 548; *Horton v. McMurty*, 5 Hurl. & N. 667.

Obscene and Improper Language.—Likewise where the employee uses obscene and improper language while performing his duties, particularly where the master is not in the habit of using language of similar character. *Mattheson v. McKinnon*, 10 S. (Sc.) 825; *Weaver v. Halsey*, 1 Ill. App. 558.

Incompetency.—There is an implied contract upon the part of a servant that he is competent to discharge the duties of the employment entered into, and a breach of such contract will, therefore, warrant his discharge before the term of service has expired.¹

2. Term of Service.—But a contract of employment for a certain

Immoral Conduct.—Or is guilty of immoral conduct, so held in an English case where a female servant became pregnant during the term of employment. *Rex v. Brampton*, Cald. 11.

A person engaged as a theatrical performer may be lawfully discharged for indecent and immoral conduct so gross as to cause the other members of the company to refuse to associate with her, and so open as to become matter of public scandal, even although she fully performed all her theatrical duties. *Drayton v. Reid*, 5 Daly (N. Y.) 442.

Directing Others to Do Work for Which He Was Hired.—It is presumed, where a person is employed to perform a certain duty, that he will do so personally; and in many cases, if not invariably, if the servant deposes such duty to another it will justify his dismissal. *Wise v. Wilson*, 1 C. & K. 662; *Stanton v. Bell*, 2 Hawks (N. Car.) 145.

1. *Leatherberry v. Odell*, 7 Fed. Rep. 641.

Base Ball Player.—*Winship v. Portland League B. B. & A. Assoc.* 78 Me. 571.

Continued Illness of Servant.—The continued illness of a servant releases the employer likewise. *Tebo v. Ballard*, 36 Vt. 612; *Hubbard v. Belden*, 27 Vt. 645; *Deaver v. Morse*, 20 Vt. 620; *Fenton v. Clark*, 11 Vt. 557; *Hunter v. Waldron*, 7 Ala. 753; *Green v. Gilbert*, 21 Wis. 395; *Ryan v. Dayton*, 25 Conn. 188; *Hillyard v. Crabtree*, 11 Tex. 264; *Wennall v. Adney*, 3 B. & P. 246.

False Representations as to Capacity.—Or false representations by the servant as to his capacity. *Anstee v. Ober*, 26 Mo. App. 665.

Failure to Keep Time Correctly.—Sickness for half a month, together with failure to keep the time of employees correctly, is sufficient cause for discharge. *Miller v. Gidder*, 36 La. An. 201. See *Jenkins v. Betham*, 15 C. B. 189.

Dealing with Certain Person.—An employee may be discharged for dealing with certain tradesmen named by his employer. *Payne v. Western etc. R. Co.*, 13 Lea (Tenn.) 507; 18 Am. & Eng. R. Cas. 119.

Renting Certain Premises.—Or rent-

ing premises named, even when such prohibition arises from malice or ill will. *Heywood v. Tillson*, 75 Me. 225. But see 1 *Wait's Act. & Def.* 35, 36. *Addison on Torts* 20. *Gilbert v. Mickie*, 4 Sandf. Ch. (N. Y.) 357; *Springhead Spinning Co. v. Riley*, Law Rep., 6th Eq. Cas. 539.

Trading with Merchant Named.—Or trading with merchant duly designated. *Payne v. Western etc. R. Co. (Tenn.)*, 18 Am. & Eng. R. Cas. 119.

Fraudulent Conduct.—Likewise for fraudulent conduct toward master. *Libhart v. Woods*, 1 Watts & S. 265; *Singer v. McCormick*, 4 Watts & S. 266; *Horton v. McMurtry*, 5 Hurl. & N. 667.

Habitual Negligence.—Or his habitual negligence. *Callo v. Brouncker*, 4 C. & P. 518; *Newman v. Reagan*, 63 Ga. 755.

Disclosure of Secrets—Tattling.—Tattling or disclosing family secrets is a good cause for turning servant away. *Beeston v. Caller*, 2 C. & P. 607. So held where clerk of a railroad company disclosed the secrets of his employer's business. *Drayton v. Reid*, 5 Daly (N. Y. C. P.) 442; *Filliél v. Armstrong*, 7 Ad. & El. 557.

Robbery of another than the master. *Libhart v. Woods*, 1 Watts & S. 265; *Trotman v. Dunn*, 4 Camp. 211.

Embezzlement from Master or Third Person.—And embezzlement from the master or from a stranger. *Spotswood v. Barrow*, 5 Ex. 110; *Libhart v. Wood*, 1 Watts & S. 265. And see *Brown v. Craft*, 6 C. & P. 16; *Turner v. Robinson*, 6 C. & P. 16.

Challenging Master.—Sending or bearing a challenge to fight a duel. *Dolby v. Kinnear*, 1 Kerr 480; *King v. Rice*, 3 East 581.

Unprofitable Business.—On the other hand an employer has no right to discharge his employee merely because the relation is not likely to be a profitable one. *Jaffray v. King*, 34 Md. 222; *Dugan v. Anderson*, 36 Md. 567; *Greene v. Washburn*, 7 Allen (Mass.) 390.

The fact that the efforts of a travelling salesman to make sales are not very successful, and that another person who is afterwards employed in the same capacity succeeds in making larger sales, is no evidence that he did not serve his firm faithfully and to the best of his

number of years, "unless sooner terminated," cannot be terminated by either party alone within the terms.¹ And where the employee is to be retained so long as he satisfies the master, he may be discharged at any time without assigning any reason.²

3. Condonation by Master.—Where the master excuses the servant's breach of the contract of service by retaining him in employment, he waives all right to subsequently complain thereof.³ But not so the right of action arising through the servant's tortious or negligent acts.⁴

Whether delay is a waiver by an employer of his right to discharge an employee for a fault committed is a question for the jury where there are facts indicating an excuse for the delay.⁵

4. Breach by Anticipation—Executory Contract.—While a contract of employment remains executory, the principal may rescind it, especially if the employee was not acting in good faith toward him. And the party claiming the right of rescission must give notice to the other party of the fact that he does withdraw, and this before the other party has performed.⁶

ability. *Hamill v. Foute*, 51 Md. 419.

Plaintiff alleged that defendant employed him for a year at a certain salary as commercial traveller, and wrongfully discharged him at the end of seven months. Defendant, under a plea of the general issue, offered to prove that plaintiff had represented to him that he could sell \$20,000 worth of goods per annum; that agents who had preceded plaintiff in the same route in duller seasons had sold much larger quantities than he in the same length of time, as also had agents who succeeded him. *Held*, that the evidence was properly excluded. *Champlain v. Detroit Stamping Co.*, 68 Mich. 238.

1. Term of Service.—The employer may also discharge the servant where there is no particular term of service, and may eject him by force if necessary. *De Briar v. Minturn*, 1 Cal. 450; *Niagara Fire Ins. Co. v. Whittaker*, 21 Wis. 329.

2. Spring v. Ansonia Glock Co., 24 Hun (N. Y.) 175. And see *Tyler v. Ames*, 8 Lans. (N. Y.) 280; *Hart v. Hart*, 22 Barb. (N. Y.) 606.

Contract with Ball Player.—A contract for employment provided that if the employee failed to comply with the agreements or rules of certain baseball clubs, or became careless or indifferent, or conducted himself in such a manner as to injure the employer, or became ill or otherwise unfit from any cause whatever, in the judgment of the employer, to fulfil in a satisfactory manner

his duties, then the employer should have the right to discipline, suspend or discharge him, and should be the sole judge of the sufficiency of the reason for so doing. *Held*, that his discharge without the existence, or an adjudication of the existence of a reason, and without alleging any reason, was a breach of the contract. *Winship v. Portland League etc. Assoc.*, 78 Me. 571. And see generally *Spain v. Arnot*, 2 Starkie 227; 14 M. & W. 116; *Lilly v. Elwin*, 11 Q. B. 742; *Amor v. Fearon*, 9 Ad. & E. 543; 1 P. & D. 398; 14 M. & W. 42; *Marsh v. Ruleson*, 1 Wend. (N. Y.) 514. Compare *Winstone v. Linn*, 1 B. & C. 460. And see *Turner v. Mason*, 14 M. & W. 112; *Fillieul v. Armstrong*, 7 Ad. & E. 557; *Beach v. Mullen*, 5 Vr. (N. J.) 343; *Lacy v. Osbaldistan*, 8 C. & P. 80; *Read v. Dunsmore*, 9 C. & P. 588; *Nichol v. Martyn*, 2 Esp. 732; *Gardner v. McCutcheon*, 4 Beav. 543; *Ridgway v. Market Co.*, 3 Ad. & E. 171; *Horton v. Murtry*, 5 H. & M. 667; *Thompson v. Havelock*, 1 Camp. 527.

3. Brown v. Kimball, 12 Vt. 617; *Harrington v. Bank*, 1 T. & C. (N. Y.) 363; *Hunter v. Gibbons*, 3 Rich. (S. Car.) 161. See also *ante*, IV, 19 d. RETURN OF SERVANT—CONDONATION.

4. Stoddard v. Treadwell, 26 Cal. 294.

5. Jones v. Field, 83 Ala. 445. See *Stoddard v. Treadwell*, 29 Cal. 294.

6. Gaty v. Sack, 19 Mo. App. 470.

But where a contract is made for future employment and service, and upon the arrival of the time specified for the commencement of the service, the employee is ready and willing to perform, but the employer absolutely repudiates the contract, this is equivalent to a refusal to allow the employee to enter upon the service, and is a breach of the contract. In such a case the employee need not tender his services or keep himself in readiness to perform.¹ But the words or conduct relied upon as a breach of the contract by anticipation must amount to a total refusal to perform it, and that does not, by itself, amount to a breach of the contract, unless so adopted, and acted upon by the other party.²

Where a servant is wrongfully prevented from entering upon the performance of the duties for which he was engaged he is entitled to the damages suffered by him.³

5. The Discharge—What Constitutes.—A discharge must, of course, be couched in such terms as to leave no doubt in the mind of the employee of the employer's desire to terminate the relation. No set form of words is necessary.⁴

6. Assignment of Cause.—An adequate cause for the dismissal of the employee existing and known to the employer at the time of

A master may repudiate a contract with a hired servant, if he ascertains that he is a drunkard before the term of service begins. *Nolan v. Thompson*, 11 Daly (N. Y.) 314; *Johnson v. Gorman*, 30 Ga. 612.

Or mentally incapable of performing the duties in question. *Lyon v. Pollard*, 20 Wall. (U. S.) 403.

1. *Howard v. Daly*, 61 N. Y. 362.

Accommodations Offered.—In a suit brought by a teacher against a college, for breach of contract to employ her and to furnish her with a room, it was *held*, it appearing that she refused to occupy the room assigned to her, that she could not recover. *Illinois etc. College v. Perry*, 8 Ill. App. 188.

2. *Dingley v. Oler*, 6 Sup. Ct. Rep. 850; following *Johnston v. Willing*, 16 Q. B. Div. 460; *Smoat v. U. S.*, 15 Wall. (U. S.) 36; *Benj. Sales*, 9 568.

3. *Wilcox v. Plummer*, 4 Pet. (U. S.) 172; *Miller v. Ward*, 2 Conn. 494; *Davis v. Ayres*, 9 Ala. 292; *Whitney v. Brooklyn*, 5 Conn. 405.

4. The words "I am very sorry to have to ask you to resign your position," in a letter from an employer to an employee, are properly construed as a peremptory discharge. *Jones v. Graham etc. Transp. Co.*, 51 Mich. 539.

Discharge by Letter.—A letter from

C, the president of a railroad company, to S, the superintendent, informing S that C had written to M, the vice-president, to superintend everything, and adding: "I presume you will prefer to retire by means of resignation. It is hereby understood that the same is accepted, and you will please telegraph me of its transmission, as I have instructed M to take charge of the railroad immediately on the receipt of my letter. Please confer with M in turning over the papers in the supt's office," followed by a letter next day from S, resigning the position to take effect at once. *Held* as a positive dismissal of S from the service of the company. The letter from S could not change its character or construction. *Cumberland etc. R. Co. v. Slack*, 45 Md. 161.

Letter Rescinding Contract—Assent of Employee.—A was employed by B, a firm, to sell goods for them for one year from January 1st, 1884, at an annual salary of \$1,800. About the middle of the year B became insolvent and made an assignment, and later wrote A that his services would not be required after July 1st. *Held*, in an action by A to recover, that the notice would not have the effect of rescinding the contract without the assent of A. *Vanuxem v. Bostwick (Pa.)*, 7 Alt. Rep. 598.

such dismissal, excuses and justifies the discharge, though it may not have been specially assigned at the time.¹

7. Partnerships.—As to the transaction of the ordinary business of a firm and the carrying out of the declared objects of its formation, in the usual way, within the scope of the business, it follows of necessity that the majority must control, and that the minority cannot arrest the business or suspend its operations. As where the majority insist upon the discharge of a servant objectionable to the rest.² Where the firm consists of two partners only, each has the power, in the absence of dissent by the other, to discharge a person employed by the other.³

8. Recovery for Work Done.—In the majority of the American States, servants' contracts, though for a specified time, are deemed apportionable, and a servant who has been discharged for cause is still entitled to recover for the work actually done.⁴

It was formerly laid down that where one contracted to employ another a certain time at a specified price for the entire time, and discharged him wrongfully before the expiration thereof, the servant could recover his wages for the entire period.⁵

It may be laid down as the modern rule, however, that the true measure of damages, in such cases, is an amount equal to the stipulated wages for the whole period covered by the contract,

1. Thus, if the want of business be assigned as the cause of the dismissal, the employer is not thereby estopped, when sued, from showing misconduct or other adequate cause, existing and known to him at the time of the discharge. *Strauss v. Meertief*, 64 Ala. 299.

2. *Bates on Partnership* 431; *Kirk v. Hodgson*, 3 Johns. Ch. (N. Y.) 400.

3. *Holloway v. Turner*, 61 Md. 217; *Bests v. His Creditors*, 15 La. An. 55.

4. *Newman v. Reagan*, 63 Ga. 755; *Du Quoin Star Coal M. Co. v. Thorwell*, 3 Ill. App. 394; *Foster v. Watson*, 6 B. Mon. (Ky.) 377; *Kessee v. Mayfield*, 14 La. An. 90; *Lawrence v. Gullifer*, 38 Me. 532; *Jones v. Jones*, 2 Swan (Tenn.) 605; *Massey v. Taylor*, 5 Swan. (Tenn.) 447. See *ante*, IX, 19, a, *QUANTUM MERUIT*.

In such case suit must be brought by the servant on the contract for the wages provided for therein, or for damages for its breach. The dismissal does not operate as a rescission of the contract so as to justify suit upon a *quantum meruit*. *Woods' Master and Servant*, § 128.

See generally *Beach v. Mullen*, 34 N. J. L. 343; *Britton v. Turner*, 6 N. H. 481; *Elliott v. Heath*, 14 N. H. 131;

Laton v. King, 19 N. H. 280; *Davis v. Barrington*, 30 N. H. 517; *Pixler v. Nichols*, 8 Iowa 106; *Byerlee v. Mendel*, 39 Iowa 382; *Fenton v. Clarke*, 11 Vt. 560; *Gilman v. Hall*, 11 Vt. 510; *Blood v. Enos*, 12 Vt. 625. Compare *De Camp v. Hewitt*, 43 Am. Dec. 207.

5. *Gandell v. Pontigny*, 4 Camp. 374, 376; 1 Starkie's Rep. 198, 199; *Collins v. Price*, 5 Bing. 132; *Pagani v. Gandolphi*, 2 Car. & P. 370; *Smith v. Kingsford*, 3 Scott 279; *Fawcett v. Cash*, 5 Barn. & Ad. 904; *Williams v. Byrne*, 7 Ad. & El. 177; *Callo v. Brouncker*, 4 Car. & P. 518; *Robinson v. Hindman*, 3 Esp. 235. And see 19 Cent. L. J. 342; *Bennett v. St. Louis Car Roofing Co.*, 23 Mo. App. 587; *James v. Allen Co.*, 44 Ohio St. 226; *Hogan v. Titlow*, 14 Cal. 255; *Diefenback v. Stark*, 56 Wis. 462; *Hutchinson v. Wetmore*, 2 Cal. 311; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Henson v. Hampton*, 32 Mo. 408; *Brown v. Fitch*, 33 N. J. L. 418; *Langtry v. Parks*, 8 Cow. (N. Y.) 63; *Smith v. Brady*, 17 N. Y. 173; *Bragg v. Bradford*, 33 Vt. 35; *Patnole v. Sanders*, 41 Vt. 60; *Earp v. Tyler*, 73 Mo. 617; *Britton v. Turner*, 6 N. H. 481; *Hayward v. Leonard*, 19 Am. Dec. 272, 275; *Chamblee v. Baker*, 95 N. Car. 98.

less the sum earned, or which might have been earned, in other employment during the time covered by the breach.¹

1. *Shannon v. Comstock*, 21 Wend. (N. Y.) 457; *Howard v. Daly*, 61 N. Y. 362; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Decker v. Hassel*, 26 How. Pr. (N. Y.) 528; *Bromley v. School Dist.* 47 Vt. 381; *Prentiss v. Ledyard*, 28 Wis. 131; *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630; *Fowler v. Armour*, 24 Ala. 194; *Daniel v. Parks*, 19 Ark. 671; *Blun v. Holitzer*, 53 Ga. 82; *Utter v. Chapman*, 38 Cal. 659; *Ry. Co. v. Slack*, 45 Md. 161; *Alger v. Alger*, 10 S. & R. (Pa.) 235; *Sprague v. Morgan*, 7 Ala. 952; *Koenig Kraemer v. Mo. Glass Co.*, 24 Mo. App. 124; *Holloway v. Talbot*, 70 Ala. 389; *Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Miller v. Goddard*, 34 Me. 102; *McDaniel v. Parks*, 19 Ark. 671; *Jones v. Jones*, 2 Swan (Tenn.) 605; *Bradshaw v. Branan*, 5 Rich. (S. Car.) 465; *Baron v. Placide*, 7 La. An. 229; *De Leon v. Echeverria*, 45 N. Y. Super. Ct. 610; *Howard v. Daly*, 61 N. Y. 362; *Chamberlin v. Morgan*, 68 Pa. St. 168; *King v. Steirer*, 44 Pa. St. 99; *Fowler v. Armour*, 24 Ala. 194; *Booge v. Pacific R. Co.*, 33 Mo. 212; *Steinberg v. Gebhart*, 44 Mo. 520; *Armfield v. Nash*, 31 Miss. 361; *Sutherland v. Dyer*, 67 Me. 64; *Benziger v. Miller*, 50 Ala. 206; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Gazette Printing Co. v. Morse*, 60 Ind. 153; *Gillis v. Space*, 63 Barb. (N. Y.) 177; *Pond v. Wyman*, 15 Mo. 175; *Hearns v. Herbert*, 25 Mo. 352; *Howard v. Daly*, 61 N. Y. 371; *Gillis v. Space*, 63 Barb. (N. Y.) 177; *Hearne v. Garrett*, 49 Tex. 619; *Byrd v. Boyd*, 4 McCord (S. Car.) 246; *French v. Brooks*, 6 Bing. 304; *Ricks v. Yates*, 5 Ind. 115; *Webster v. Wade*, 19 Cal. 291; *Smith v. Thompson*, 8 M. & S. 44; *Decker v. Hassel*, 26 How. Pr. (N. Y.) 528; *Miller v. Goddard*, 34 Me. 102; *Sherman v. Trans. Co.*, 31 Vt. 162; *Meade v. Rutledge*, 11 Tex. 44; *Money v. Taylor*, 5 Swan (Tenn.) 447; *Costigan v. Mohawk etc. R. Co.*, 2 Den. (N. Y.) 609.

The measure of damages against a party who has employed another to do certain mechanical work at a price agreed upon, and who has countermanded his directions, and forbidden the further execution of the work, after it had been commenced, is not the whole amount agreed to be paid, but a just recompense for such injury as the

party employed has sustained on account of the breach of the agreement. *Clark v. Marsiglia*, 1 Den. (N. Y.) 317.

Discharge Before End of Month Without Reason.—One hiring another to work one month for a stipulated sum, and discharging him before the end of the month without sufficient cause, is liable to pay him for the month. *Dunn v. Hereford*, 1 Wy. T. 206. See *Liddell v. Chidester*, 84 Ala. 508.

Servant to Have Been Furnished Board.—Where a master undertook to board a servant and wrongfully dismissed him, and it appeared in a suit by the servant that he was boarded by his new employers, it was held that as he was re-employed directly after his dismissal, he could not recover for board; there being no suggestion that the board furnished by his new employer was inferior to that furnished by defendant. *Ansley v. Jordan*, 61 Ga. 482.

Evidence as to Special Damage.—In an action by an employee against his employer for wrongful discharge, the declaration containing no allegation of malice or of special damage beyond the loss of position and wages, the admission of evidence of special damage by loss of character is reversible error. *Lee v. Hill* (Va.), 1888, 6 S. E. Rep. 473.

Check for Amount Less than Claimed.—Where a person hired for a year was discharged by letter before his time was up, the letter containing a check for a certain amount, and requesting the return of the check if the amount was not satisfactory, it was held, upon suit brought by the employee after the year was up for the balance, over and above the amount of the check that the action could not be maintained. *Hutton v. Stoddart*, 83 Ind. 539.

Cultivation of Land for Share of Crop.—A contract between one to furnish land, team and tools, to make a crop, and another to work the land and make the crop for a specified portion of it, fixes a rule whereby to compensate the laborer for his services, and if the former discharge the laborer without cause before the crop is made and gathered, the laborer may then sue and recover the value of his services to that time, or he may wait until after the time for gathering the crop, and

Where a person employed for a term of service seeks to recover on the contract without full performance, on the ground that his employer refused to allow him to serve out his time, he must aver and prove his ability, readiness, and an offer to perform on his part, as to the subsequent time, or he cannot recover beyond the service actually rendered.¹ But where the master agrees to pay the servant a certain salary whether he serves the whole time or not, in case of discharge, the measure of damage will be the full amount of the same.²

9. Obligation of Discharged Servant to Seek Employment.—As we have before seen, master may show in mitigation of damages what the servant did earn, or could have earned, between the time of his discharge and the commencement of suit.³ For upon dismissal a servant under the law must seek other employment.⁴

then sue and recover the value of his agreed portion of the crop, less what he had an opportunity to make by like service after his dismissal. *Gardenhire v. Smith*, 39 Ark. 280. See *Christian v. Crocker*, 25 Ark. 330; *Bengie v. Davis*, 34 Ark. 179; *Sentell v. Moore*, 34 Ark. 690.

1. *Leopold v. Salkey*, 89 Ill. 413; *Bodgley v. Heald*, 4 Gilm. (Ill.) 64; *Swanzy v. Moore*, 22 Ill. 63; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203; *Tompkins v. Elliott*, 5 Wend. (N. Y.) 406; *Blan v. Atwater*, 4 Conn. 3; *McClure v. Rush*, 9 Dana (Ky.) 64.

Servant Was Locked Out of the Premises.—A plaintiff, employed to work in defendant's glass factory from September to July, testified that he went to work in September and worked until December 22nd, and was then discharged, and ordered not to come around the factory; that the gates were all locked up the next day, and another man was put in his place, so that he could not get in. *Held*, that the evidence should have been submitted to the jury on the questions whether the plaintiff was discharged by competent authority, and whether he was willing to continue in defendant's employ, and that a nonsuit for want of evidence on this point was erroneous. *Syncar v. Wharton*, 48 N. J. L. 97.

2. *Wachs v. Friedman*, 11 Mo. App. 602; *Goldman v. Wolff*, 6 Mo. App. 490, 496; *Clancy v. Robertson*, 2 Mills' Const. Rep. (S. Car.) 404; *Smith v. Thompson*, 8 C. B. 44; *Ex parte Clark*, L. R., 7 Eq. 550; *Yelland's Case*, L. R., 4 Eq. 350.

3. 2 Greenleaf on Ev., § 261a. 2 Sutherland on Damages 475. *Wilkinson v. Black*, 80 Ala. 329.

4. *Dillon v. Anderson*, 43 N. Y. 231; *Howard v. Daly*, 61 N. Y. 370; *Emmons v. Elderton*, 4 H. L. 645; *Beckman v. Drake*, 2 H. L. 606; *Chamberlain v. Morgan*, 68 Pa. St. 168; *King v. Steiren*, 44 Pa. St. 99; 1 Sedgwick on Dam. 93-4.

It was laid down in an early case that "idleness" in a servant discharged is in itself a breach of moral obligation; and furthermore, that 'if he continues idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance.'

Shannon v. Comstock, 21 Wend. (N. Y.) 457. And see *Miller v. Mariner's Church*, 7 Greenleaf 55; *Heckscher v. McCrea*, 24 Wend. (N. Y.) 304; *Wilson v. Martin*, 1 Den. (N. Y.) 605; *Taylor v. Read*, 4 Paige (N. Y.) 572; *Costigan v. R. Co.*, 2 Den. (N. Y.) 616; *Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Bradley v. Denton*, 3 Wis. 557.

Minor Servant—Obligation of Father.—In actions by a father for wages on a contract for employment of his minor son for a certain term, the son having been prematurely dismissed, the father may recover for every instalment as it falls due, and he is not bound to accept employment for his son by others, unless in the same or a similar employment in the same place and by persons of unobjectionable capacity, reputation, habits, morals, and mode of conducting their business; and the burden of showing such an opportunity is on the defendant; but, if the latter shows that the offer was rejected by the father, simply on the ground that the acceptance might prejudice his right of recovery, then the burden is on the plaintiff to show that some just objection to the

But extraordinary diligence is not required of him in this regard.¹ He must simply use reasonable efforts.²

The servant is not bound to seek employment or perform service of a different kind from that which he was engaged to perform.³ That is, the service must be of equal grade, not of a more menial kind, even if the compensation is greater in the latter service.⁴ Neither is a servant bound to seek work in another neighborhood.⁵ But if he fails to obtain it, and does work of his own, its value cannot be deducted from the amount of his claim.⁶

There is this distinction, however, to be considered; when one is employed to do a single specific piece of work, and is wrongfully discharged, and prevented from carrying it out, the obtaining of other work by him will not affect his recovery in full the damages suffered by him.⁷

10. Offer of Continuance at Lower Rate.—Where an employee discharged before the expiration of his term of service, refuses continued employment except at reduced wages, his refusal neither prejudices his right of action under the contract, nor reduces the amount of his recovery.⁸

11. Servant Receiving Share of Profits.—Where a servant is to

offer existed. *Strauss v. Meertief*, 64 Ala. 299.

1. *Byrd v. Boyd*, 4 McCord (S. Car.) 246; *Howard v. Daly*, 61 N. Y. 362; *Gillis v. Space*, 63 Barb. (N. Y.) 177; *Polk v. Daly*, 14 Abb. Pr., N. S. (N. Y.) 156; *Moore v. Leverich*, 14 Abb. Pr., N. S. (N. Y.) 146.

2. What is reasonable diligence depends upon all the circumstances of each particular case. *Howard v. Daly*, 61 N. Y. 362; *Byrd v. Boyd*, 4 McCord (S. Car.) 246; *Meade v. Rutledge*, 11 Tex. 44.

3. *Wilkinson v. Black*, 80 Ala. 329; *Strauss v. Meertief*, 64 Ala. 299; *Fuschs v. Koerner*, 107 N. Y. 529; *Howard v. Daly*, 61 N. Y. 370; *Beckham v. Drake*, 2 H. L. Cas. 606; *Costigan v. R. Co.*, 2 Den. (N. Y.) 609; *Walworth v. Pool*, 9 Ark. 394; *Perry v. Simpson Waterproof Co.*, 37 Conn. 540.

4. A superintendent of a railroad company need not accept the work of a conductor. *Costigan v. R. Co.*, 2 Den. (N. Y.) 609.

Nor an overseer the work of a laborer. *Walworth v. Pool*, 9 Ark. 394.

Nor the foreman of a type foundry the work of a common hand. *Gillis v. Space*, 63 Barb. (N. Y.) 177.

Nor an actor the labor of a clerk. *Polk v. Daly*, 14 Abb. Pr., N. S. (N. Y.) 156.

5. *Gillis v. Space*, 63 Barb. (N. Y.)

177; *Costigan v. R. Co.*, 2 Den. (N. Y.) 609; *Howard v. Daly*, 61 N. Y. 371; *Hamilton v. McPherson*, 28 N. Y. 72; *Walworth v. Pool*, 9 Ark. 394.

6. *Harrington v. Gies*, 45 Mich. 374.

That an employee after his discharge has engaged in business for himself in competition with his late employer is no defence to the former's action for a breach of the contract of hiring. *Stone v. Vimont*, 7 Mo. App. 277.

7. *Wolf v. Studebaker*, 65 Pa. St. 459; *Hoy v. Gronoble*, 34 Pa. St. 1; 2 Greenleaf Ev., § 261.

8. *People's Co-operative Assoc. v. Lloyd*, 77 Ala. 387; *Strauss v. Meertief*, 64 Ala. 297; *Holloway v. Talbot*, 70 Ala. 389; *Whitmarsh v. Littlefield*, 53 Hun (N. Y.) 418.

Offer of Same Wage for Less than Time.

—But a master cannot, while repudiating the contract to serve for a definite period of time, reduce the servant's right of recovery to merely nominal damages, by showing that he offered the servant the same work at the same price for a less period than that for which he was hired. Thus where one is hired for a year and discharged, but the master offers the servant the same work at the same price, but by the week, the servant is not bound to accept it. *Wachs v. Friedman*, 11 Mo. App. 602.

receive a certain portion of the profits of a business and is discharged before the time for which he was hired has run, he may recover such share of the profits for the stipulated period less what he could or did earn during the time between the date of his discharge and the date of the expiration of the contract.¹

12. Recalling Discharged Servant.—A master having discharged a servant has no right to recall him on pain of forfeiting all claim for compensation, but if the servant is not otherwise employed he may recall him to do a part of the stipulated work without restoring him to his former position.²

13. Evidence—Burden of Proof.—All relevant facts transpiring between the wrongful discharge of a servant and the trial of his action therefor may be considered in estimating the damages.³ In such actions the burden of proof is on the master to show that the discharge was for good cause.⁴ And furthermore the rule is that where the defendant alleges the ability of the plaintiff to get employment, or the fact that he did get it, in mitigation of damages, the burden of proof is upon him to show it.⁵

14. New Contract After Breach.—Where a contract has been broken by one party and the parties make thereafter a new contract, it does not necessarily take away the action for damages for the breach.⁶

15. Remedies of Servant for Wrongful Discharge.—Where an employee for a fixed period, at a salary for the period, payable at intervals, is wrongfully discharged, he may pursue any one of four courses:

1. He may sue at once for a breach of contract, in which case he can only recover his damages up to the time of bringing suit.⁷

1. *Goldman v. Wolff*, 6 Mo. App. 490, 496; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Philadelphia R. Co. v. Howard*, 13 How. (U. S.) 344; *Lewis v. Ins. Co.*, 61 Mo. 535; *Alfaro v. Davidson*, 40 N. Y. Sup. Ct. 87; *Burrell v. Saginaw etc. Co.*, 14 Mich. 35; *Hoy v. Gronoble*, 34 Pa. St. 1; *Masterton v. Mayor*, 17 Hill (N. Y.) 62; *Cox v. McLaughlin*, 54 Cal. 605; *Blair v. Laffin*, 127 Mass. 518.

2. *Mitchell v. Toole*, 25 S. Car. 238. See *Saunders v. Anderson*, 2 Hill (N. Y.) 486.

3. *Roberts v. Crowley*, 81 Ga. 429.

4. *Koenigkraemer v. Mo. Glass Co.*, 24 Mo. App. 124; *Green v. Washburn*, 7 Allen (Mass.) 390.

5. *Barker v. K. L. Ins. Co.*, 24 Wis. 630; *Holloway v. Talbot*, 70 Ala. 389; *Costigan v. R. Co.*, 2 Den. (N. Y.) 609; *Kirk v. Hartman*, 63 Pa. St. 97; *Cong v. Peeres*, 2 Cald. 620; *King v. Steiren*, 44 Pa. St. 99; *Walworth v. Poole*, 9 Ark. 394; *Saxonia M. & R.*

Co. v. Cook, 7 Colo. 569. Compare *Hunt v. Crane*, 33 Miss. 669; *Hearne v. Garrett*, 49 Tex. 619.

See generally *Underhill v. N. Am. etc. Co.*, 36 Barb. 354; *Thompson v. Wood*, 1 Hilt. (N. Y.) 93; *Hoy v. Gronoble*, 34 Pa. St. 9; *Allen v. Thrall*, 36 Vt. 711; *Dibol v. Minott*, 9 Iowa 403; *Richmond v. Dubuque etc. R. Co.*, 26 Iowa 191; *Western v. Sharp*, 14 Mon. (Ky.) 177; *Hosmer v. Wilson*, 7 Mich. 294; *Hunt v. Crane*, 33 Miss. 669; *Steinberger v. Gebhart*, 41 Mo. 520; *Nearns v. Harbert*, 25 Mo. 352; *Howard v. Daly*, 61 N. Y. 362; *Hochster v. DeLaTour*, 3 El. & B. 678; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 130; *Frost v. Knight, L. & R.*, 5 Exch. 322; *L. R.*, 7 E. Ch. 111.

6. *McKnight v. Dunlap*, 5 N. Y. 537; 23 Wend. (N. Y.) 309; 1 Hill (N. Y.) 486; 5 Hill (N. Y.) 77; *Wilmington v. Backhouse*, 2 Barn. & Cres. 821.

7. *Colburn v. Woodworth*, 31 Barb.

2. He may wait until the end of the contract period, and then sue for the breach.¹

3. He may treat the contract as existing and sue at each period of payment for the salary then due.²

(N. Y.) 381; *Booge v. R. Co.*, 33 Mo. 212.

Nations v. Cudd, 22 Tex. 550; *Gordon v. Brewster*, 7 Wis. 355; *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11; *Wright v. Falkner*, 37 Ala. 274; *Hartland v. Gen'l Ex. Bank*, 14 L. T., N. S. 863; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Sutherland v. Wyer*, 67 Me. 64; *Fowler v. Armour*, 24 Ala. 194; *Gifford v. Waters*, 67 N. Y. 80; *Pritchard v. Martin*, 27 Miss. 305; *Howe Machine Co. v. Bryson*, 44 Iowa 159; *Squire v. Wright*, 1 Mo. App. 172; *Sprague v. Morgan*, 7 Ala. 952; *Martin v. Everett*, 11 Ala. 375; *Bromley v. School Dist.*, 47 Vt. 381; *Hendrickson v. Anderson*, 5 Jones L. (N. Car.) 246; *Williams v. Anderson*, 9 Minn. 50; *Horn v. Wes. L. Assoc.*, 22 Minn. 233; *Utter v. Chapman*, 38 Cal. 659; *Jeffray v. King*, 34 Md. 217; *Cumberland R. Co. v. Stack*, 45 Md. 161; *Congregation etc. v. Hassel*, 24 How. P. (N. Y.) 528; *Blun v. Holitzer*, 53 Ga. 82; *Fereira v. Sayres*, 5 W. & S. 210; *Baker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630; *Prentiss v. Ledyard*, 28 Wis. 131; *McDaniel v. Parks*, 19 Ark. 671; *Alger v. Alger*, 10 S. & R. 235; *Whitaker v. Landifer*, 1 Duer (N. Y.) 261; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Booge v. R. Co.*, 33 Mo. 212; *Fish v. Folly*, 6 Hill (N. Y.) 54; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207; *Richardson v. Eagle Machine Works*, 78 Ind. 422; 4 Am. Rep. 584; *Crosby v. Jerolman*, 37 Ind. 264; *Camp v. Morgan*, 21 Ill. 256; *Lucas v. Le Compte*, 42 Ill. 303; *Casselberry v. Forquer*, 27 Ill. 170; *Secor v. Sturges*, 16 N. Y. 548; *Guernsey v. Carver*, 8 Wend. (N. Y.) 492; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207; *Borgnesser v. Harrison*, 12 Wis. 544; *Admr. of Whitney v. Clarendon*, 18 Vt. 253.

In *Rosenmueller v. Lampe*, 89 Ill. 212, the facts were: Church trustees employed plaintiff as a teacher and sexton for a year at a fixed compensation, and at request of the priest he performed similar services a second year on the promise of the same compensation. After all the services had been rendered he recovered judgment against the trustees for a balance due on the

first year. *Held*, a bar to an action for the second year's services.

Two Suits Under Same Discharge.—A entered into a contract with B by which he agreed to serve B for the term of one year for a salary of \$1,500. Before the expiration of the year B discharged him without cause. After the expiration of a couple of months, A being unable to secure employment elsewhere, brought an action for the wages accrued after the discharge. Judgment was rendered in his favor. He afterwards brought another suit for similar wages alleged to have accrued after the commencement of the first suit. The judgment in the first action was pleaded in bar of a recovery in the second. It was held that the second action could not be maintained, plaintiff having exhausted his remedy in the first. *Kahn v. Kahn*, 24 Neb. 709. See *James v. Allen Co.*, 44 Ohio St. 228.

1. *Holloway v. Talbot*, 70 Ala. 389; *Thompson v. Wood*, 1 Hilt. (N. Y.) 93; *Taylor v. Read*, 4 Paige (N. Y.) 572; *Costigan v. R. Co.*, 2 Den. (N. Y.) 616; *Gordon v. Brewster*, 7 Wis. 355; *Fowler v. Prout*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299; *Rogers v. Parham*, 8 Ga. 190; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Weed v. Burt*, 78 N. Y. 191; *DeCamp v. Hewitt*, 43 Am. Dec. 205.

Where One Partner Buys Out Another.—Where a travelling salesman contracted with a partnership at so much a year, and notified one of them that he would not engage for less than a year, which partner subsequently bought out his associate, it was held that such salesman, upon being discharged shortly after having begun on his second year, could maintain an action for his entire salary for the second year. *Alba v. Moriarty*, 36 La. An. 680.

2. *Wilkinson v. Black*, 80 Ala. 329; *Cutter v. Powell*, 2 Sm. L. Cas. 39 and note. *Huntington v. Ogdensburgh etc. R. Co.* (N. Y. Supr. Ct. 1868), 7 Am. L. Reg., N. S. 148; *Cook v. Wharwood*, 2 Saund. 337; *Badger v. Titcomb*, 15 Pick. (Mass.) 409; *Thompson v. Wood*, 1 Hilt. (N. Y.) 93; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Secor v.*

4. He may treat the contract as rescinded and sue immediately on a *quantum meruit* for the services performed. But in this case he can recover only for the time he *actually* served.¹

16. Death of Employer—Refusal of Administrator to Carry Out the Contract of Service.—Death of an employer excuses further performance of the contract, and no recovery can be had by the servant against the administrator for refusing to carry out the same.²

17. Arising of Unexpected Conditions.—Where the failure to perform a contract is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for the party not in default may abandon the contract.³

18. Labor During Unseasonable Hours.—A servant is not required to work during unseasonable hours unless the contract or the nature of the employment makes it reasonable that he should do so. But if he voluntarily does so, it is no ground for claiming that there is a breach of the contract by the employer.⁴

19. Discharge of Domestic Servants Without Notice.—In England, a domestic servant who is turned away without notice, and without fault, is entitled to one month's wages, although there is no agreement to that effect.⁵

20. Giving Character to Servant—(a) *Obligation to Give Character.*—It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much the servant is entitled to a character in fairness or how cruel the refusal may be.⁶

(b) *Privileged Communications—Libel.*—But where such char-

Sturges, 16 N. Y. 548; Perkins v. Hart, 11 Wheat. (U. S.) 251.

1. Huntington v. Ogdensburg etc. R. Co. (N. Y. Supr. Ct. 1868), 7 Am. L. Reg., U. S. 148; Ryan v. Dayton, 25 Conn. 188; Rogers v. Parham, 8 Ga. 190; Britt v. Hayes, 21 Ga. 157; Clark v. Manchester, 51 N. H. 564; Howard v. Daly, 61 N. Y. 362; Hearne v. Garrett, 49 Tex. 619.

A contract of service at a fixed rate for a certain time, providing that, in case of breach or nonfulfilment, the balance due "shall be payable at the end of the contract period," applies only to a breach by the *employee*; hence, if he is properly discharged before the end of the time, he cannot sue for the amount due till the end of the time; but if he is improperly discharged he can sue at once. Knutson v. Knapp, 35 Wis. 86.

2. Herrington v. Greene, 7 R. I. 589.

3. Leopold v. Salkey, 89 Ill. 413.

4. Koplitz v. Powell, 56 Wis. 671.

5. Robinson v. Hindman, 3 Esp. 235.

And this is on the ground that a general hiring, that is, a hiring without any en-

gagement as to the duration of the service, is presumed to be a hiring for a year, and it will be construed in a court of law to be a hiring on the terms that either party might determine the engagement upon giving a month's notice, and the law implies a promise by the master to pay a month's wages if he dismiss his servant without cause without giving such notice. Parsons on Contracts 35; citing Fawcett v. Cash, 5 B. & Ad. 904; Lilly v. Elwin, 11 Q. B. 754; Nowlan v. Ablett, 2 C. M. & R. 54; Beeston v. Collyer, 4 Bing. 309, 2 C. & P. 607; Spain v. Arnott, 2 Stark. 257; Huttman v. Boulnois, 2 C. & P. 511; Halcraft v. Barber, 1 Car. & K. 4; Baxter v. Nurse, 1 Car. & K. 10.

But this presumption of a yearly hiring may be rebutted by evidence showing that such was not the intention of the parties. Bayley v. Rimmell, 1 M. & W. 506; Baxter v. Nurse, 6 Man. & J. 935; Rex v. Christ's Parish, 3 B. & C. 459.

6. Carrol v. Bird, 3 Esp. 201; Handley v. Moffatt, Ir. R. C. L. 104.

acter is given it is looked upon as a privileged communication and no action whatever can be maintained by the servant against him on account of it.¹

(c) *Knowingly Giving False Character*.—If a master knowingly give a false character of a servant to a person about to hire him, and the servant afterwards rob or injure his new master, *he* may, in an action for the deceit, recover from the former master the damages he has sustained in consequence of such false character having been given.²

(d) *Forged Testimonial*.—And furthermore, knowingly uttering a forged testimonial to character with intent to deceive, and thereby obtain a situation of emolument, is a forgery at common law.³

21. Malicious Procurement of Discharge.—An employee can maintain an action against one who maliciously procures his discharge, provided he can prove damages resulting from such discharge.⁴

Damages—Proposed Partnership.—Where the defendant knew or believed, or had reason to believe, that the employer had promised or did actually intend to admit the plaintiff into partnership with him, the fact of such knowledge or belief, or reason to believe such promise or intention, may be considered by the jury in passing upon the motive of the defendant and in fixing exemplary damages. But speculative profits of a proposed business cannot be the basis of the assessment of actual damages.⁵

XV. ENTICING SERVANT AWAY—1. General Rule.—An action at law will lie in behalf of an employer against anyone who knowingly entices away his servant, or wrongfully prevents him from performing his duty during the existence of the relation.⁶ A

1. *Cooke v. Wildes*, 5 E. & B. 335; *Gardner v. Slade*, 13 Q. B. 801; *Weatherstone v. Hawkins*, 1 T. R. 110.

For a complete discussion of the subject of privileged communications between master and servant and third persons, in their relation to the law of libel and slander, see **LIBEL AND SLANDER**, vol. 13.

2. *Foster v. Charles*, 6 Bing. 396; *Wilkin v. Read*, 15 C. B. 192; *Pasley v. Freeman*, 3 T. R. 51; 2 Smith L. C. 71.

3. *Rex v. Sharman*, 23 L. J., M. C. 51; *Rex v. Moah*, 27 L. J., M. C. 205; 1 Dears. & Bell C. C. 550; 4 Jur. N. S. 464.

4. *Chipley v. Atkinson*, 23 Fla. 206.

Discharge Is Essential to Recovery.—But a discharge by the employer is essential to recovery. If the employee was not discharged, but voluntarily left the employment on account of the conduct of the party charged with having procured his discharge, the action cannot be maintained. *Chipley v. Atkinson*, 23 Fla. 206.

5. *Chipley v. Atkinson*, 23 Fla. 206.

6. *Hudson v. State*, 46 Ga. 624; *Lee v. West*, 47 Ga. 311; *Jeter v. Blocker*, 43 Ga. 331; *Butterfield v. Ashley*, 60 Mass. 249; *Walker v. Cronin*, 107 Mass. 555; *Ames v. Union R. Co.*, 117 Mass. 541; *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Boston Glass Co. v. Binney*, 4 Pick. (Mass.) 425; *Bixby v. Dunlap*, 56 N. H. 456; *Noice v. Brown*, 39 N. J. L. 569; *Hoskins v. Royster*, 70 N. Car. 601; *Woodward v. Washburn*, 3 Den. (N. Y.) 369; *Daniel v. Swearingen*, 6 S. Car. 297; *Hoff v. Watkins*, 15 S. Car. 82; *Sherwood v. Hall*, 3 Sumn. (U. S. C. C.) 127; *Plummer v. Webb*, 4 Mason (U. S. C. C.) 380; *Lumley v. Gye*, 2 El. & Bl. 216; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Ga. 601; *Carew v. Rutherford*, 106 Mass. 1; *Melburne v. Byrne*, 1 Cranch C. C. 239; *Haight v. Badgeley*, 15 Barb. (N. Y.) 499. Compare *Burgess v. Carpenter*, 2 Rich. (S. Car.) 7.

master may maintain an action even if the service is only one at will, if subsisting when interrupted.¹

So an action lies for procuring the breach of a subsisting contract, even though the relation of master and servant has not been entered into under it,² and it has been so held that the action would lie where a person employed on piece work quits his employment and hires out to another, leaving a portion of his work unfinished.³ So also, where one who employs the servant of another without notice of his contract, continues to employ him after notice has been given.⁴

2. Harboring Servant.—A person is also liable in damages to an employer, if he permits such employer's servant to stay with him, intending to deprive the master of his services, even though he derives no benefit therefrom;⁵ and under a count for harboring or

1. Schouler on Domestic Relations, § 487. *Lykes v. Dixon*, 9 Ad. & E. 693; *Salter v. Howard*, 43 Ga. 601.

2. *Lumley v. Gye*, 2 El. & Bl. 216. The former rule was to the contrary. *Butterfield v. Ashley*, 2 Gray (Mass.) 254; *Coughey v. Smith*, 47 N. Y. 244.

3. *Blake v. Lanyon*, 6 T. R. 221; *Walker v. Cronin*, 107 Mass. 555; *Gunter v. Astor*, 4 Moore 12.

Where Laborers Leave Through Threats.—An action likewise lies against a person who, to force another to give up a lease, persuades and threatens his laborers so that they leave him. *Dickson v. Dickson*, 33 La. An. 1261.

Engineer Maliciously Arrested.—And on behalf of a railway company, where a person maliciously causes the arrest of an engineer running one of its trains. *St. Johnsbury etc. R. Co. v. Hunt*, 55 Vt. 570; s. c., 15 Am. & Eng. R. Cas. 113.

Person Enticed to Share in Crop.—And where the person enticed away was to receive from his employer a share in certain crops for his services. *Haskins v. Royster*, 70 N. Car. 601.

Trespass Quare Clausum Against Person Entering Upon Premises.—And it has been laid down in New York that trespass *quare clausum* will lie where a person wrongfully enters upon the plaintiff's premises for the purpose of enticing his servant away. *Haight v. Badgeley*, 15 Barb. (N. Y.) 499.

4. *Butterfield v. Ashley* (6 Cush.), 60 Mass. 249.

But, of course, no action lies where a third person merely induces a servant to leave his employer at the end of the contract term, even though such employer might desire to re-employ him. *Nichols v. Martin*, 2 Esp. 732;

Boston Glass Co. v. Binney, 4 Pick. (Mass.) 425.

Or where such person employed him after leaving an employment under a voidable contract. *Sykes v. Dixon*, 9 Ad. & El. 693.

Or where the employment was entered into after the servant had paid a penalty provided for in the contract broken by him. *Bird v. Randall*, 3 Burr. 1345.

Nor where after an infant has disaffirmed his voidable contract for personal services and leaves his employer he is hired by another. *Langham v. State*, 55 Ala. 114.

But to the contrary where he is persuaded to so disaffirm. *Keane v. Boycott*, 2 H. Bl. 511.

Nor (in Alabama) against a father who having hired his minor son to another person for a specified time, induces him to leave the service before the expiration of the term. *Driscoll v. State*, 77 Ala. 84.

Nor where the contract of service was made in a foreign country. *Parsons v. Trask*, 7 Gray (Mass.) 473.

Nor where, although a third person attempts to entice a servant to leave, he does not succeed. *Bird v. Randall*, 3 Burr. 1352.

Unless damage results from such endeavor. *Carew v. Rutherford*, 126 Mass. 1.

Nor where servant had previously broken his contract with or without cause. *Morris v. Neville*, 11 Lea (Tenn.) 271.

5. *Woods v. Master and Servant*, § 240; *Dubois v. Allen*, Anth. (N. Y.) 94; *Sargeant v. Matthewson*, 38 N. H. 54; *Campbell v. Cooper*, 34 N. H. 49.

entertaining a servant, evidence of enticement is not necessary.¹

3. Notice to Defendant.—Before an action is brought for enticing away, or retaining or employing a servant, it is advisable to give notice to the intended defendant that the party is servant to the plaintiff, and to demand him; and proving such notice and a subsequent employment during the time for which the plaintiff hired, retained, took and engaged the servant, will entitle the plaintiff to a verdict. To this proof must be added proof of the contract between the plaintiff and the servant, and that the time was not expired. In order to prevail it must be shown that the servant was retained after the new employer was informed of the existence of a previous contract of service;² for this action cannot be maintained unless the defendant knew that the servant was bound under contract to serve the plaintiff.³

4. Sufficiency of Contract.—There is no rule requiring a written contract between master and servant in order to sustain such action;⁴ nor that it be made in presence of witnesses.⁵

5. Malice.—It must also be shown that the defendant acted maliciously, not in the sense of actual ill will to the plaintiff, but in the sense of an act done to the apparent damage of another without legal excuse.⁶

6. Evidence of Enticement.—The employment of one's servant by another is *prima facie* evidence of enticement.⁷

7. Measure of Damages.—The measure of damages for enticing away the servant of another is the direct loss suffered, and the average net profits that were made by men of fair business ca-

But of course not where he does not know that such servant has absconded. *Gale v. Parrott*, 1 N. H. 33; *Huntoon v. Hazleton*, 20 N. H. 388; *Coughey v. Smith*, 46 N. Y. 244.

1. *Dubois v. Allen*, Anth. (N. Y.) 128.

2. *New Nat. Brev.* 374, 375; 6 Term Rep. K. B. 221; 1 Comm. 429.

3. *Fores v. Wilson*, Peake 55; *Butterfield v. Ashley*, 2 Gray (Mass.) 254.

4. *Salter v. Howard*, 43 Ga. 601. Compare *Hightower v. State*, 72 Ga. 482.

5. *Huff v. Watkins*, 18 S. Car. 510. Compare *Hightower v. State*, 72 Ga. 482; *Sargent v. Matthewson*, 38 N. H. 54; *Caughey v. Smith*, 47 N. Y. 250; *Everett v. Sherpey*, 1 Iowa 356.

6. *Morgan v. Smith*, 77 N. Car. 37.

But it was laid down in the above case that proof of defendant's lending servants a wagon with which to remove from plaintiff's premises, or employing them after they left, is not enough, standing alone, to warrant a verdict for damages.

7. *Wilburn v. Byrne*, 1 Cr. C. C. (U. S.) 239.

Under the Alabama Code.—Code Ala., §§ 3757, 3758, provide that where a laborer has entered into a written contract of service for a period not exceeding a year, it shall be a criminal offence to knowingly induce such laborer to leave his employer before the expiration of his time of service without the consent of his employer; and that the fact that such laborer having so contracted is afterwards found in the service of another before the termination of the contract, shall be *prima facie* evidence of such offence. *Held*, that it was a defence to a prosecution under such statute that the defendant had, prior to the written contract entered into between the prosecuting witness and the laborer, verbally employed the latter for a period which had not expired, although the contract with the defendant was voidable under the statute of frauds the parties to it electing to treat it as valid. *Tartt v. State*, 86 Ala. 26.

capacity, out of the labor of such a servant during the year for which the enticed servant was hired.¹

A master may recover damages of anyone who, after demand made, detains a servant.²

8. Injunction.—Where, in cases of this sort, there is no adequate remedy at law, relief may be had in equity by injunction.³

XVI. COMBINATIONS AND COERCION OF SERVANTS.—Every man has a right to work for whom he pleases, and on what terms he pleases. He may refuse to deal with a particular man or class of men. It is perfectly legal for any number of persons, without an unlawful object in view, to agree that they will not work for or deal with certain persons, or under a fixed price, or without certain conditions.⁴ The test is the legality of the intent.⁵

On the other hand, a conspiracy to obtain a sum of money from an employer by inducing his workmen to leave him, and deterring others from engaging with him, is illegal. Any association designed to coerce workmen to become members, or to dictate terms to employers on which their business shall be conducted, by means of threats of loss, interference with their traffic, or lawful employment of other persons, is *pro tanto* an illegal combination, and any doings in furtherance of such design accompanied by damage are actionable.⁶

1. *Lee v. West*, 47 Ga. 311. *Compare Hudson v. State*, 46 Ga. 624.

Share of Crop.—Upon a suit for decoying away hands under an agreement to give a part of the crop in consideration of the labor of tillage, will be competent to look to everything resulting from the loss of labor, such as the reasonable cost of procuring other labor, the damage to crops from delay in planting or failure to work them, and such kindred damages as plaintiff by reasonable diligence could not have prevented. *McCutchin v. Taylor*, 11 Lea (Tenn.) 259.

Cases of an Aggravated Character.—Where, in such a case, aggravating circumstances in both the act and intention exist, the jury will not be confined to actual damages, but may give an additional sum to deter the wrong doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. *Smith v. Goodman & Co.*, 75 Ga. 198.

2. *Ferrell v. Boykin*, Phill. (N. Car.) 9.

3. The leading case taking this view shows the following facts: One Johanna Wagner, an opera singer, engaged to sing at the theatre of one Lumley for three months and not at any other during that time, subsequently contracting to do so; a bill was filed against

her and her new employer asking for an injunction against her singing at his theatre, which was granted, and sustained upon appeal. *Lumley v. Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; 13 Eng. Law & Eq. R. 252, and see *Webster v. Dillon*, 3 Jur., N. S. 432; *Cook v. Taunton Cooper Mfg. Co.*, 24 Boston L. Rep. 547; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; *Hayes v. Willio*, 11 Abb. (N. Y.) Pr., N. S. 157. *Compare Kimble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; *Sanguirico v. Benedetti*, Barb. (N. Y.) 315; *Haight v. Badgeley*, 15 Barb. (N. Y.) 409; *Fredricks v. Mayer*, 13 How. Pr. (N. Y.) 566; *Butler v. Jalletti*, 21 How. Pr. (N. Y.) 465; *Burton v. Marshall*, 4 Gill (Md.) 487.

4. *Carew v. Rutherford*, 106 Mass. 1; *Boston Glass Co. v. Binney*, 4 Pick. (Mass.) 425; *Bowen v. Matthewson* 14 Allen (Mass.) 499; *Walker v. Cronin*, 107 Mass. 555.

5. *Brown v. Matthewson*, 14 Allen (Mass.) 503; *Snow v. Wheeler*, 113 Mass. 185.

6. *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. (N. Y.) 48; *Com. v. Curren*, 3 Pitts. (Pa.) 143; *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *State*

Where the employer is a railroad company in the hands of a receiver, interfering with the running of the same is contempt of court, and persons guilty of interference may be punished therefor.¹

Damages suffered may of course be recovered by the person whose business has been thus affected.²

XVII. SEDUCTION OF SERVANT.—See SEDUCTION.

XVIII. LIABILITY OF MASTER ON SERVANT'S CONTRACTS.—The relation of master and servant *per se* invests the latter with no authority to bind the former, but the servant may readily have, from the particular duties assigned to him, the right to bind his master in regard to contracts. The question is properly one of agency and will be found treated under that title.³

XIX. LIABILITY OF THE MASTER FOR THE NEGLIGENCE OR UNSKILFULNESS OF SERVANT—1. **General Rule.**—A master is ordinarily liable to a third person injured through the negligence of his servant while acting within the scope of his employment. This is so because every master is bound to employ servants that are both skilful and careful, and is answerable to third persons for loss or injury sustained by them through his failure to do so.⁴

Whether an act constituting negligence was such on common law principles or is made such by statute, the doctrine of the master's liability applies to cases of injury to third persons through his servant's negligent acts.⁵

2. **Existence of Relation.**—The right of selection is the basis of the responsibility of a master for the acts of his servant. No one can be held responsible as master who has not the right to choose the servant from whose act the injury flows.⁶ And in order to establish the liability of an employer for an injury caused by the carelessness or negligence of a servant, it is not enough to

v. Stewart, 59 Vt. 273; *BOYCOTT*, 2 Am. & Eng. Encyc. of Law 512; *CRIMINAL CONSPIRACY*, 4 Am. & Eng. Encyc. of Law 582.

1. *United States v. Kane*, 25 Am. & Eng. R. Cas. (Colo.) 608, and note.

2. *Carew v. Rutherford*, 106 Mass. 1.

3. See *AGENCY*, vol. 1, p. 331.

4. *Atchison etc. R. Co. v. Galins*, 36 Kan. 749; *McIntire R. Co. v. Bolton*, 43 Ohio St. 224; 21 Am. & Eng. R. Cas. 501; *Conlon v. Eastern R. Co.*, 15 Am. & Eng. R. Cas. 99; 135 Mass. 195; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407; *Reeve* 517; 1 Salk. 441; 1 Black. Com. 431; *Pothier on Obligations* 453, 456; *Story on Bailment* 400, 406; *Wanstall v. Pooley*, 6 Cl. & F. 910; *Anderson v. Brownell*, 1 Shaw (S. Car.) 474; *Sashern v. How*, Cro. Jac. 471; *Adams v. Cole*, 1 Daly (N. Y. C. P.) 147.

Owner of Ship.—The owner of a ves-

sel is responsible for damages resulting from the lack of proper skill and knowledge on the part of those in charge of her. *St. John v. Paine*, 10 How. (U. S.) 557; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *Ward v. Chamberlain*, 21 How. (U. S.) 572; *Germania Ins. Co. v. The Lady Pike*, 21 Wall. (U. S.) 1.

The commander of a ship is responsible for the acts of those under his command. *The Eleanor*, 2 Wheat. U. S. 345.

Mortgagees of a Railroad.—And the mortgagees of a railroad, who are in possession and who manage the road, are likewise liable for the negligence of their servants. *Ballou v. Farnum*, 9 Allen (Mass.) 47.

5. *Osborne v. McMasters*, 40 Minn. 103.

6. *Boswell v. Laird*, 8 Cal. 469; *Du Pratt v. Lick*, 38 Cal. 691; *Kelley v. Mayor*, 1 Kernan (N. Y.) 436; *Blake*

show that the latter was at the time acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant.¹

Corporations are liable for the acts of their servants while engaged in the business of their employment to the same extent and in the same manner that individuals are liable under like circumstances.²

v. Ferris, 1 Selden (N. Y.) 48; *Stevens v. Armstrong*, 2 Selden R. 493; *Sproul v. Hemmingway*, 14 Pick. (Mass.) 1; *Story on Agency*, § 453.

1. *Hexamer v. Webb*, 101 N. Y. 377; 54 Am. Rep. 703; *King v. New York etc. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 317; *Pickens v. Diercker*, 21 Ohio St. 212; *Brown v. Purviance*, 2 H. & G. (Md.) 316; *Norton v. Wiswall*, 26 Barb. (N. Y.) 618; *Laugher v. Painter*, 5 B. & C. 547; *Knight v. Fox*, 5 Exch. 721; *Stables v. Eley*, 1 C. & P. 614; *Kimball v. Cushman*, 103 Mass. 194; *Norris v. Koehler*, 41 N. Y. 42; *Wood v. Cobb*, 13 Allen (Mass.) 58; *Cincinnati v. Stone*, 5 Ohio St. 38; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604; *Wightman v. Washington*, 1 Black 39; *Moore v. Chicago etc. R. Co.* (Miss.), 9 Am. & Eng. R. Cas. 401.

2. *Ranger v. The Great Western Ry. Co.*, 5 H. L. Cas. 72; *Thayer v. Boston*, 19 Pick. (Mass.) 571; *Frankfort Bank v. Johnson*, 24 Me. 490; *Muster v. Chicago etc. R. Co.*, 61 Wis. 325; 18 Am. & Eng. R. Cas. 113; *Angell v. Ames on Corp.*, §§ 382, 388; *Com. v. Brockton St. Ry. Co.* (Mass.), 30 Am. & Eng. R. Cas. 632.

Negligence of Third Persons—Legislative Act.—Under the provisions of Mass. Pub. St., ch. 112, § 212, that, certain cases of death occasioned by the negligence of a corporation, etc., the damages shall be "assessed with reference to the degree of culpability of the corporation, or of its agents or servants," the corporation is not rendered liable by showing that it had assumed a contractual or quasi contractual responsibility for third persons who were not its servants, but through whose negligence the injury happened. *Littlejohn v. Fitchburg R. Co.* (Mass.), 2 L. R. A. 502.

Acceptance of Services Without Previous Contract.—A contract or for a job, by accepting and paying for work done thereon by a mechanic without his prior order or authority, does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, not

a part or result of the work itself, such as carelessly letting fall a brick. *Coomes v. Houghton*, 102 Mass. 211; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *Linton v. Smith*, 8 Gray (Mass.) 147; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Wood v. Cobb*, 13 Allen (Mass.) 58.

Person in Temporary Charge of Team.

—Defendant was boarding with his father in law, who took charge also of his horses. Defendant's brother in law took more or less care of the same and drove them frequently, it not appearing that he was paid for so doing. One day while riding one of them violently on the highway he injured a third person, while on his way to purchase hay for said horses. *Held*, that he was to be considered sufficiently in the employ of the defendant to render him liable for the injury. *Kimball v. Cushman*, 103 Mass. 194; *Norris v. Kohler*, 41 N. Y. 42; *Cincinnati v. Stone*, 5 Ohio St. 38; *Wood v. Cobb*, 13 Allen (Mass.) 58; *Brackett v. Lubke*, 4 Allen (Mass.) 138; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Chicago etc. R. Co. v. McCarthy*, 20 Ill. 385; *Schwartz v. Gilmore*, 45 Ill. 455; *McGuire v. Grant*, 25 N. J. L. 356; *Clark v. Vermont etc. R. Co.*, 28 Vt. 103; *Pawlet v. R. & W. R. Co.*, 28 Vt. 298; *Norton v. Wiswall*, 26 Barb. (N. Y.) 610; *Gilbert v. Black*, 4 Duer (N. Y.) 423; *Boswell v. Laird*, 8 Cal. 469.

Injury Arising from Disobedience.—

H sent his servant and team to deliver a load of paper to T, four miles distant, directing him to return thence by a particular route, getting a load of wood on the way. When he arrived T requested him to go on with the paper to a station four miles farther, and there get some freight, pay the freight bill, and bring the freight to him. The servant drove to the station, and while there left his horses unhitched, and they ran away and injured the property. It was held that the servant was not to be regarded as at the time in the employment of H, and that H was not liable. *Stone v. Hills*, 45 Conn. 44.

Negligence.—Instruction held erroneous as indicating that term "negligence"

But generally a lessor railway company is not liable to its servant for an injury caused by the negligence of the servants of the lessee railway company.¹

If a person who is bound to perform a duty leaves that duty to be performed by another, by himself neglecting to perform it, when its performance becomes a necessity, the person discharging the duty, although voluntarily and gratuitously, is in law regarded as the servant of him upon whom the duty is imposed, to the extent of charging him with liability for the improper execution of the work.²

is to be considered as synonymous with intention on servant's part to inflict injury. *Hays v. Gainesville Street R. Co.* (Tex.), 34 Am. & Eng. R. Cas. 97.

Railroad in Hands of Contractors.—In a suit against a railway company for damages caused from personal injuries inflicted by the alleged negligence of the employees on a railway train, it was shown that both the train and the road belonged to the company, though the road had not been formally received from the contractors who constructed it. The engineer, conductor and employees were, when the accident occurred, employed and paid by the company, and could be discharged on complaint of the contractor. *Held*: (1) That these facts, unexplained, would make the company liable for the negligence of the engineer and its other employees on the train. (2) That if the train was run by the company with its own employees, for the purpose of transporting construction material for the contractors, the company would be responsible to anyone not an employee for injury received by the negligence of those operating the train, even though the contractors had the right to determine when, where and to what extent supplies should be transported, and to that extent had the control of the company's train and employees. (3) It would seem that, even if the employees operating the train, who were employed and could be discharged by the company alone, were yet operating the train in transporting supplies according to the directions, and subject to the will, of the contractors, they would still be the servants of the company, which would be responsible in damages for their negligence. *Citing Quarman v. Burnett*, 6 M. & W. 499; *Michael v. Stanton*, 3 Hun 462, and other cases cited in the opinion; *Burton*

v. G. H. & S. A. R. Co., 61 Tex. 526. This case distinguished from *Cunningham v. Railroad Co.*, 51 Tex. 509.

1. *Clark v. C. B. & Q. R. Co.*, 92 Ill. 43.

Servant of Lessor Railway Company.

—Where one railway company acquires the right to run its trains over a portion of the road of another company by a contract, in which it is agreed, its trains, while on such leased road, shall be under the control and direction of the yard master of the latter road, at such place and for the time being will be the servant of the lessee company, and it will become liable for an injury caused to another from the negligent acts of such yard master, the same as if he was its own employee on its own road. *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1.

Sleeping Car Porters.—In cases involving the responsibility of railroad companies for injuries sustained by passengers, the porter and other employees of a sleeping car company, forming part of a railway company's train, will be considered as the servants and employees of the railway company, and such company will be liable for the negligence of such persons whereby a passenger is injured. *Williams v. Pullman Palace Car Co.*, 40 La. An. 417; 33 Am. & Eng. R. Cas. 414; *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225; *Cleveland etc. R. Co. v. Walroth*, 8 Am. & Eng. R. Cas. 371; 38 Ohio St. 461. And see *Nevin v. The Pullman Palace Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 93.

2. *Wood's Master and Servant*, § 305; *Oil Creek etc. R. Co. v. Keighron*, 74 Penn. St. 316; *Quarman v. Burnett*, 6 M. & W. 499, 509, 510; *Randleson v. Murray*, 8 Ad. & El. 109; *Laugher v.*

3. Scope of Employment.—In all cases, in order to recover, it must be shown that the act committed was within the scope of the servant's employment.¹ And a master cannot be relieved from respon-

Pointer, 5 B. & C. 547; *Dalyell v. Tyrer*, 1 E. B. & E. 899; *Spoone v. Hemmingway*, 14 Pick. (Mass.) 1; *Brady v. Giles*, 1 M. & R. 494; *Milligan v. Wedge*, 4 P. & D. 714; 1 Q. B. 714; *Murphy v. Caralli*, 10 Jur., N. S. 1207; 13 W. R. 165.

1. In illustration of this principle see the following cases, in which the master was held liable:

Servant of railroad company arresting robber of company. *Allen v. London* etc. R. Co., L. R., 6 Q. B. 65; *Paulton v. G. W. R. Co.*, L. R., 2 Q. B. 534; *Goff v. Great Northern R. Co.*, 3 E. & E. 672; *Edwards v. London* etc. R. Co., L. R., 5 C. P. 445; *Porter v. C. R. I. & P. R. Co.*, 41 Iowa 358; *Mali v. Lord*, 39 N. Y. 381.

Servant of lumber yard piling wood in highway. *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

Farm servant burning house while cleaning chimney. *McKenzie v. McLeod*, 10 Bing. 385; *Keith v. Kier*, 19 C. (Sc.) 679; *Simons v. Monier*, 29 Barb. (N. Y.) 419; *Serandat v. Saisse*, L. R., 1 C. P. 152; *Woodman v. Joiner*, 10 Jur., N. S. 852; *Williams v. Jones*, 3 H. & C. 256.

Inn keeper's servant neglecting to fully harness horse. *Hall v. Warner*, 60 Barb. (N. Y.) 198.

Servant of ferry company towing burning barge. *Aycrigg v. Erie R. Co.*, 30 N. J. L. 460.

Servant of railroad company leaving fence bars down. *Chapman v. New York* etc. R. Co., 33 N. Y. 369.

Servant of railroad company cutting loose burning boat. *Thames Steamboat Co. v. R. Co.*, 24 Conn. 40.

Farm servant violently riding strayed horse. *Dalrymple v. McGill*, Hume (Sc.) 387; *Goodman v. Kennell*, 3 C. & P. 168; *Weldon v. New York* etc. Co., 5 Bos. (N. Y.) 596.

Servant of railroad company assaulting passenger. *Walker v. The South Eastern R. Co.*, C. P., 23 L. T. R. 14.

Servant of railroad company maliciously frightening horse. *Toledo* etc. R. Co. *v. Harmon*, 47 Ill. 298.

Servant of municipality negligently removing flag staff. *Gilmartin v. New York City*, 55 Barb. (N. Y.) 239.

Servant of railroad company re-

moving trespasser. *Ramsden v. Bost.* etc. R. Co., 104 Mass. 117; *Bayley v. The Manchester* etc. R. Co., L. R., 7 C. P. 415; *Goff v. The Great Northern R. Co.*, 3 El. & El. 672; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Holmes v. Wakefield*, 12 Allen (Mass.) 580; *Lovett v. Salem* etc. R. Co., 9 Allen (Mass.) 557; *Kline v. C. P. R. Co.*, 37 Cal. 400; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343.

Farm servant stabling horse afflicted with glanders on the premises of another. *Baird v. Graham*, 1 Stuart (Sc.) 578.

Farm servant setting dog on cattle. *Steele v. Smith*, 3 E. D. Smith (N. Y.) 321.

Toll keeper; injury by dog of. *Baker v. Kinsey*, 38 Cal. 631.

Servant Removing Debris.—A master is liable for injuries that may be done neighboring property while workmen hired by him are engaged in removing debris from a building damaged by fire belonging to him. *Dillon v. Hunt*, 82 Mo. 150.

Stretching of Telephone Wire.—Telephone company held liable in damages for the death of a person driving along a highway caused by a wire left stretched across the same by one of its servants. *Pennsylvania Tel. Co. v. Varnau* (Pa.), 1888, 5 Atl. Rep. 624.

Servant of Gas Company.—Appellant, the Louisville Gas Company, sent its agent with directions to turn off the gas from appellee's premises. By means of a key he proceeded to do so, but in such manner as that when appellee's wife went into the cellar of the building with a lighted candle, an explosion occurred which burned her so badly as to endanger her life. Held, that the negligent act of the company's agent was the proximate and necessary cause of the injury, and the company was properly held bound for his negligence. *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 433.

Guard Dangerous Spot.—Likewise where a master directed his servant to receive bags of shavings thrown from an upper floor, and the servant undertook to guard the place, but did it so inefficiently that plaintiff, who was passing by, was struck by a bag thrown down.

sibility by ordering a servant to be cautious while performing an act within the scope of his employment;¹ nor where the servant is guilty of an abuse of authority.²

Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed are outside of his authority.³

4. Improper Execution of Lawful Act.—Where an injury occurs to a third person through the improper execution by a servant of a lawful act, the master alone is liable therefor.⁴

Post v. Stockwell, 44 Hun (N. Y.) 28.

Servant of Upper Tenant Allowing Water to Overflow.—The occupant of an upper tenement is liable for damage done to the lower one by an overflow of water, caused by the negligence of his servant in leaving a faucet open. *Simonton v. Loring*, 68 Me. 164.

See in this connection *Fletcher v. Rylands*, L. R., 3 H. L. 340; *Ross v. Fedden*, L. R., 7 Q. B. 661; *Eakin v. Brown*, 1 E. D. Smith (N. Y.) 42; *Losee v. Buchanan*, 51 N. Y. 476; 1 *Thompson on Neg.* 105.

Scope of Employment—Instructions.—Instructions that if employees permitted engine to be moved without consent of engineer, whether within scope of their employment or not, company would be liable, held not a ground for reversal. *Lakin v. Oregon Pac. R. Co.*, 15 Oreg. 220; 34 Am. & Eng. R. Cas. 500.

1. *Tuberville v. Stamp*, 1 Salk. 13; *Baird v. Hamilton*, 4 Shaw (S. Car.) 790.

2. *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Philadelphia etc. R. Co. v. Philadelphia etc. Tow Boat Co.*, 23 How. (U. S.) 209; *Texas etc. R. Co. v. Capps* (Tex.), 16 Am. & Eng. R. Cas. 118; *Chicago etc. R. Co. v. Conklin*, 32 Kan. 55; 16 Am. & Eng. R. Cas. 116; *Isaacson v. New York etc. R. Co.*, 16 Am. & Eng. R. Cas. 188; 94 N. Y. 278.

3. *New Orleans etc. R. Co. v. Hanning*, 15 Wall. (U. S.) 649; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Pittsburgh etc. R. Co. v. Kirk*, 102 Ind. 399. In the latter case, where a section foreman, returning with his crew and hand car from work, en-

countered obstructions on the line of his employer's road, and thereupon directed the car to be transferred to the track of a parallel line operated by another company, as occasionally had been done before, but without the knowledge or consent of either company, and while proceeding on such track his car was negligently propelled against the car containing the section men of such road, whereby one of its employees was injured.

4. *Denny v. Manhattan Co.*, 5 Den. (N. Y.) 639; *Colvin v. Holbrook*, 2 N. Y. 126; *Blockstock v. R. R. Co.*, 20 N. Y. 48; *Wanstall v. Pooley*, 6 Cl. & F. 910; *Anderson v. Brownell*, 1 Shaw (S. Car.) 474; *Isaacson v. New York etc. R. Co.*, 94 N. Y. 278; 16 Am. & Eng. R. Cas. 278; *St. Louis etc. R. Co. v. Marshall*, 78 Mo. 610; 18 Am. & Eng. R. Cas. 248; *Harriman v. Pittsburgh etc. R. Co.*, 45 Ohio St. 11; 32 Am. & Eng. R. Cas. 37; *Atchison etc. R. Co. v. Thul*, 32 Kan. 255.

Defendant was the owner of a ferry boat running across the Hudson River between H and A. When the boat was making its regular trip across from A to H, the pilot in charge took on at A a boatman, agreeing without compensation to put him on board his boat, which was part of a tow passing up the river. Similar acts had occasionally been done before, but without the knowledge or consent of the defendant. The ferry boat diverged from its course to reach the tow, and, through the negligence of those in charge, collided with a canal boat attached thereto, upon which was plaintiff's intestate, who was thrown by the collision into the river and drowned. In an action to recover damages for the death, held that those in charge of the ferry boat were,

5. Acts Beyond Scope of Employment.—(See *post*, 11, DRIVING ON HIGHWAY).—Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.¹

And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is his own.²

Thus it has been held that where proper care has been observed in selecting honest and faithful officers, a bank is not responsible for a loss resulting from carelessness not in the course of the officer's business.³

Whether a servant was acting in the course of his employment when he committed a negligent or tortious act is a question of fact for the jury.⁴

6. Servant Employed by Compulsion.—But where a person, or corporation, is compelled by law to employ an individual in a given

at the time of the accident, engaged in the defendant's business, and he was responsible for their negligent acts; and that, therefore, a direction of a verdict for him was error. *Quinn v. Power*, 87 N. Y. 535; 41 Am. Rep. 392, *overruling* 17 Hun (N. Y.) 102.

1. *Little Miami etc. R. Co. v. Wetmore*, 19 Ohio St. 110.

A corporation owning a parlor car in use on a railroad, under an agreement between it and the railroad corporation, is not liable for an injury caused to a person not a passenger by the porter of the car, who was in its employ, throwing from the car a bundle, containing his soiled clothing and other personal property, solely for his own convenience. *Walton v. New York Central Sleeping Car Co.*, 139 Mass. 556.

The defendant was a corporation owning and maintaining a toll bridge. The bridge extended across the river, and a toll house was near one end of it. The toll keeper lived there, and one day some of his furniture was removed to the yard in front of his house. The day was windy; the horse of the plaintiff while passing the house took fright at a portion of the drapery of a lounge fluttering in the wind. He was thrown out and injured, and brought suit against the bridge company to recover damages. *Held*, that the company was not liable, the premises being leased to the toll keeper, and beyond their control. *Wiltse v. State Bridge Co.*,

63 Mich. 639; 16 Am. & Eng. Corp. Cas. 118.

2. 2 Thompson on Neg. 885, 886; *Shearm. & R. Neg.*, §§ 62, 63; *Cooley on Torts* 533; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Storey v. Ashton*, L. R., 4 Q. B. 476; *Mitchell v. Cresswell*, 13 C. B. 237; *McClenaghan v. Brock*, 5 Rich. (S. Car.) 17; *Sheridan v. Charlick*, 4 Daly (N. Y.) 338; *Courtney v. Baker*, 37 N. Y. Super. Ct. 249.

Servant Acting in His Own Affairs.—Owners of a foundry, who give the ashes to their engineer in consideration of his taking them from the furnace after working hours, are not liable for damage to a child who falls into them and is burned, although the engineer, for years before the accident, deposits them without guards in a town on an open lot, which he obtains for the purpose, opposite the foundry. *Burke v. Shaw*, 59 Miss. 445; 42 Am. Rep. 390.

Permission of Conductor to Ride in Baggage Car.—A conductor cannot authorize a passenger to ride in a baggage car contrary to rules. *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; 1 Am. & Eng. R. Cas. 87.

3. *White v. Bank*, 1 Brewst. (Pa.) 234. In this case it was also held that a bank is responsible for securities delivered to a wrong person by a default, mistake, carelessness or misconduct of any officer of such bank.

4. *Redding v. South Carolina R. Co.*, 3 S. Car. 1.

matter, no liability attaches for his tortious or negligent acts.⁻¹

7. Protection of Master's Interests.—It is also well settled that a master is ordinarily liable for injuries caused by his servant in preventing damage or loss to property of the master.²

8. Employment of Assistant by Servant.—And where a servant employs a third person to perform an act within the servant's employment, and injury results to another, the master is liable the same as though his servant employed no agent.³

9. Servant Deviating from Instructions.—The master is also liable where the employee or servant, while engaged in the prosecution of the master's business, deviates from his instructions as to the manner of doing it.⁴

10. Carriers of Passengers—(See vol. 2, p. 738).⁵

11. Driving Upon Highway—Injury to Horses.—Where a servant drives his master's horse so negligently as to injure the person or property of another, the master is liable for the damage.⁶ No lia-

1. *James v. San Francisco*, 6 Cal. 530; *De Forrest v. Wright*, 2 Mich. 368; *Milligen v. Wedge*, 12 Ad. & El. 237. As where, as in above case, a municipal corporation is obliged to let a contract to the lowest bidder. *Boswell v. Laird*, 8 Cal. 492.

2. *Estes v. Southwick*, 7 Cush. (Mass.) 385; *Wolf v. Mersereau*, 4 Duer (N. Y.) 473; *Johnson v. Barber*, 5 Gilm. (Ill.) 425; *Limpus v. Omnibus Co.*, 1 H. & C. (Exch.) 528; *Croft v. Allison*, 4 B. & Ald. 590.

3. *Althorff v. Wolfe*, 22 N. Y. 355; *Mayor v. Bailey*, 2 Den. (N. Y.) 433; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Simons v. Monier*, 29 Barb. (N. Y.) 419; *Wichtrecht v. Fasnacht*, 17 La. An. 166; *Booth v. Mister*, 7 C. & P. 66; *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 M. & W. 710; *Huzzey v. Field*, 2 C. M. & R. 432; *Chandler v. Broughton*, 1 C. & M. 29; *Randleson v. Murray*, 8 Ad. & El. 109; *Wheatley v. Patrick*, 2 M & W. 650; *Bush v. Steinman*, 1 B. & P. 404.

4. *Atchinson etc. R. Co. v. Randall*, 40 Kan. 421; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Newman v. Jones*, 20 Ir. L. T. 303; *Ochenbein v. Shapley*, 85 N. Y. 214.

So held where a car company let a pistol, which he was carrying for a passenger, fall, although he was expressly forbidden to carry any baggage for passengers. *Heenrich v. Pullman etc. Co.* (Oreg.), 18 Am. & Eng. R. Cas. 379; 20 Fed. 100. And see *Ramsden v. Bost. etc. R. Co.*, 104 Mass. 117; *Fuller v. Voght*, 13 Ill. 285; *Oxford v. Peters*, 28 Ill. 435; *Foster v.*

Essex Bank, 17 Mass. 508; *Mate v. Lord*, 39 N. Y. 381; *Wharton on Neg.*, § 157; *Cooley on Torts*, § 539; *McClenaghan v. Brock*, 5 Rich. L. (S. Car.) 17; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468.

Where a salesman in a gun and ammunition store was requested by a customer to load a gun that he might see its working, and refused to purchase unless he did load it, whereupon the salesman loaded the gun, which was accidentally discharged, wounding the plaintiff, it was held that the employer was liable for the injury, and that the fact that the salesman disobeyed the instructions of his employer in loading the gun made no difference. *Garretzen v. Duenckel*, 50 Mo. 104.

Where a passenger is injured in a collision, it is no defence on the part of the railroad company that the engineer in charge of the train disobeyed orders in using the track where the accident occurred. *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 469.

5. *Smith v. Consumers' Ice Co.*, 52 N. Y. Superior Ct. 430; *Schaefer v. Osterbrink*, 67 Wis. 495; 58 Am. Rep. 875; *Molbus v. Herrmann*, 108 N. Y. 349; *Bartons Hill Coal Co. v. Reid*, 3 McQueen (S. Car.) 283; *Russell v. Gray*, 13 Ala. 131; *Paulton v. Great Western R. Co.*, L. R., 2 Q. B. 534.

Where a cab owner furnishes team to drivers for a certain sum per day, the relation of master and servant exists between them as to third persons. *Powles v. Hider*, 6 E. & B. 207; *Fowler v. Locke*, L. R., 7 C. P. 272.

Parent and Child.—The relation of

bility attaches, however, where the servant was blameless, as where a horse becomes frightened and does an injury while being driven.¹

If one agrees to furnish another with a team and suitable driver, he is guilty of negligence if he does not furnish such a driver, and he must bear all loss or damage occasioned to the team in consequence of the incapacity and negligence of the driver.² And it is immaterial that the person hiring expressly asked for the services of the particular driver.³

the defendants was that of father and son. The son was twenty-eight years old, and, while living with his father as a hired man on his farm, took his father's horse and drove three miles to the railroad depot to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. The horse, tied to a post in the rear of the depot, where the defendants were accustomed to hitch, broke away, ran into the plaintiff's team and injured him. The referee found that the son in tying the horse "did not exercise the prudence of an average prudent man." *Held*, that the father was not liable, but that the son was; that licence to use the horse could not be inferred from the fact of former use without leave. *Way v. Powers*, 57 Vt. 135.

Evidence showing, among other things, that a minor son was in the habit of driving his father's team to convey members of the family to and from church, in accordance with the custom of the family, with the knowledge and acquiescence of the father and afterwards of an older daughter, who, in the father's absence, was left in general charge of his family, business, and property, is held sufficient to charge the father with liability for the negligence or wilful misconduct of the son in the management of the team while so driving it. *Schaefer v. Osterbrink*, 67 Wis. 495; 58 Am. Rep. 875.

The liability of the servant under a statute relating to the law of the road is no bar to an action against the master at common law to recover for his servant's negligence. *Reynolds v. Hanrahan*, 100 Mass. 313.

1. *Holmes v. Mather*, L. R., 10 Exch. 261; *Weldon v. Harlem etc. R. Co.*, 5 Bosw. (N. Y.) 576.

2. *Ames v. Jordan*, 71 Me. 540; 36 Am. Rep. 352.

3. *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516; 45 Am. Rep. 54.

G and S occasionally exchanged labor with their teams. On one occasion G sent a driver with a team to draw some material for S. It was held that while so employed the driver was the servant of G, and S was not liable for the negligence of such driver. *Michael v. Stanton*, 3 Hun (N. Y.) 462; *Huff v. Ford*, 126 Mass. 24.

Team and Driver Let to City.—The defendant's horse kicked a loose shoe through the plaintiff's window glass. The horse was being driven by a person paid by the defendant, and by the latter let with a wagon by the day to a city in the work of paving streets. It was under the sole management of that person whose duty it was to keep it properly shod. *Held*, that the defendant was liable for the injury. *Huff v. Ford*, 126 Mass. 24; 30 Am. Rep. 645. And see *Crockett v. Calvert*, 8 Ind. 127.

Hirer Agreeing to Furnish Driver.—But where the owner of a team, after hiring it out and binding himself to furnish a driver, makes a temporary arrangement with the other party whereby the latter takes the team into his own charge and promises to furnish a driver himself if he has occasion to use it, the transaction being for the benefit of both, amounts to a bailment for hire, and the party in possession of the team is bound to take such ordinary care of it as a prudent owner would take. And the driver whom he furnishes is his servant and not that of the owner of the team. *Hofer v. Hodge*, 52 Mich. 372; 50 Am. Rep. 256.

Negligence of Servant of Inn Keeper.—As where the hirer of a horse and buggy entrusted the horse to the servant of an inn keeper to be fed, by whose negligence the bit was not replaced, and the horse, becoming unmanageable, damaged himself and the buggy, in this case it was held that the hirer was liable to the owner for the damage, and as between them the servant of the inn keeper must be regarded as the servant of the hirer. *Hall v. Warner*, 60 Barb. (N. Y.) 198.

It may be laid down as a general rule that while the hirer of a team with driver is liable for the acts of the driver done in pursuance of his orders, the owner of the team is liable for the results of his incompetency.¹

A hirer of a horse is liable where an injury occurs to a third person while being driven by a friend of the hirer.²

And it has been held in England that a passenger by one line of public conveyances injured by collision with the vehicle of another and opposition line, the drivers of both carriages, being negligent, can proceed against either line, or both of them.³

When a servant in driving his master's team, not in the master's business, but for private purposes of his own, carelessly does an injury, the master is not liable.⁴ But the contrary is the rule where the same is entrusted to the servant generally to be used at his discretion, he doing such business as he can in the employment of the same.⁵ As to law of the road, and liability of master where servant violates rules, see LAW OF THE ROAD.

Where a person placed his mare at livery, and instructed a servant of the proprietors of the stable to take her out for exercise, such, however, being no part of the contract of livery, and while the servant had her out for such purpose she died, the proprietors of the stable cannot be held liable to the owner, though the mare was injured by, and died in consequence of, the immoderate riding, and carelessness of their servant. *Adams v. Cost*, 62 Md. 264; 50 Am. Rep. 264.

Unskilful Driver—Instructions.—Instructions as to failure of defendant to employ prudent street car drivers, held argumentative and improper. *Hays v. Gainesville etc. R. Co.* (Tex.), 70 Tex. 602; 34 Am. & Eng. R. Cas. 97.

Team Let to Travelling Salesman.—Where a traveling agent of a firm, to solicit goods, paid by salary, though not under particular instructions as to route, without disclosing his employers, hired, at a livery stable, a team and buggy to go to a neighboring town in the prosecution of his business, and the team and buggy were injured through his negligence, it was held that he was the servant or agent of the defendants in the hiring and use of the team, and for the damages resulting from his negligence they were responsible. *Pickens v. Diecker*, 21 Ohio St. 212.

1. *New Orleans etc. R. Co. v. Norwood*, 62 Miss. 565; *Ames v. Jordan*, 71 Me. 540; *Crockett v. Colvert*, 8 Ind. 127; *De Voin v. Michigan Lumber Co.*, 64 Wis. 616; 54 Am. Rep. 649;

Quarman v. Burnett, 6 M. & W. 499; *Laugher v. Pointer*, 5 B. & C. 572; *Fenton v. Packet Co.*, 8 Ad. & El. 835; *Dalyell v. Tyrer*, El. Bl. & El. 899; *Kimball v. Cushman*, 103 Mass. 194; *Hall v. Pickard*, 3 Camp. 187; *Croft v. Allison*, 4 B. & Ald. 590; *McLaughlin v. Pryor*, 4 Sc. (N. R.) 665.

2. *Wheatley v. Patrick*, 2 M. & W. 650.

3. *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, 5 Exch. 244.

Driver of Hack in Exclusive Control.—But a person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence. *Little v. Hackett*, 116 U. S. 366.

4. *Kuhn v. Singer Mfg. Co.*, 26 Fed. Rep. 912; *Cavanagh v. Dinsmore*, 19 N. Y. 465; *Sheridan v. Charlick*, 4 Daly (N. Y.) 338.

But if the servant, when doing the wrong, was employed in the service of the master, it is no defence for the master that he was also, and in some degree, acting in his own business. *Patton v. Rea*, 2 C. & B. 605. And see in this connection *Mitchell v. Crassweller*, 13 C. B. 237; *Morier v. St. Paul M. & M. R. Co.*, 31 Minn. 364; *Sleath v. Wilson*, 9 C. & P. 607; *Whatman v. Pearson*, L. R., 2 C. P. 422; *Storey v. Ashton*, L. R., 4 Q. B. 476.

5. *Mulvehill v. Bates*, 31 Minn. 364; 47 Am. Rep. 796; *Venables v. Smith*, L. R., 2 Q. B. Div. 279.

12. Servants of Charitable Institutions.—A charitable corporation, having no funds which have not been contributed for the purposes of charity cannot be rendered liable for injuries occasioned by the negligence of its servants or agents.¹

13. Servants of Municipality.—When a municipal corporation elects or appoints an officer, in obedience to or by authority of an act of legislature, to perform a public service in which such corporation has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed for the general welfare of the inhabitants, or of the community, such officer cannot be regarded as a servant or agent for whose negligence or want of skill in the performance of his duties the city will be liable.²

14. Servants of School Districts.—Upon the ground that a school district is a public charity, such institutions cannot ordinarily be held for the negligence of their employees.³

15. Servant of Unsound Mind.—While as a rule any mental disease or infirmity which will excuse the servant from criminal responsibility, will also excuse the master from civil responsibility, this

1. *Fire Ins. Patrol v. Boyd* (Pa.), 112 Pa. St. 269; 16 Am. & Eng. Corp. Cas. 466.

Hospital.—Corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529.

2. *Dillon's Mun. Corp.*, §§ 39, 754, 758, 760, 773, 776; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Fisher v. Boston*, 104 Mass. 187; *Buttrick v. Lowell*, 1 Allen (Mass.) 172; *Jewett v. New Haven*, 38 Conn. 368; *Torbush v. Norwich*, 38 Conn. 225; *Small v. Danville*, 51 Me. 359; *Mitchell v. Rockland*, 52 Me. 118; *Underhill v. Manchester*, 45 N. H. 214; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Elliott v. Philadelphia*, 7 Phila. (Pa.) 128; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Western College v. Cleveland*, 12 Ohio St. 375; *Detroit v. Corey*, 9 Mich. 165, 184; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Harrison v. Baltimore*, 1 Gill (Md.) 264; *Baltimore v. Poultney*, 25 Md. 107; *Richmond v. Long*, 12 Gratt. (Va.) 375; *White v. Charleston*, 2 Hill (S. Car.) 571; *Dargan v. Mobile*, 31 Ala. 469; *Cheaney v. Hooser*, 9 La. An. 330; *Stewart v. New Orleans*, 9 La. An. 461; *Lewis v. New Orleans*, 12 La. An. 190; *Wilde v. New Orleans*, 24 La. An. 15; *Fauvia v. New*

Orleans, 20 La. An. 410; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559; *Ward v. Louisville*, 16 B. Mon. (Ky.) 184; *Patch v. Covington*, 17 B. Mon. (Ky.) 722; *Murtaugh v. St. Louis*, 44 Mo. 479; *McDonald v. Redwing*, 13 Minn. 38; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Weber v. San Francisco*, 1 Cal. 455. See PUBLIC OFFICERS AND AGENTS.

Thus a city is not liable for an injury sustained by reason of the negligence of a laborer employed by its highway surveyor to aid him in performing the duties of his office. *Walcott v. Swampscott*, 1 Allen (Mass.) 101.

Nor for an injury caused by the negligence of a teamster employed in transporting stone to repair a highway by the superintendent of streets, who is charged with the duty of keeping the streets in repair. *Barney v. Lowell*, 98 Mass. 570.

Nor for the negligence of an employee of the commissioners of public charities in driving an ambulance wagon belonging to the city. *Maxmillian v. Mayor of New York*, 62 N. Y. 160. And see *Condict v. Jersey City*, 46 N. J. L. 157; 4 Am. & Eng. Corp. Cas. 645; article MUNICIPAL CORPORATIONS, this work.

3. *School District v. Fuess*, 98 Pa. St. 600; *Ford v. School Dist. of Kendall Borough*, 121 Pa. St. 543. And see *Elliott v. City*, 75 Pa. St. 347; *Boyd v. Insurance Patrol*, 112 Pa. St. 269; 16

will not be the case if the master employed the servant and assigned him to duty, with knowledge of his insane condition or of his being subject to sudden fits of insanity.¹

16. Evidence—Reputation of Servant.—General reputation of a servant for carelessness is inadmissible where it is sought to charge his master;² the issue in such cases being confined to the question of negligence at the time of the occurrence in question.³ And furthermore the mere fact that an accident occurred, though evidence of negligence in that particular is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged.⁴

17. Liability of Servants Personally.—A servant is to be deemed the agent of his employer in all matters within the scope of his employment, and so long as no unlawful act is done by him, the authority of the master is a complete defence to an action against him therefor; but if he commits a trespass, or converts the goods of another, or commits any unlawful act, whether within the scope of his employment or by the express command of his master even, he is liable personally therefor.⁵

18. Joint Liability of Master and Servant.—For an injury resulting to a third person from the carelessness or negligence of a servant, while in the performance of his master's business, both the master and the servant may be joined as defendants in an action to recover damages for the injury.⁶ But a servant cannot be joined with his master in an action to recover for the owner's negligence.⁷

19. Criminal Liability of Master.—Where a master, owing a duty to the public, entrusts its performance to a servant, he is responsible criminally for the failure of his servant to discharge that duty, if its nonperformance is a crime.⁸

Am. & Eng. Corp. Cas. 466. *Compare* School Dist. v. Fuess, 98 Pa. St. 600.

1. *Christian v. Columbus etc. R. Co.*, 79 Ga. 460.

2. *Baltimore & Ohio R. Co. v. Colvin* (Pa.), 32 Am. & Eng. R. Cas. 160; 118 Pa. St. 230. In this case it was sought to introduce evidence of the general reputation of a flagman at a crossing for carelessness in an action against a railroad company, where it was alleged that the accident was caused by carelessness on his part.

Evidence of a servant's long continued and notorious habit of leaving his horse unhitched in the street is inadmissible in an action against the master as tending to show that it was done with the master's knowledge and permission. *Schulte v. Holiday*, 54 Mich. 73.

3. *Baltimore & Ohio R. Co. v. Colvin*, 32 Am. & Eng. R. Cas. 163; 118 Pa. St. 230.

4. *Buckley v. Gould & Curry etc. Co.*, 14 Fed. Rep. 833.

5. *Wood's Master and Servant*, § 324; *McClanathan v. Oswego etc. R. Co.*, 1 T. & C. (N. Y.) 501; *Harriman v. Stowe*, 57 Mo. 93; *Johnson v. Barber*, 5 Gilm. (Ill.) 425; *Hawksworth v. Thompson*, 98 Mass. 77; *Bennett v. Joes*, 30 Conn. 329; *Mitchell v. Harmony*, 13 How. (U. S.) 115; *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

6. *Wright v. Compton*, 53 Ind. 337; *Evansville etc. R. Co. v. Baum*, 26 Ind. 70. *Compare* *Bailey v. Bussing*, 37 Conn. 351.

7. *Mulchey v. Methodist Religious Society*, 125 Mass. 487.

8. *United States v. Buchanan* (N. Car.), 9 Fed. Rep. 689.

20. Master's Remedy Against Servant.—While a master is liable to third persons for injuries arising through his servant's negligence within the scope of his employment, if the master is free from fault as to the negligence in question, he may have his remedy against the servant for the damages to which he is thereby subjected.¹ And the measure of damages in such cases is the amount of the recovery against the master.²

XX. LIABILITY FOR WILFUL AND MALICIOUS ACTS OF SERVANT—

1. General Rule.—The responsibility of a master for the malicious and tortious acts of his servant, grows out of, is measured by, and begins and ends with, his control over them.³ And whether a municipal or private corporation, the lessee of a corporation, or a private individual, the master is liable to third persons, when the same are committed in the course and within the scope of the employment;⁴ although such employer did not directly author-

1. *Arnott v. Pittstown etc. Coal Co.*, 5 T. & C. (N. Y.) 143.

2. *Green v. New River Co.*, 4 T. R. 389; *Pritchard v. Hitchcock*, 6 M. & G. 165.

3. *McGuire v. Grant*, 25 N. J. L. 356; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Allegheny Valley R. Co. v. McLain*, 91 Pa. St. 442; *Sullivan v. Oregon River etc. Co.*, 12 Oreg. 392; 21 Am. & Eng. R. Cas. 391.

Persons employed by and put upon pay roll of company and paid by it are its servants, and the latter is liable for their torts. *New Orleans etc. R. Co. v. Reese (Miss.)*, 61 Miss. 581; 18 Am. & Eng. R. Cas. 110.

In order to fasten liability on a railroad company for the act of its conductor it must be shown that he was a servant of the road. The mere fact that he was paid by the defendant does not make him its servant if he ran the train of another company. *Sullivan v. Oregon River etc. Co.*, 12 Oreg. 392; 21 Am. & Eng. R. Cas. 391.

4. *Cawthorn v. Deas*, 2 Port. (Ala.) 276; *Blackburn v. Baker*, 1 Ala. 173; *Lindsay v. Griffin*, 22 Ala. 629; *Smith v. Causey*, 22 Ala. 568; *Alabama etc. R. Co. v. Waller*, 48 Ala. 459; *Mobile etc. R. Co. v. Smith*, 59 Ala. 245; *Tyson v. South etc. R. Co.*, 61 Ala. 554; *Smoot v. Mobile etc. R. Co.*, 67 Ala. 13; *Gilliam v. South etc. R. Co.*, 70 Ala. 268; *Baker v. Kinsey*, 38 Cal. 631; *Denver etc. R. Co. v. Conway*, 8 Colo. 1; *Burton v. Philadelphia etc. R. Co.*, 4 Hafr. (Del.) 252; *McDougal v. Bellamy*, 18 Ga. 411; *Kipp v. State*, 5 Blackf. (Ind.) 149; *Crawfordsville etc. R. Co. v. Wright*, 5 Ind. 252; *Evans-*

ville etc. R. Co. v. Baum, 26 Ind. 70; *Bannister v. Pennsylvania Co.*, 98 Ind. 220; *Terre Haute etc. R. Co. v. Jackson*, 81 Ind. 19; *Donaldson v. Mississippi etc. R. Co.*, 18 Iowa 280; *Hudson v. M. K. & T. R. Co.*, 16 Kan. 470; *The Leavenworth etc. R. Co. v. Forbes*, 37 Kan. 445; *Robinson v. Webb*, 11 Bush (Ky.) 482; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.) 65; *Lowell v. Boston etc. R. Co.*, 23 Pick. (Mass.) 24; *Ramsden v. Boston etc. R. Co.*, 104 Mass. 117; *Great Western etc. R. Co. v. Miller*, 19 Mich. 305; *Eckert v. St. Louis Transfer Co.*, 2 Mo. 36; *McKeon v. Citizens R. Co.*, 42 Mo. 79; *Reilly v. Hannibal etc. R. Co.*, 94 Mo. 600; *Brokaw v. New Jersey etc. R. Co.*, 32 N. J. L. 328; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *P. W. & B. R. Co. v. Quigley*, 21 How. Pr. (N. Y.) 202; *Priest v. Hudson River R. Co.*, 40 How. Pr. (N. Y.) 456; *Parker v. Erie etc. R. Co.*, 5 Hun (N. Y.) 57; *Cleveland etc. R. Co. v. Keary*, 3 Ohio St. 201; *Little Miami etc. R. Co. v. Wetmore*, 19 Ohio St. 110; *Pennsylvania R. Co. v. Vandever*, 42 Pa. St. 365; *Harrisburg v. Taylor*, 87 Pa. St. 216; *Mayor v. Brown*, 9 Heisk. (Tenn.) 1; *Milwaukee v. Davis*, 6 Wis. 377; 22 Am. & Eng. R. Cas. 277; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; s. c., 22 Am. & Eng. R. Cas. 278; *Moore v. Richmond R. Co.*, 28 Va. 745; 17 Am. & Eng. R. Cas. 531; *Baltimore R. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; *Weed v. Panama R.*

ize the wrong action, or subsequently ratify it.¹ And furthermore the master is liable for such acts without regard to the character of the servant for care and skill.²

2. Disobedient and Unnecessary Acts.—Such, also, is the rule where the acts in question were in disobedience to the master's orders,³ for it is not sufficient for the master to give proper instructions to his servants to avoid liability, but he must also see that they are obeyed;⁴

Co., 17 N. Y. 362; Craker v. Chicago etc. R. Co., 36 Wis. 657; Milwaukee etc. R. Co. v. Finney, 10 Wis. 388; Quigley v. Central Pac. R. Co., 11 Nev. 350; Goddard v. Grand Trunk R. Co., 57 Me. 202; Sherley v. Billings, 8 Bush (Ky.) 147; Isaacs v. Third Ave. R. Co., 47 N. Y. 122; Jackson v. Second Ave. R. Co., 47 N. Y. 274; De Camp v. Mississippi R. Co., 12 Ga. 348; Evansville R. Co. v. Baum, 26 Ind. 70; Philadelphia etc. R. Co. v. Wilt, 4 Whart. (Pa.) 43; Pennsylvania R. Co. v. Toomey, 37 Leg. Int. 105; New Orleans etc. R. Co. v. Harrison, 48 Miss. 112; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40; Chicago etc. R. Co. v. Bayfield, 37 Mich. 204, 205; Snyder v. Hannibal R. Co., 60 Mo. 413; Bayley v. Manchester etc. R. Co., L. R., 7 C. P. 415; Goddard v. Grand Trunk R. Co., 57 Me. 202; Poulton v. London etc. R. Co., L. R., 2 Q. B. 534.

Sufficiency of Allegation as to Scope of Employment.—A declaration alleged that "the defendant's servant, B, who was at the time watching and guarding the defendant's lumber yard and had charge thereof, unlawfully, without cause and maliciously, made an assault upon" the plaintiff to an extent specified, "all of which the said defendant's servant did wrongfully and without cause, in an unjustifiable attack upon the plaintiff, under an assumption that the plaintiff was trespassing upon the defendant's land, and without notice to leave." *Held*, on demurrer, that the declaration did not sufficiently allege that the assault was committed by B while acting within the scope of his employment as the defendant's servant. McCann v. Tillinghast, 140 Mass. 327.

Assault by Stranger.—A person knocked off a platform and robbed by one not shown to be a servant of a railroad company, is not entitled to recover under a petition charging assault by employees. Sachrowitz v. Atchison

etc. R. Co., 37 Kan. 212; 34 Am. & Eng. R. Cas. 382.

Assault by Conductor of Train.—Where the complaint averred that the plaintiff had been called from the car, beaten, bruised, and ejected by the conductor, it was held unnecessary also to aver that the conductor was acting in the line of his duty. People v. B. & A. R. Co., 60 Ga. 281.

Corporations Engaged in Ultra Vires Business.—Corporations likewise which engage in *ultra vires* business are likewise liable for torts of agents committed in the course of their employment in such business, but not where officers thereof engage therein unless the transaction was authorized or ratified. C. R. & B. Co. v. Smith, 25 Am. & Eng. R. Cas. 25; 76 Ala. 572.

1. Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350. And see Denver etc. R. Co. v. Harris, 122 U. S. 597; 31 Am. & Eng. R. Cas. 592; McGlothlin v. Madden, 16 Kan. 466; Robinson v. Webb, 11 Bush (Ky.) 464; Snyder v. Hannibal etc. R. Co., 60 Mo. 413; Gilmartin v. New York, 55 Barb. (N. Y.) 239.

2. Hays v. Miller, 77 Pa. St. 238.

3. Philadelphia R. Co. v. Derby, 14 How. (U. S.) 468; Schmidt v. Adams, 18 Mo. App. 432. See also Savings Bank v. Ward, 10 Abb. (U. S.) 203; New Orleans etc. R. Co. v. Hanning, 15 Wall. (U. S.) 649; Cohen v. Dry Docks etc. R. Co., 69 N. Y. 170; Mott v. Consumers' Ice Co., 73 N. Y. 543, 547; Pendleton v. Kinsley, 3 Cliff. (U. S.) 416; The R. F. Cahill, 9 Ben. (U. S.) 354; D. S. R. Co. v. Harris, 67 Ala. 9; Memphis etc. Packet Co. v. McCord, 83 Ind. 298; George v. Gobey, 128 Mass. 290; Chicago etc. R. Co. v. Scurr, 59 Miss. 464; Philadelphia etc. R. Co. v. Derby, 14 How. (U. S.) 468; Heenrich v. Pullman etc. P. Car Co., 20 Fed. Rep. 100; 18 Am. & Eng. R. Cas. 379.

4. Johnson v. Central Vermont R. Co., 56 Vt. 707; 19 Am. & Eng. R. Cas. 169.

or unnecessary to the prosecution of the master's business.¹

3. Servant Failing to Act Within Reasonable Bounds.—And this liability exists although the servant is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty and inflicts unnecessary and unjustifiable injury.²

4. Torts in Furtherance of Master's Business.—A master is also responsible for torts of his servant, done with a view to the furtherance of the master's business, whether the same be done negligently, wantonly, or even wilfully, but within the scope of his employment.³

So held where an engineer of a colliding engine had been forbidden to run on a certain track at the time, and has acted in disobedience of such orders. *Philadelphia etc. Co. v. Derby*, 14 How. (U. S.) 468; *Quinn v. Power*, 87 N. Y. 539; *Siegrist v. Arnot*, 10 Mo. App. 201; *French v. Cresswell*, 13 Oreg. 418; *Pennsylvania etc. R. Co. v. Langdon*, 92 Pa. St. 21, 32.

1. *Minter v. Pacific R. Co.*, 41 Mo. 503; *Craft v. Allison*, 4 B. & Ald. 590; *Baltimore R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; *Pierce v. O'Keefe*, 11 Wis. 180.

2. *Wade v. Thayer*, 40 Cal. 578; *Bank of California v. Western Union Tel. Co.*, 52 Cal. 282, 287; *Rounds v. Del. etc. R. Co.*, 64 N. Y. 129; *Cohen v. Dry Dock etc. R. Co.*, 69 N. Y. 170; *Holmes v. Wakefield*, 12 Allen (Mass.) 580; *Lovett v. Salem etc. R. Co.*, 9 Allen (Mass.) 557; *Kline v. Central Pacific R. Co.*, 37 Cal. 400; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Garretzen v. Duenckel*, 50 Mo. 104; *Heenrich v. Pullman Palace Car Co.*, 20 Fed. Rep. 100.

3. *Arasmith v. Temple*, 11 Ill. App. 39; *Buffalo Oil Co. v. Standard Oil Co.*, 3 N. Y. St. Rep. 571; *Limpus v. General Omnibus Co.*, 1 H. & C. Exch. 528; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Duggins v. Watson*, 15 Ark. 118; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Campbell v. City of Providence*, 9 R. I. 262; *Seymour v. Greenwood*, 6 H. & N. Exch. 359; 7 H. & N. Exch. 356; *Goff v. Great Northern R. Co.*, 30 L. J., Q. B. 148; *Poulton v. London etc. R. Co.*, L. R., 2 Q. B. 534; *Murphy v. Central Park etc. R. Co.*, 48 N. Y. Super. Ct. 96; *Chapman v. New York etc. R. Co.*, 23 N. Y. 369; *Pickens v. Diecker*, 2 Ohio 212; *Black-*

burn v. Baker, 1 Ala. 173; *Lindsay v. Griffin*, 22 Ala. 629; *Puryear v. Thompson*, 5 Humph. (Tenn.) 397; *Priester v. Angley*, 5 Rich. L. (S. Car.) 44; *Hewitt v. Swift*, 3 Allen (Mass.) 423; *Croft v. Allison*, 4 B. & Ald. 590; *Southwick v. Ellis*, 7 Cush. (Mass.) 385; *Andrus v. Howard*, 36 Vt. 248; *Crocker v. New London etc. R. Co.*, 24 Conn. 266; *French v. Cresswell*, 13 Oreg. 418; *Wolfe v. Mersereau*, 4 Duer (N. Y. Sup. Ct.) 473; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Fuller v. Voight*, 13 Ill. 277; *Chicago etc. R. Co. v. Flexman*, 103 Ill. 546; *Jackson v. St. Louis etc. R. Co.*, 87 Mo. 422; 25 Am. & Eng. R. Cas. 327; *Coleyer v. Pennsylvania R. Co.*, 49 N. J. L. 59; *Hewett v. Swift*, 3 Allen (Mass.) 420; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.) 465; *Sherley v. Billings*, 8 Bush (Ky.) 147; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; 1 Am. & Eng. R. Cas. 461; *Seymour v. Greenwood*, 6 H. & N. 359.

Where the plaintiff was run over and hurt by a railroad train at a crossing, it was held, in an action against the company, that the mere fact that the engineer had been actuated by personal malice and revenge did not relieve the company from liability. *Georgia R. Co. v. Newsome*, 60 Ga. 492; *Terre Haute etc. R. Co. v. Graham*, 46 Ind. 239; *Indianapolis etc. R. Co. v. McClaren*, 62 Ind. 566.

Racehorse Intentionally Fouled.—If a horse is intentionally fouled in a race, or purposely run against or interfered with by the rider of another horse, the employer of such rider is liable for the damages resulting. *McKay v. Irvine*, 11 Biss. C. Ct. (U. S.) 168.

Car Conductor.—It was so held in a

But where the employee is not acting in the course of his employment the mere purpose to serve his employer has no tendency to bring the act within its scope.¹

5. Acts Outside Scope of Employment.—On the other hand, a master is not liable for the wilful and malicious acts of his servant when they happen outside of the scope of his employment and are in no way connected with the execution of his master's business or orders.² As where a servant, in doing a particular act in a particular manner, departs from the appointed mode of performance to inflict a wanton injury.³

New York case, where a conductor of a horse car refused to stop his car fully, and threw a passenger on the ground with great violence, whereby she was seriously injured. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

Persuading Witnesses to Remain Away.—Where a clerk of a city railway company, who has assigned to him the general and special duty of looking for and arranging the evidence in cases where the company is sued by persons injured, wrongfully and without authority offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act. *Chicago etc. R. Co. v. McMahon*, 105 Ill. 485; 8 Am. & Eng. R. Cas. 68. *Compare Green v. Town of Woodbury*, 48 Vt. 5.

1. *Morrison v. Chicago etc. R. Co.*, 59 Iowa 428; 8 Am. & Eng. R. Cas. 177.

Lawless Acts Adverse to Employer's Interests.—Lawless acts of employees, adverse to interests and contrary to orders of employer cannot be imputed to it as having been done by its agents and servants. *Greisner v. Lake Shore etc. R. Co.*, 102 N. Y. 563; 26 Am. & Eng. R. Cas. 287; *Marion v. Chicago etc. R. Co.*, 59 Iowa 428; 8 Am. & Eng. R. Cas. 177; *Louisville etc. R. Co. v. Kelley*, 92 Ind. 371; 13 Am. & Eng. R. Cas. 1.

2. *Lyons v. Martin*, 8 A. & E. 512; *Coleman v. Riches*, 16 C. B. 104; *Frazer v. Freeman*, 43 N. Y. 566; *Greisner v. Lake Shore etc. R. Co.*, 102 N. Y. 563; 26 Am. & Eng. R. Cas. 287.

Unwarrantable Assault.—A railroad company is not liable for an unwarrantable assault by its servant upon a passenger. *International etc. R. Co. v. Kentle* (Tex. 1883), 16 Am. & Eng. R. Cas. 337.

Conductor of Train Carrying Off Boy.—A railroad company is not liable for the act of a conductor in wrongfully chas-

ing and seizing a boy and carrying him off on a railroad train. *Gilliam v. South etc. R. Co.*, 15 Am. & Eng. R. Cas. 138; 70 Ala. 268.

Placing of Torpedoes on Track.—It was held in an Illinois case that when a locomotive fireman, from wantonness and a desire to help celebrate the fourth of July, placed torpedoes upon the track over which his train was to pass, whereby an injury occurred, that such act was an abandonment by him of the service of the company, and that the latter was not liable for the consequences of the act. *Chicago etc. R. Co. v. Epperson*, 26 E. B. Smith (Ill. App.) 79.

3. The owner of a building instructed his servant to throw the snow from the roof into a vacant adjoining lot, where no one would be endangered. The servant disregarded the instruction and carelessly threw it into the street and injured a person. It was held that the master would be liable if the servant intentionally threw it on the passer; otherwise, not. *Cosgrove v. Ogden*, 49 N. Y. 255; *King v. N. Y. Cent. etc. R. Co.*, 66 N. Y. 181; *Althorf v. Wolfe*, 22 N. Y. 355.

Wilful Driving Into Another.—In *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, the defendant's son driving a wagon wilfully and designedly drove over and injured the plaintiff's son, a minor. *Held*, that it was an independent tort and that the defendant was in nowise liable. See *Evansville etc. R. Co. v. Baum*, 26 Ind. 70; *Croft v. Alison*, 4 B. & Ald. 590.

Likewise where the driver of a street car ran into a vehicle with an oath, exclaiming that he could smash it anyhow. *Wood v. Detroit City St. R. Co.*, 52 Mich. 402; 19 Am. & Eng. R. Cas. 129.

Porter of a Sleeping Car.—The obligation of a sleeping car company for injury to a stranger, who enters the car

6. Rule as to Passengers—(a) Generally.—This rule does not obtain, however, where there is a contract or obligation between the master and the injured party,¹ as between a common carrier of passengers and a passenger; for such a carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger.²

(b) Offensive Conduct Towards Passenger by Servant.—A passenger upon a railroad is entitled to recover damages from the company for insolent, abusive and offensive words spoken by its servants, un-

der the purpose of asking the privilege of washing his hands, and is there wantonly and without provocation assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by servants on their passengers; being a menial servant, and having no police authority whatever, and no connection with the enforcement of the rules of the service. A servant of this sort has no authority to use violence toward any person whatever, such conduct being entirely foreign to the functions of his employment. The company employing him is not responsible. *Williams v. Pullman Palace Car Co.*, 40 La. An. 87, 417; 33 Am. & Eng. R. Cas. 407.

Arrest by Clerk Upon Suspicion.—It was held in *Allen v. London etc. R. Co.*, E. L. R., 6 Q. B. 65, where a clerk on suspicion had a person arrested for abstracting money from a till, that the defendant was not liable, as it was not at all within the business of the clerk to do the act.

Assault Upon Passenger by Employee Not in Charge of Car.—Likewise where a wilful and violent assault was made upon a passenger by a servant of the company not in charge of the car conveying such person, that no recovery could be had of the company. *Evansville etc. R. Co. v. Baum*, 26 Ind. 70; *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; s. c., 1 Am. & Eng. R. Cas. 461.

Shooting Trespasser.—Where an armed watchman fatally shot a trespasser, it was held that his employer was not responsible. *Golden v. Newbrand*, 52 Iowa 59.

Assault by Servant of Inn Keeper.—An inn keeper is not liable for an assault and battery committed on a guest by one of his servants, where the assault was not within the line of the servant's

duty, and was not advised or countenanced by the master. *Curtis v. Dinneen* (Dak. 1886), 30 N. W. Rep. 148.

Fire negligently set by section men of railroad company in order to warm dinner; company held not responsible for damage done. *Morier v. St. Paul etc. R. Co.*, 31 Minn. 351; 15 Am. & Eng. R. Cas. 135; 47 Am. Rep. 793.

Distraining Nontrespassing Cattle.—In *Lyons v. Martin*, 8 Ad. & El. 512, a servant was authorized merely to distract cattle damage feasant, but he deliberately drove the cattle from the highway into his master's close, and there distrained them. *Held*, the master could not be liable, as the act was entirely unauthorized and unlawful and out of the course and scope of his employment. See *Wood v. Detroit R. Co.*, 52 Mich. 402; 19 Am. & Eng. R. Cas. 129.

1. *Weed v. Panama R. Co.*, 17 N. Y. 362; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Angell & Ames on Corp.* 404. *Howe v. Newmarch*, 12 Allen (Mass.) 55; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.) 465; *Seymour v. Greenwood*, 7 Hurl. & Norm. 354.

2. *Stewart v. Brooklyn etc. R. Co.*, 12 Am. & Eng. R. Cas. 127; 90 N. Y. 588; 43 Am. Rep. 185; *Craker v. Chicago etc. R. Co.*, 36 Wis. 657.

International etc. R. Co. v. Kentle (Tex. 1883), 16 Am. & Eng. R. Cas. 337. *Goddard's Case*, 57 Me. 202; *Wab. R. Co. v. Savage*, 110 Ind. 156; *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 414; *Evansville etc. R. Co. v. Baum*, 26 Ind. 70; *Louisville etc. R. Co. v. Kelley*, 92 Ind. 371; 13 Am. & Eng. R. Cas. 1; *Western etc. R. Co. v. Turner*, 72 Ga. 292; 8 Am. & Eng. R. Cas. 455.

The liability of the carrier does not, however, depend entirely on its duty to its passengers. *Johnson v. Chicago etc. R. Co.*, 58 Iowa 348; 8 Am. & Eng. R. Cas. 206.

less the company can show justification or other defence.¹ For it is a well established principle of law that it is obligatory upon a carrier to treat its passengers respectfully, and that if he entrusts this duty to his servant the law holds him responsible.²

(c) *Wanton Assault, Excuse for.*—No degree of carelessness or negligence on the part of a passenger will excuse a wanton and malicious assault on him by the conductor or other servant of the transportation company.³

1. *Bryan v. Chicago etc. R. Co.*, 63 Iowa 464; 16 Am. & Eng. R. Cas. 339; *Louisville etc. R. Co. v. Kelley*, 92 Ind. 371; 13 Am. & Eng. R. Cas. 1.

Actionable Language.—If, in giving reasons why certain regulations were made, an agent of a railroad uses actionable language, he, and not the company, will be liable. *Donovan v. T. & P. R. Co. (Tex.)*, 29 Am. & Eng. R. Cas. 320. But see *Bryan v. Chicago etc. R. Co.*, 63 Iowa 464; 16 Am. & Eng. R. Cas. 335.

2. *Chicago etc. R. Co. v. Flexman*, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354.

3. *Wat. etc. R. Co. v. Rector*, 9 Am. & Eng. R. Cas. 264; *Shultz v. Third Ave. R. Co.*, 89 N. Y. 242; 9 Am. & Eng. R. Cas. 412; *Chicago etc. R. Co. v. Flexman*, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354; 42 Am. Rep. 33. And see *Dillingham v. Anthony (Tex.)*, 1889, 11 S. W. Rep. 139; *Central R. Co. v. Peacock*, 69 Md. 257; *Cain v. Minneapolis R. Co.*, 39 Minn. 297; *Stewart v. Brooklyn etc. R. Co.*, 12 Am. & Eng. R. Cas. 127; 90 N. Y. 588.

But where a person, after purchasing a ticket as a passenger, got into an altercation with an employee of the company, who assaulted him, it was held that no recovery could be had of the company. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

Assault by Conductor Upon Demand of Ticket.—Where conductor assaulted passenger on demanding his ticket. *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Chamberlin v. Chandler*, 3 Mas. (U. S.) 242; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Moore v. Fitchburgh R. Co.*, 4 Gray (Mass.) 465; *Ramsden v. Boston etc. R. Co.*, 104 (Mass.) 117; *Western etc. R. Co. v. Turner*, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455; *Chicago etc. R. Co. v. Sykes*, 96 Ill. 162; 2 Am. & Eng. R. Cas. 254; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316.

Kissing Female Passenger.—Where

conductor kissed female passenger against her will. *Craker v. Chicago etc. R. Co.*, 36 Wis. 657.

Arrest of Passenger.—It is competent to prove that conductor is acting within scope of his authority in ordering passenger to be arrested. *Galveston etc. R. Co. v. Donahoe*, 56 Tex. 162; 9 Am. & Eng. R. Cas. 287. See *Lynch v. Metropolitan etc. R. Co. (N. Y.)*, 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119.

Person Asking Passage on Freight Train.—An assault by a conductor on a person asking for passage on a freight train, held to have been done within scope of his business and company held liable. *Western etc. R. Co. v. Turner*, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455. See *Shultz v. Third Ave. R. Co.*, 89 N. Y. 242; 9 Am. & Eng. R. Cas. 412.

Ejection of Colored Person.—*Redding v. South Carolina R. Co.*, 3 S. Car. 1. And see *Shultz v. Third Ave. R. Co.*, 89 N. Y. 242; 9 Am. & Eng. R. Cas. 412; *Coger v. Northwestern etc. Co.*, 37 Iowa 145.

By Brakeman—Removal of Dog.—The company was likewise held liable where a brakeman assaulted a passenger who resented the removal of his dog from the car, the passenger having first laid hands on the brakeman. *Hanson v. European etc. R. Co.*, 62 Me. 84.

In Carrying Out Supposed Order.—Likewise where a malicious and criminal assault was committed on a passenger while carrying out a supposed order. *McKinley v. Chicago etc. R. Co.*, 44 Iowa 314; *Chicago etc. R. Co. v. Flexman*, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354.

Pushing Passenger from Car.—Likewise where such employee wantonly pushes a passenger from a train. *Wabash R. Co. v. Savage*, 110 Ind. 156; 28 Am. & Eng. R. Cas. 288.

Dashing Water Upon Passenger.—Where a brakeman wilfully dashed a jet of water upon a passenger, who had refused to pay the brakeman for watering his hogs, it was held that the com-

(d) *Passengers on Vessels.*—The owners of vessels are likewise liable for the torts of the master, officers and crew when they involve a breach of the passenger contract, and are done while acting within the scope of the employment.¹

(e) *Removal of Trespassers from Train.*—The conductor of, or a brakeman upon, a railroad passenger train has authority to remove, in a lawful manner, trespasser upon the platform of a car, whether the authority is conferred by the rules of the company or not; it is implied and is incident to his position.²

pany was liable. *Terre Haute etc. R. Co. v. Jackson*, 81 Ind. 19; 6 Am. & Eng. R. Cas. 178. And see *Hanson v. European etc. R. Co.*, 62 Me. 84; *McKinley v. Chicago etc. R. Co.*, 44 Iowa 314.

Engineer Sounding Whistle.—Likewise where an engineer maliciously sounds a whistle. *Chicago etc. R. Co. v. Dickson*, 63 Ill. 151.

Baggage Master—Quarrel About Baggage.—Likewise where a baggage master struck a passenger with a hatchet in a quarrel about baggage. *Little Miami R. Co. v. Wetmore*, 17 Ohio St. 110.

Injury Through Fight in Car.—Likewise where a passenger was injured through fight in car. *Pittsburgh etc. R. Co. v. Hinds*, 53 Pa. St. 512. And see *Flint v. Transportation Co.*, 34 Conn. 554; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Bryant v. Rich*, 106 Mass. 180.

Assault Because of Expostulation as to Treatment of Another.—A common carrier of passengers is liable for a malicious assault by his servant on a passenger in his charge, the moving cause of the assault being the passenger's expostulation with the servant for an assault on a third person outside the vehicle. *Stewart v. Brooklyn etc. R. Co.*, 90 N. Y. 588; 12 Am. & Eng. R. Cas. 127; 43 Am. Rep. 185.

Ticket Agent—Dispute About Change.—In an action against railroad company for an assault committed on plaintiff by one of its employees acting as ticket agent, it appearing that the regular ticket agent was absent at the time, having left another employee, who was employed in a different line of work, in charge of the office, who got into a dispute with plaintiff about making change upon the sale of a ticket, and in course thereof, struck the plaintiff; held, that the railroad company was liable. *Fick v. Chicago etc. R. Co.*, 68 Wis. 469; 34 Am. & Eng. R. Cas. 378.

Malicious Treatment of Invalid.—

Where the conductor on a train pretended to help an invalid passenger to search for a ticket, but in reality made no search, being actuated by malicious motives, it was held that the company would be liable in exemplary damages. *Louisville etc. R. Co. v. Fleming*, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347.

Driver of Street Car.—A street car company is liable for an assault by its driver upon a passenger. *Winnegar v. Central Passenger R. Co.*, 85 Ky. 547; 34 Am. & Eng. R. Cas. 462.

False Arrest by Detective.—A false arrest by a detective employed to arrest and prosecute persons unlawfully obstructing track makes company liable. *Evansville etc. R. Co. v. McKee*, 99 Ind. 519; 22 Am. & Eng. R. Cas. 366.

1. *Chitty on Carriers*, § 335; *McGuire & Place v. The Golden Gate*, 1 McAll. (U. S.) 104; *Gibbons v. Morse*, 7 N. J. L. 253; *Block v. Bannerman*, 10 La. An. 1; *Malpica v. McKown*, 1 La. 92; *Loy v. The Steamboat F. N. Aubury*, 28 Ill. 412; *Sunday v. Gordon*, *Blatchf. & H., Adm.* 569; *Abbott v. Bradstreet*, 55 Me. 530.

It was held in a Massachusetts case that common carriers of passengers by water are liable for an assault and battery committed by their steward and table waiters on a passenger upon his interference, by a proper remark, with their rude treatment of his relative, a fellow passenger, with reference to a meal which he had taken on the boat. *Bryant v. Rich*, 106 Mass. 180. See *Coger v. North Western etc. Co.*, 37 Iowa 146; *Pendleton v. Kingsley*, 3 Cliff. (U. S.) 416.

An employer is likewise liable where his employee, the steward of a ship, insults a female passenger. *Nieto v. Clark*, 1 Cliff. (U. S.) 145. And see *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277.

2. *Hoffman v. New York etc. R. Co.*, 87 N. Y. 25; 4 Am. & Eng. R. Cas.

But where such servant, acting in the line of his duty, ejects a trespasser, the company is liable if he does it in a careless, negligent, reckless or malicious manner only.¹

537; 41 Am. Rep. 37; Kansas City etc. R. Co. v. Kelly, 36 Kan. 655; Marion v. Chicago etc. R. Co., 59 Iowa 428; 8 Am. & Eng. R. Cas. 177; Johnson v. Chicago etc. R. Co., 58 Iowa 348; 8 Am. & Eng. R. Cas. 206; Allegheny V. R. Co. v. McLain, 91 Pa. St. 442.

So have servants of engine engaged in switching. Carter v. Letc. R. Co. (Ind.); 22 Am. & Eng. R. Cas. 360.

Authority to Remove Trespasser—Evidence.—The testimony of one who had for fourteen years been in defendant's employ as fireman, engineer, brakeman and conductor, and who at the time of the injury complained of was a conductor on the branch of defendant's road where the injury occurred, to the effect that brakemen were subject to the orders of the conductors, and that the conductors' orders to their brakemen were to eject trespassers from trains, and that such were the orders of the conductor to the brakeman who did the wrong complained of, was held competent to show the authority of the brakeman to remove a trespasser from the train; and so was the testimony of other witnesses to the effect that they had many times seen brakemen eject trespassers from trains. Marion v. Chicago etc. R. Co., 64 Iowa 569. And see St. Louis etc. R. Co. v. Hendricks, 48 Ark. 177.

1. Pennsylvania Co. v. Toomey, 91 Pa. St. 442; 1 Am. & Eng. R. Cas. 461; Kentucky etc. R. Co. v. Gastineau, 83 Ky. 119; Rounds v. Delaware etc. R. Co., 4 Hun (N. Y.) 329; New York L. etc. R. Co. v. Haring, 47 N. J. L. 137; Carter v. Louisville etc. R. Co., 98 Ind. 552; 169 Am. Rep. 780; Perkins v. Missouri etc. R. Co., 55 Mo. 201; 8 Am. & Eng. R. Cas. 347; Cain v. Minneapolis etc. R. Co., 39 Minn. 297; Eastern etc. R. Co. v. Brown, 6 Exch. 327; Goff v. Great Northern R. Co., 3 E. & E. 672; Seymour v. Greenwood, 7 H. & N. 355; Bailey v. Manchester etc. R. Co., L. R., 7 C. P. 415; Moore v. Metropolitan R. Co., L. R., 8 Q. B. 36; Philadelphia etc. R. Co. v. Derby, 14 How. (U. S.) 468; Baltimore etc. R. Co. v. Blocher, 27 Md. 277; Goddard v. Grand Trunk R. Co., 57 Me. 202; Moore v. Fitchburg R. Co., 4 Gray (Mass.) 465.

And see in this connection Ramsden

v. Boston etc. R. Co., 104 Mass. 117; Drew v. Sixth Ave. R. Co., 26 N. Y. 49; Brand v. Iron etc. R. Co., 8 Barb. (N. Y.) 368; Passenger etc. R. Co. v. Young, 21 Ohio St. 518; Hanson v. European etc. R. Co., 62 Me. 84; Pennsylvania etc. R. Co. v. Vandiver, 42 Pa. St. 365; Bryant v. Rich, 106 Mass. 180; Pittsburgh etc. R. Co. v. Donahue, 70 Pa. St. 119; Ramsden v. Boston etc. R. Co., 104 Mass. 117; Healey v. City R. Co., 28 Ohio St. 23; Pendleton v. Kinsey, 3 Cliff. (U. S.) 416; Springer Transportation Co. v. Smith, 16 Lea (Tenn.) 408; Rounds v. Delaware etc. R. Co., 64 N. Y. 129; Coggins v. Chicago etc. R. Co., 18 Ill. App. 620; Shea v. Sixth Ave. R. Co., 62 N. Y. 180; Stewart v. Brooklyn etc. R. Co., 90 N. Y. 588; Terre Haute etc. R. Co. v. Jackson (Ind.), 81 Ind. 19; 6 Am. & Eng. R. Cas. 178; Wabash etc. R. Co. v. Savage, 110 Ind. 156; Johnson v. Chicago etc. R. Co., 8 Am. & Eng. R. Cas. 6; Chicago etc. R. Co. v. Flexman, 103 Ill. 546; Wabash etc. R. Co. v. Rector, 104 Ill. 296; 9 Am. & Eng. R. Cas. 264; Terre Haute etc. R. Co. v. Jackson, 81 Ind. 19; Schultz v. Third Ave. R. Co. (N. Y.), 89 N. Y. 242; 9 Am. & Eng. R. Cas. 412; McKinley v. Chicago etc. R. Co., 44 Iowa 314; Townsend v. N. Y. Central etc. R. Co., 56 N. Y. 295; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Hays v. Houston etc. R. Co., 46 Tex. 272; Hogan v. Providence etc. R. Co., 3 R. I. 88.

Assault While Attempting to Seize Baggage.—And so where a conductor committed an assault and battery in attempting to seize the baggage of a passenger in order to enforce the payment of illegal fare. Ramsden v. Boston etc. R. Co., 104 Mass. 117.

Refusal of Passenger to Assume Certain Position.—So where a passenger was ejected for refusing to comply with the arbitrary direction of the conductor as to the position he should assume in a car. Passenger R. Co. v. Young, 21 Ohio St. 518.

False Accusation of Improper Conduct.—Where a conductor ejected a passenger for alleged improper behavior toward a woman in the car, when he had not been guilty of such behavior, the company was held liable. Indianapolis etc. R. Co. v. Anthony, 43 Ind. 183.

It may be stated as a general rule that if a person who is illegally attempting to board a train is assaulted by a servant duly authorized to remove trespassers, the company is liable, but if the person assaulted is not attempting to board the train, the corporation is not liable.¹

Of Being Drunk and Disorderly.—So where a conductor ejected a passenger on a false charge of being drunk and disorderly. *Higgins v. Watervliet etc. R. Co.*, 46 N. Y. 23. See in this connection *Passenger R. Co. v. Young*, 21 Ohio St. 518; *Cain v. Minneapolis etc. R. Co.*, 39 Minn. 297.

Dragging Passenger from Carriage.—It was held in an English case, a railroad porter having acted under the erroneous impression that plaintiff was in the wrong carriage, whereupon he dragged him therefrom with violence, that such act was within the scope of his employment, and that the company was liable. *Bayley v. The Manchester etc. R. Co.*, L. R., 7 C. P. 415.

Kicking Boy from Platform.—The conductor of a railroad car kicked a boy, who was a trespasser, from the platform while the car was in motion. The company was held to be liable. *Hoffman v. New York etc. R. Co.*, 44 N. Y. Super Ct. 1. Compare *Pennsylvania etc. R. Co. v. Donahoe*, 70 Pa. St. 119.

Off Engine.—*Carter v. Louisville etc. R. Co.*, 98 Ind. 552; 8 Am. & Eng. R. Cas. 347.

Jumping Through Fear of Being Thrown Off.—Where a boy, fifteen years old, gets upon a freight train wrongfully, and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the night time, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable. *Kansas City etc. R. Co. v. Kelly*, 36 Kan. 655. And see *Wabash R. Co. v. Savage*, 110 Ind. 156; *Higgins v. Turnpike Co.*, 46 N. Y. 203; *North Western R. Co. v. Hack*, 66 Ill. 238; *Kline v. Central Pac. R. Co.*, 37 Cal. 400; *Beems v. C. R. etc. R. Co.*, 58 Iowa 150; *Keffe v. Milwaukee etc. R. Co.*, 21 Minn. 207; *Kansas City R. Co. v. Pitzsimmons*, 22 Kan. 686.

Throwing Coal at Boy.—And in an action against a company for its brakeman's expulsion of a boy from a coal train by throwing coal at him and causing him to fall, whereby his leg was crushed, the company was held liable

in damages. *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418.

Under Legislative Act.—Under a legislative act providing "that every corporation and person owning and operating a railroad shall be liable for all damages sustained by any person in consequence of the wilful wrongs, whether of commission or omission, of their agents and employees, when such wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed," a railroad company is liable for the tort of a brakeman committed in removing a trespasser from a train, whether the wrongful act be merely one of negligence or a wilful and criminal wrong. *Marion v. Chicago etc. R. Co.*, 64 Iowa 568; 8 Am. & Eng. R. Cas. 177.

A railroad company is liable in damages for the wrongful homicide of its customer committed by its depot agent in his office while the customer was lawfully there for the transaction of business with such agent appertaining to his agency, under a legislative act which renders all railroad companies liable for damages done by any person in their employment and service, unless their agents have exercised all ordinary care and diligence. *Christian v. Columbus etc. R. Co.*, 79 Ga. 460.

Ejectment by Brakeman Without Orders.—Where a brakeman, who had authority to remove persons from the train only upon orders of the conductor, did so without such orders, it was held that the act was not in the scope of his employment, and consequently the railroad company was not liable for the injury caused thereby. *Marion v. Chicago etc. R. Co.*, 59 Iowa 428; 8 Am. & Eng. R. Cas. 177.

Knocking Boy from Street Car.—A street railway company has been held not liable for the act of a driver in wilfully knocking a small boy from the platform while the car was in motion, but has been held liable for the negligent act of the same employee in driving over him. *Pennsylvania etc. R. Co. v. Donahoe*, 70 Pa. St. 119.

1. *Malloy v. New York etc. R. Co.*, 10 Daly (N. Y.) 453.

7. Trespasses of Servants.—A master is ordinarily liable for the trespasses of his servants;¹ but not if the trespass be criminal and felonious.²

8. Joint Liability.—Where a wilful injury is done by an agent, by the command or authority of the principal, both are, in law, principal trespassers, and therefore liable jointly.³ In other words, both the master who commands the doing, and the servant who commits an act of trespass, may be made responsible as principals, and may be sued jointly or severally.⁴

Assault on Passenger Attempting to Board Train.—In an action for damages against a railway company, the proof showed that the plaintiff, having a ticket, delayed getting upon the train until it had started and got under considerable speed, when he caught hold of the railing at the end of the rear car and stepped upon the bottom step, when he was swung round to the rear of the car, with his back toward it, and in an effort to recover himself swung back, and with his right hand took hold of the other guard rail, and while in that position it was claimed he was wantonly and maliciously assaulted by the conductor. The court instructed the jury that if they believed, from the evidence, that plaintiff, under all the circumstances, in attempting to board the train acted as a reasonably prudent man would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by him resulting from the wilful or wantonly malicious conduct of the servant of defendant acting in the line of his duty, the defendant was liable for such injuries. *Held*, that while under some circumstances the principles of the instruction might be applicable, it was calculated to mislead the jury under the facts of the case tried. *Wabash etc. R. Co. v. Rector*, 104 Ill. 296; 9 Am. Eng. R. Cas. 264.

1. *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20; *Barden v. Felch*, 109 Mass. 154; *Bath v. Caton*, 37 Mich. 199; *Smith v. Webster*, 23 Mich. 290; *Gregory v. Pifer*, 9 Barn. & C. 591; *Walker v. R. Co.*, 37 L. J., C. P. 346; *Green v. Omnibus Co.*, 7 C. B., N. S. 290; *Mackay v. Commercial Bank, L. R.*, 5 P. C. 394; *Patulin v. Saunders*, 37 Minn. 517. *Compare Lyons v. Martin*, 8 Ad. & E. 512; *Lord Bolingbroke v. Swinden, L. R.*, 9 C. P. 575.

Trespass by Servant in Master's Presence or by His Command.—If a trespass, however wilful and wanton, is com-

mitted by the servant in the presence of his master, with knowledge on his part that the servant was about to commit it, or if it is committed in pursuance of the master's orders in defence of the master's property or possession, which he has been directed to protect, or to aid in protecting, the master will be liable for an assault committed by the servant in such employment. *Woods' Master and Servant* 589. But it is also true that in some cases the master, although present, would not be liable for his servant's trespass, as where it was impossible for him to prevent an entirely unauthorized act. *Vanderbilt Transportation Co., 2 Comst. (N. Y.) 479.*

2. *Golden v. Newbrand*, 52 Iowa 59. **Attack by Command of Master.**—Where servant of a railroad Company, under command of its vice president and assistant general manager, attacked servants of another road and took forcible possession thereof, it was held that there was evidence to go to a jury to establish the liability of the company for a personal injury inflicted by said servants in such attack. *Denver etc. R. Co. v. Harris*, 122 U. S. 597; 15 Am. & Eng. R. Cas. 142; *Denver etc. R. Co. v. Harris*, 122 U. S. 597; 31 Am. & Eng. R. Cas. 592.

3. *Hewett v. Swift*, 3 Allen (Mass.) 420; *Parsons v. Winchell*, 59 Mass. 592; *Barden v. Felch*, 109 Mass. 154; *Mulchey v. Methodist Society etc.*, 125 Mass. 487; *Regina v. Stevens*, 1 Bl. Comm. 431; *Tuberville v. Stamp*, 1 Ld. Raym. 264; *Reedie v. London etc. R. Co.*, 4 Exch. 244; *Rex v. Pease*, 4 B. & Ad. 30; *Rex v. Pedly*, 1 Ad. & El. 822; *Rich v. Basterfield*, 4 C. B. 783; *Clark v. Fry*, 8 Ohio St. 358.

It has been held in *Tennessee*, however, that when a servant wantonly and designedly injures or destroys the property of another under an arrangement with his master, the master is not liable therefor. *Diehl v. Ottenville*, 14 Lea (Tenn.) 191.

4. *Lightner v. Brooks*, 2 Cliff. (U. S.)

9. Honest Trespasses.—A master is likewise liable for the trespasses of his servant done honestly in the course of his employment.¹

10. Fraudulent Acts.—The master is also liable for the wrongful, fraudulent or deceitful act of the servant committed within the scope of his authority.²

11. Servants of Municipality.—A municipality is liable for the torts of its agents in the performance of a public duty, if they are specially employed to superintend a particular work for the city, and are not acting generally in the capacity of public officers.³

12. Torts Involving a Wrongful Intention.—An employer, even though a corporation, may also be held liable for torts involving a wrongful intention, such as false imprisonment.⁴ And it is com-

287; *Herring v. Hoppock*, 15 N. Y. 409, 413; *Castle v. Bullard*, 23 How. (U. S.) 185; *Baker v. Lovett*, 6 Mass. 80; *Smith v. Rines*, 2 Sumn. (U. S.) 348; *Murray v. Lovejoy*, 26 Lowell's U. S. Rep. 428.

1. Timber Cutting.—As the cutting of timber on the land of an adjoining proprietor. *Smith v. Webster*, 23 Mich. 298; *Carman v. Mayor*, 14 Abb. Pr. 301; *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20; *Hilt v. Morey*, 26 Vt. 178; *Bath v. Caton*, 37 Mich. 199.

Where rubbish falls or where he directs his servant to pile rubbish in a certain place and it accidentally falls and injures another. *Gregory v. Piper*, 9 Barn. & C. 591. And see *Fairchild v. New Orleans R. Co.*, 60 Miss. 931.

Removal of barge, or where a servant, in order to move his master's barge to a dock, removes the plaintiff's therefrom and so injures it. *Page v. Defries*, 7 Best & S. 137.

Obstruction of Highway.—Or where a servant obstructs a highway whereby a stranger is injured. *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

Assault Upon Alleged Spy.—Plaintiff went to defendant's store to purchase an ulster. A floor walker accused her of not desiring to purchase, but of being a spy, and a cloak which she was examining was taken from her. *Held*, to be an assault for which the proprietor was liable. *Geraty v. Stern*, 30 Hun (N. Y.) 476.

Killing the Wrong Beef.—Where a master instructed his servant to go to a certain place at a certain time and kill a beef, and the servant went to such place at such time, and, finding no animal there except plaintiff's bull, killed the bull, skinned him, dressed him, and hung his carcass up in the slaughter

house as a beef, honestly attempting to carry out his master's orders; *held*, that the master was liable. *Maier v. Randolph*, 33 Kan. 340.

Arrest of Wrong Person.—Or where servant engaged in the pursuit of a criminal illegally arrests the wrong person. *Harris v. Louisville etc. R. Co.* (Ky.), 35 Fed. Rep. 116.

Taking Hay to Feed Master's Horses.—Defendant employed a servant to drive his team (it not appearing whether the employer made provision of hay for servant to feed the team), and the servant, without express authority from the defendant, took by trespass plaintiff's hay and fed to the team. *Held*, that it was within the line of the servant's employment, and defendant is liable for the trespass. *Potulni v. Saunders*, 37 Minn. 517.

2. Johnson v. Barber, 10 Ill. 425; *Armstrong v. Cooley*, 10 Ill. 509; *Sherman v. Dutch*, 16 Ill. 285; *Moir v. Hopkins*, 16 Ill. 315; *Keedy v. Howe*, 72 Ill. 136; *Locke v. Stearns*, 1 Metc. (Mass.) 560; *Reynolds v. Witte*, 13 S. Car. 5.

3. Mulcairns v. Janesville, 67 Wis. 24; 15 Am. & Eng. Corp. Cas. 269; *Toledo v. Cone*, 41 Ohio St. 149.

4. Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350; *Clark v. Storm*, 54 Hun (N. Y.) 345; *Pittsburgh etc. R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic etc. R. Co. v. Dunn*, 19 Ohio St. 162; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Philadelphia etc. R. Co. v. Quigley*, 21 How. (U. S.) 213; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489; *New Orleans etc. R. Co. v. Bailey*, 40 Miss. 395; *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9; *Illinois R. Co. v. Hammer*, 72 Ill. 307; *Reid v.*

petent to prove that an employee is acting within the scope of his authority in ordering the arrest of a third person.¹ But a railroad company is not liable to an action for a malicious prosecution, instituted by its officers against a servant, charging embezzlement of funds.²

13. Criminal Acts.—(See CRIMINAL LAW, vol. 4, pp. 703-704).—A master is not liable for the criminal acts of his servants not authorized or sanctioned by him.³ And to maintain an action against the master for the criminal act of an employee, it must appear that the particular injury or act of trespass was done by his command or with his assent.⁴ But if a crime is committed through the medium of an innocent servant or agent, the master is liable, the same as if it had been committed by his own hand,⁵ although absent when the crime was committed.⁶

14. Ratification and Repudiation.—(See *post*, 15, PUNITIVE DAMAGES).—A master may ordinarily ratify an unauthorized act in his behalf on the part of his servant.⁷ Ratification can only be inferred from acts which evince clearly and unequivocally, the intention to ratify and not from acts which may be readily and satisfac-

Home Savings Bank, 130 Mass. 443; Fenton v. Sewing Machine Co., 9 Phila. (Pa.) 189; Goodspeed v. E. Haddam Bank, 22 Conn. 530; Boogher v. Life Assoc. of America, 75 Mo. 319; Wheelless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469; Jordan v. Alabama etc. R. Co., 74 Ala. 85; Williams v. Planters' Ins. Co., 57 Miss. 759; Vance v. R. Co., 32 N. J. L. 334; Cooley on Torts 119; 3 Sutherlandon Damages 270; 2 Wait's Act. & Def. 447; Leavenworth etc. R. Co. v. Rice, 10 Kan. 437; M. K. etc. R. Co. v. Weaver, 16 Kan. 456; Kansas etc. R. Co. v. Kessler, 18 Kan. 523; Kansas etc. R. Co. v. Little, 19 Kan. 269; Western News Co. v. Wilmarth, 33 Kan. 570; Mallach v. Ridley, 43 Hun (N. Y.) 336; Mali v. Lord, 29 N. Y. 381.

1. Galveston etc. R. Co. v. Donahoe, 56 Tex. 162; 9 Am. & Eng. R. Cas. 287.

Arrest of Passenger at Instance of Gate Keeper.—A railroad company is liable where a gate keeper causes the arrest and detention of a passenger for failing to give up a ticket on leaving station. Lynch v. Metropolitan etc. R. Co., 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119.

2. Gillett v. Missouri R. Co., 55 Mo. 315.

As to liability of master for libel published by servant see LIBEL AND SLANDER.

3. Jackson v. St. Louis etc. R. Co., 87 Mo. 422; 25 Am. & Eng. R. Cas.

327; State v. Prevention etc. Soc., 47 N. J. L. 237.

Cruelty to Animals.—A complaint for cruelty to an animal will not lie against one whose servant did the act, unless direct agency be shown by presence, order or direction. State v. Prevention etc. Soc., 47 N. J. L. 237.

4. Allegheny R. Co. v. McLain, 91 Pa. St. 442; Philadelphia etc. R. Co. v. Wilt, 4 Whart. (Pa.) 142; Yerger v. Warren, 31 Pa. St. 319; Rex v. Hug-gins, 2 Strange 882; Rex v. Michael, 9 Carr & P. 357; Rex v. Bleasdale, 2 C. & R. 766.

5. Rex v. Giles, 1 Moo. C. C. 166; Rex v. Clifford, 2 C. & K. 202.

6. Foster's Crown Cas. 349.

As to illegal sale of intoxicating liquors by servants see INTOXICATING LIQUORS, vol. 11, 714, *et seq.*

A master has also been held liable, though ignorant thereof, in the following criminal cases, viz:

Concealing Tobacco.—For concealing tobacco upon which the duty was unpaid. Atty. Gen. v. Siddons, Cr. & J. 120.

Adulteration of Bread.—In adulterating bread with alum. Rex v. Dixon, 4 Camp. 12.

Pollution of Stream.—In polluting a stream with refuse from gas works. Rex v. Medley, 6 C. & P. 292. And see Rex v. Pease, 4 B. & Ad. 30; Reg. v. Gt. Northern R. Co., 9 Ad. & El., Q. B. 315; Rex v. Ivens, 7 C. & P. 213.

7. Illinois etc. R. Co. v. Hammer, 72

torily explained without involving such intention;¹ such as subsequent promotion,² or retention in service.³ But the discharge of the servant and repudiation of his act excludes the right of the person injured to recover additional damages, "to deter the wrong doer from repeating the trespass."⁴

15. Punitive Damages.—Although the authorities are not agreed, it may be laid down as the better doctrine that a master is liable in punitive damages for the wrongful act of a servant, in cases where punitive damages could be recovered against a master performing a similar act.⁵

Ill. 347; Nashville etc. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; Milwaukee etc. R. Co. v. Finney, 10 Wis. 388; Craker v. Chicago etc. R. Co., 36 Wis. 657; Bass v. Chicago etc. R. Co., 42 Wis. 654; Hull v. Pickersgill, 1 B. & B. 282; Lewis v. Read, 13 M. & W. 834; Wilson v. Tummam, 6 M. & G. 236; Woolen v. Wright, 1 H. & C. 554; Freeman v. Rosher, 13 Ad. & El. Q. B. 780; Burow v. Denman, 2 Exch. 167; Johnstone v. Sutton, 1 T. R. 510.

1. Williams v. Pullman Palace Car Co., 40 La. An. 87, 417; 33 Am. & Eng. R. Cas. 414.

2. Goddard v. Grand Trunk R. Co., 57 Me. 202; Perkins v. Missouri etc. R. Co., 55 Mo. 201. Compare Edelman v. St. Louis Transfer Co., 3 Mo. App. 503.

3. Bass v. Chicago etc. R. Co., 42 Wis. 654.

It has been held in one State at least that ratification of the act of the porter of a sleeping car company in assaulting a stranger could not be inferred from his retention after his criminal conviction. Williams v. Pullman Palace Car Co., 40 La. An. 87, 417; 33 Am. & Eng. R. Cas. 407.

4. Western etc. R. Co. v. Turner, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455.

But where a malicious and unprovoked assault was made by a railroad train hand upon a passenger, it is error to charge that if the company, with "knowledge of the act and its character, still continued to employ a servant in his former position, such retention is a ratification of the act, and warrants a recovery of exemplary damages against the company." Dillingham v. Anthony, 73 Tex. 47. And see Ramsden v. Boston etc. R. Co., 104 Mass. 120; Bryant v. Rich, 106 Mass. 180; Craker v. Chicago etc. R. Co., 36 Wis. 657; Stewart v. Brooklyn etc. R. Co., 90 N. Y. 588; 12 Am. & Eng. R. Cas. 127; Sherley v. Billings, 8 Bush (Ky.) 147;

Chicago etc. R. Co. v. Flexman, 103 Ill. 546; Wabash etc. R. Co. v. Rector, 104 Ill. 296; Goddard v. Grand Trunk R. Co., 57 Me. 202.

5. Goddard v. Grand Trunk R. Co., 57 Ill. 202.

In support of the doctrine that an employer is punishable with punitive damages for the act of his servant, where no moral responsibility for the act rested on the master where the act was unauthorized and unsatisfied, and the master was in nowise negligent in his selecting or retention, see dissenting opinion of TAPLEY, J., same case.

Punitive Damages Not Allowed.—The following cases take the view that punitive damages are not collectible. Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Turner v. North Beach etc. R. Co., 34 Cal. 594; Wardrobe v. California Stage Co., 7 Cal. 118; Keene v. Lizardi, 8 La. Rep., O. S. 32; Boulard v. Calhoun, 13 La. An. 445; Hill v. New Orleans etc. R. Co., 11 La. An. 292; McKeon v. Citizens' R. Co., 42 Mo. 79; Detroit Daily Post Co. v. McArthur, 16 Mich. 446; Great Western R. Co. v. Miller, 19 Mich. 205; Ackerson v. Erie R. Co., 32 N. J. L. 254; Hogan v. Providence etc. R. Co., 3 R. I. 88; Nashville etc. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; Craker v. Chicago etc. R. Co., 36 Wis. 657; Milwaukee etc. R. Co. v. Finney, 10 Wis. 388; Jones v. Burgett, 46 Tex. 272; The Amiable Nancy, 3 Wheat. 546; Parsons v. Missouri Pac. R. Co., 94 Mo. 286; Chicago v. Jones, 66 Ill. 349; Chicago v. Langloss, 52 Ill. 246; Sullivan v. Oregon etc. R. Co., 12 Oreg. 392; 21 Am. & Eng. R. Cas. 391; Galveston H. & Sa. R. Co. v. Donahoe, 56 Tex. 287.

In Illinois it is apparently held that a corporation is liable in punitive damages for the wanton and wilful acts of its servants, but not for the servant's negligent act, however grossly negligent it may be. Illinois Cent. R. Co.

v. Hammer, 72 Ill. 347; *Singer Mfg. Co. v. Holdford*, 56 Ill. 455.

Texas Rule.—A railroad company is not liable in exemplary damages for injuries caused by the malicious acts of its agents engaged in running a train, unless such acts were authorized by the company, or subsequently ratified by it with full knowledge of the facts. *Gulf etc. R. Co. v. Moore*, 69 Tex. 157.

A passenger unable to get off at his point of destination because the car was beset by others endeavoring to get on, and who, in consequence, was carried six miles and detained an hour, and had to pay sixty cents to get back, is not entitled to punitive damages because the conductor refused to let him get off after the train had started, and failed to arrange for his return passage as he promised to do. *Mississippi & T. R. Co. v. Gill* (Miss.), 1889, 5 So. 393.

The New York rule is as follows: For injuries by the negligence of a servant while engaged in the business of the master within the scope of his employment, the latter is liable for compensation damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Something more than ordinary negligence is necessary; it must be reckless and of a criminal nature and clearly established. *Cleg-horn v. New York etc. R. Co.*, 56 N.Y. 44. Of the servant see *Western Union Tel. Co. v. Eyser*, 2 Colo. 142; *Gasway v. Atlanta etc. R. Co.*, 58 Ga. 216; *Chicago etc. R. Co. v. Bryan*, 90 Ill. 126; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; 38 Ind. 116; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350; *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Malecek v. Tower Grove etc. R. Co.*, 57 Mo. 17; *Perkins v. Missouri etc. R. Co.*, 55 Mo. 201; *Graham v. Pac. R. Co.*, 66 Mo. 536; *Evans v. St. Louis etc. R. Co.*, 11 Mo. App. 463; *Chicago etc. R. Co. v. Burke*, 53 Miss. 200; *New Orleans etc. R. Co. v. Hurst*, 26 Miss. 660; *Hopkins v. Atlantic R. Co.*, 36 N. H. 9; *Atlantic etc. R. Co. v. Dunn*, 19 Ohio St. 162; *Quigley v. C. P. R. Co.*, 11 Nev. 350; *New Orleans etc. R. Co. v. Bayley*, 40 Miss. 395; *Gasway v. Atlanta etc. R. Co.*, 58 Ga. 216; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489; *Howe v. New March*, 12 Allen (Mass.) 49; *Ramsden v. B. & O. R. Co.*, 104 Mass. 117; *Byram v. McGuire*, 3 Head (Tenn.) 530; *Cleg-horn v. New York etc. R.*

Co., 56 N. Y. 44; *Warner v. New York etc. R. Co.*, 44 N. Y. 465.

In Kentucky, by statute, in actions against a railroad company for the killing of a person by the railway or its servants, punitive damages are allowed where the act resulting in the killing was wilful. *Jacobs v. Louisville etc. R. Co.*, 10 Bush (Ky.) 263; *Louisville etc. R. Co. v. Mahoney*, 7 Bush (Ky.) 235; *Bowen v. Lane*, 3 Metc. (Ky.) 311. See also *Haley v. Mobile etc. R. Co.*, 7 Baxt. (Tenn.) 239.

Exemplary Damages Not Given as a Matter of Right.—Where an injury is wantonly and wilfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrong doer vindictive or punitive damages, by way of punishment for the wrongful act, but the party is not entitled to such damages as a matter of right, and it is error to so instruct in any case. Whether the party may have such damages rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment in this respect. *Wabash R. Co. v. Rector*, 104 Ill. 206; *Hawes v. Knowles*, 114 Mass. 518.

Drunken Driver.—Where a stage coach proprietor employed a known drunkard as a driver, through whose negligence, while intoxicated, a passenger receives injury, it was held that it was not error to instruct the jury that they might give exemplary damages. *Wiley v. Keokuk*, 6 Kan. 94; *Sawyer v. Sauer*, 10 Kan. 466. And see *Illinois etc. R. Co. v. Hammer*, 72 Ill. 347.

Expulsion from Train.—The injured feelings of a passenger wrongfully compelled to leave a train and suffer insult and abuse, and the indignity, humiliation, wounded pride and mental suffering endured, may be considered in estimating his damages; and such an allowance is merely compensatory, and does not constitute exemplary damages. *Shepard v. Chicago, R. I. & P. R. Co.* (Iowa), 1889, 41 N. W. 564.

Expulsion of Newsboy from Street Car.—Newsboy was expelled from street car and run over and injured. Evidence held not to authorize recovery of exemplary damages. *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37; 34 Am. & Eng. R. Cas. 432.

Killing Animals.—Animals were killed through wilful act of servant. Held, that there could be no recovery of exemplary damages. *Chicago etc. R. Co.*

It is generally held that where the servants of a corporation have committed a tort punishable with punitive damages the corporation may by ratification of such act make itself liable in punitive damages.¹

XXI. FELLOW SERVANTS, NEGLIGENCE OF—See FELLOW SERVANTS, vol. 7, p. 821.

XXII. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR—1. **Definition.**—An independent contractor is one who renders service in the course of an occupation representing the will of the employer only as to the result of the work, and not as to the means by which it is accomplished.² But the mere fact that one works by

v. Jarrett, 59 Miss. 470; 11 Am. & Eng. R. Cas. 455.

Seizure of Railroad.—Punitive damages are recoverable in action of trespass on the case against a corporation to recover damages for injuries inflicted by its servants in a forcible seizure of a railroad. *Denver etc. R. Co. v. Harris*, 122 U. S. 597; 31 Am. & Eng. R. Cas. 592.

1. *Nashville etc. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52; *Milwaukee etc. R. Co. v. Finney*, 10 Wis. 388; *Illinois etc. R. Co. v. Hammer*, 72 Ill. 347; *Craker v. Chicago etc. R. Co.*, 36 Wis. 657; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; *Galveston etc. R. Co. v. Donahoe*, 56 Tex. 162; 9 Am. & Eng. R. Cas. 287.

Retention of the employee, who was guilty of the wanton or grossly negligent act, and especially his promotion by the company after it knew of such act, are evidence of such a ratification of his act as will make the company liable for punitive damages. *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; *Godard v. Grand Trunk R. Co.*, 57 Me. 202. Compare *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503.

A municipal corporation is not liable in exemplary damages for the wanton or malicious act of its servant. *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Langloss*, 52 Ill. 256.

2. *Harrison v. Collins*, 86 Pa. St. 123; 27 Am. Rep. 699; *Painter v. Mayor etc.*, of Pittsburgh, 46 Pa. St. 213; *Wray v. Evans*, 80 Pa. St. 102; *Edmundson v. Pittsburgh etc. R. Co.*, 111 Pa. St. 316; 23 Am. & Eng. R. Cas. 423; *Wabash etc. R. Co. v. Farver*, 111 Ind. 195; 31 Am. & Eng. R. Cas. 134. See also CONTRACTOR, vol. 3, p. 822, and cases cited in following notes.

Agreement to Complete Another's Job.—Where one H contracted with a rail-

road company provided that he should complete the job which M had undertaken, and was to be paid for it what the material and labor to be procured and furnished by him should cost and ten per cent. additional to that as his compensation, it was held that said K was not a servant but an independent contractor. *New Orleans etc. R. Co. v. Reese*, 61 Miss. 581; 18 Am. & Eng. R. Cas. 110.

Person in Charge of Car Yards.—Defendant, a railway corporation, made a contract with A whereby he was to have entire charge in defendant's freight car yard of the work of making up freight trains, etc., and to be paid a certain sum per ton of freight and for each car hauled from the yard. Defendant's superintendent was authorized to see that the work was done satisfactorily, and if it were not, defendant could terminate the work at twenty-four hours' notice. The men employed in the yard were paid by A. B sued the company for injuries received through the negligence of trainmen in the employ of A. It was held that A was a servant of defendant, and not an independent contractor. *Speed v. Atlantic etc. R. Co.*, 71 Mo. 303; 2 Am. & Eng. R. Cas. 77.

Man Employed to Pump Water.—Man employed by railroad to furnish and superintend steam engine to pump water held an independent contractor for whose negligence company was held not liable. *Wabash etc. R. Co. v. Farver*, 111 Ind. 195; 31 Am. & Eng. R. Cas. 134.

A slater by trade, who carried on the business of slater in Portland (Me.), and had done so for more than twenty years, keeping a shop and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive,

the piece or job, and not by the day or week, is not conclusive as to whether he is a servant or an independent contractor.¹

The question as to whether a person was a servant or contractor is for the jury.²

2. General Rule of Liability.—Where a person contracts with another, exercising an independent calling, to do a work for him, according to the contractor's own methods and not subject to his control or orders except as to results to be obtained, the former is not liable for the wrongful acts of such contractor or his servants.³

was held to be carrying on what the law denominates an independent business. *McCarthy v. Second Parish*, 71 Me. 318; 36 Am. Rep. 320. And see *Hass v. Philadelphia etc. Steamship Co.*, 88 Pa. St. 269; 32 Am. Rep. 462.

Employee of Roofer.—Defendant employed one B, who was engaged in "the roofing and cornice business," to make some repairs to the cornice of his hotel in the city of New York. The defect was pointed out, but no price or plan for doing the work was specified; the method of repair and the means to be employed being left entirely to the judgment of B, who agreed simply to remedy the defect. In doing the work the employees of B suspended a ladder from the roof of the hotel, upon which planks were placed to serve as a scaffold. A gust of wind caused one of these planks to fall; it struck and injured plaintiff, who was passing at the time. Defendant was not in the city while the repairs were in progress, and had no knowledge of the manner in which the work was being done. In an action to recover damages for alleged negligence causing the injury, *held* that the complaint was properly dismissed; that the relation of master and servant did not exist between the defendant and B, but the latter was an independent contractor, and the men employed were his, not defendant's servants; also that it was immaterial that the work was charged for by the day. *Hexamer v. Webb*, 54 Am. Rep. 703.

1. *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61; *Corbin v. American Mills*, 27 Conn. 274.

2. *Hass v. Philadelphia etc. Steamship Co.*, 88 Pa. St. 269; 32 Am. Rep. 462; following *Mullan v. Steamship Co.*, 78 Pa. St. 25; 21 Am. Rep. 2. Also see *Riley v. State Line Steamship Co.*, 29 La. An. 791; 29 Am. Rep. 349.

3. *McCarthy v. Second Parish*, 71 Me. 318; 36 Am. Rep. 320; *Du Pratt*

v. Lick, 38 Cal. 691; *Aston v. Nolan*, 63 Cal. 269; *Ryan v. Curran*, 64 Ind. 345; *Wabash etc. R. Co. v. Farver*, 111 Ind. 195; 31 Am. & Eng. R. Cas. 134; *Prairie State etc. Co. v. Doig*, 70 Ill. 52; *Rale v. Johnson*, 80 Ill. 185; *Brown v. McLeish*, 71 Iowa 381; *Wattmeyer v. Wisconsin etc. R. Co.*, 71 Iowa 626; 30 Am. & Eng. R. Cas. 384; *St. Louis etc. R. Co. v. Willes*, 38 Kan. 330; 33 Am. & Eng. R. Cas. 397; *Gallagher v. S.W. Ex. Assn.*, 28 La. An. 943; *Sweeney v. Murphy*, 32 La. An. 628; *Davie v. Levy*, 39 La. An. 551; *Eaton v. European etc. R. Co.*, 59 Me. 520; *Tibbetts v. Knox etc. R. Co.*, 62 Me. 437; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *Linton v. Smith*, 8 Gray (Mass.) 147; *Sweeney v. Boston etc. R. Co.*, 128 Mass. 5; 1 Am. & Eng. R. Cas. 138; *Forsyth v. Hooper*, 11 Gray (Mass.) 419; *Brackett v. Lubke*, 4 Allen (Mass.) 138; *Barry v. St. Louis*, 17 Mo. 121; *Deford v. State*, 30 Md. 179; *Speed v. Atlantic etc. R. Co.*, 71 Mo. 303; 2 Am. & Eng. R. Cas. 77; *Brown v. Werner*, 40 Md. 15; *New Orleans etc. R. Co. v. Reese*, 61 Miss. 581; 18 Am. & Eng. R. Cas. 110; *King v. Livermore*, 16 N. Y. 298; *Slater v. Mesereau*, 64 N. Y. 138; *King v. New York etc. R. Co.*, 66 N. Y. 298; *Barrett v. Singer Mfg. Co.*, 1 Sweeney (N. Y.) 545; *Devlin v. Smith*, 89 N. Y. 470; *Young v. New York etc. R. Co.*, 30 Barb. (N. Y.) 229; *Murtfeldt v. New York etc. R. Co.*, 102 N. Y. 703; 25 Am. & Eng. R. Cas. 144; *Benedict v. Martin*, 36 Barb. (N. Y.) 288; *Schular v. Hudson etc. R. Co.*, 38 Barb. (N. Y.) 653; *McGatrick v. Wasson*, 4 Ohio St. 566; *Hughes v. Cincinnati etc. R. Co.*, 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; *Carman v. Steubenville*, 4 Ohio St. 399; *Edmundson v. Pittsburgh etc. R. Co.*, 111 Pa. St. 316; 23 Am. & Eng. R. Cas. 423; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Runt v. Pennsylvania etc. R. Co.*, 51 Pa. St. 475; *Allen v. Willard*, 58 Pa. St. 374; *Wray*

It is clear, also, that the same rule holds true as between a contractor and subcontractor.¹

The liability of the employer depends upon whether he retains direction and control of the work, or has given it to the contractor.²

v. Evans, 80 Pa. St. 102; *Mansfield etc. Co. v. McEnery*, 91 Pa. St. 185; *Burton v. Galveston etc. R. Co.*, 61 Tex. 526; 21 Am. & Eng. R. Cas. 218; *Pierce v. O'Keefe*, 11 Wis. 180; *Hitte v. Republican V. R. Co.*, 19 Neb. 620; 29 Am. & Eng. R. Cas. 566; *Quarman v. Burnett*, 6 M. & W. 499; *Blake v. Ferris*, 1 Selden's (Am.) Rep. 58; *Milligan v. Wedge*, 12 A. & E. 737; *Rapson v. Cubitt*, 9 M. & W. 710; *Gayford v. Nichols*, 9 Exch. 702; *Cuthbertson v. Parsons*, 12 C. B. 304. And see *Robinson v. Blake Mfg. Co.*, 143 Mass. 528. Compare *Philadelphia etc. R. Co. v. Hahn* (Pa.), 32 Am. & Eng. R. Cas. 24.

Guaranty by Employer.—Where one employs a contractor to erect a building, the contractor is the principal of those whom he employs, and it is for them to enquire into his character for skillfulness and carefulness; the employer of the contractor is not a guarantor for his skill and care. *Hunt v. Pennsylvania etc. R. Co.*, 51 Pa. St. 445.

Performance of Work in Lawful Manner—Presumption.—A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary to have employed him to do it in a lawful and reasonable manner; and, therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done. 1 *Redfield on Railways* 542; *Butler v. Hunter*, 7 Ill. & N. 826; *Eaton v. European etc. R. Co.*, 59 Me. 520.

1. *Rapson v. Cubitt*, 9 M. & W. 710. Compare *McClary v. Kent*, 3 Duer (N. Y.) 27. And see *McLean v. Russell*, 22 Jur. 394; *Shield v. Edinburgh R. Co.*, 28 Jur. 539; *Knight v. Fox*, 5 Ex. 721; *Devlin v. Smith*, 89 N. Y. 470; *Hilliard v. Richardson*, 3 Gray (Mass.) 349.

2. *Andrews v. Boedecker*, 17 Ill. App. 213; *Hefferman v. Benkard*, 1 Robt. (N. Y.) 432; *Corbin v. American Mills Co.*, 27 Conn. 274; *Sprout v. Hemmingway*, 14 Pick. (Mass.) 1;

Lawyer v. McLean, 10 Mo. App. 591; *Sadler v. Henlock*, 4 E. & B. 570; *Serandad v. Saisse*, 35 L. J. Pr. C. C. 17; *Peachy v. Rowland*, 13 C. B. 187; *Overton v. Freeman*, 11 C. B. 833.

Contractor Running Mill.—The owner of a mill is not liable where an employee of an independent contractor running it is injured through a defect in a machine frequently inspected by the contractor's servants. *Knoxville Iron Co. v. Dobson*, 7 Lea (Tenn.) 367.

Plumber.—An owner of a building employing a plumber to repair the water pipes in his own way, is not liable for an injury produced to a third person by his negligence in that work. *Bennett v. Truebody*, 66 Cal. 509; 56 Am. Rep. 117.

Operator of Steam Shovel on Lands of Another.—A person who is injured through the running of his horse, caused by the noise of a steam shovel operated on defendant's lands by an independent contractor, cannot recover from the owner of such lands. *Bailey v. Troy etc. R. Co.*, 57 Vt. 252; 52 Am. Rep. 129; *Harrington v. Lansingburg* (N. Y.), 16 Wash. L. Rep. 719; *Fuller v. Citizens' Bank*, 15 Fed. Rep. 875.

Operator of Shingle Machine.—A person operating a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not an employee for whose acts the owners or lessees are liable. *State v. Emerson*, 72 Me. 455.

Excavator of Earth.—Where a coterminal land owner contracts with one to excavate a lot for the purpose of erecting a building, and the contract is silent as to the mode of doing the work, he is not liable for damages occasioned by the acts of such person or his servants. *Aston v. Nolan*, 63 Cal. 269.

Contractor to Construct Gas Main.—Where an independent contractor for the construction of a gas main is required by the contract to brace and protect all water and other pipes, and by his neglect in not sufficiently bracing the pipe of another company the same breaks, causing an explosion, the company for which the main is constructed

3. Exceptions to Rule of Nonliability—(a) *Work Necessarily Attended by a Nuisance*.—A master is liable although he employs an independent contractor to perform a certain piece of work when such performance is necessarily attended by a nuisance.¹

(b) *Work Improperly Prosecuted or Wrongfully Undertaken*.—Also where work, of a kind in the ordinary doing of which a nuisance occurs, being lawfully undertaken, has been negligently or improperly prosecuted, or if it was ordered without lawful authority, a third person who has sustained injuries thereby, without fault on his own side, may recover from the employer notwithstanding the performance was entrusted to a contractor rather than to hired laborers. And furthermore, the liability of the em-

is not liable for the damage caused thereby where there is no evidence of acceptance of the work and notice of its faulty performance. Nor would it be made liable by a statute providing that any company laying a pipe line under its provisions should be liable for all damages occasioned by such company's negligence. *Chartiers etc. Gas Co. v. Waters*, 123 Pa. St. 220.

Steam Pipe Contractor.—A master who is not shown to have employed two competent persons to put in a steam pipe, and who neither knew nor was likely to know that it was insecurely put in, is not liable to a servant injured by its pulling out. *Hobbs v. Stauer*, 62 Wis. 108.

Laying Water Pipe.—A having obtained a licence from the borough authorities to lay water pipe in a street, contracted with B, for \$25, to dig a ditch in a borough street and lay the pipe, A to furnish the pipe and boxing, but to have no further connection with the work. In an action against A to recover damages for an injury caused by B's negligence in leaving the ditch unprotected, *held*, that B was an independent contractor, and that A was not liable for B's negligence in performing his contract. *Smith v. Simmons*, 103 Pa. St. 32.

Delivering Sand.—One who contracts with a furnace company to take sand from its land and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is, therefore, not liable for his negligence in conducting the work. *Fink v. The Missouri Furnace Co.* 82 Mo. 276; 52 Am. Rep. 376.

Loading Ship.—A transportation company paid a stevedore to load a

ship. Through the stevedore's negligence one of his men received an injury. It was held that he could not recover against the company. *Rankin v. Merchants etc. Transportation Co.*, 73 Ga. 229; 54 Am. Rep. 874.

Clearing Land—Damage by Fire.—The owner of land is not liable for injury by communication of a fire negligently set on his land by one contracting to clear the same. *Ferguson v. Hubbell*, 97 N. Y. 507. See *Harrison v. Collins*, 86 Pa. St. 153; *Callahan v. Burlington etc. R. Co.*, 23 Iowa 562; *Kellogg v. Payne*, 21 Iowa 575; *Earle v. Hall*, 2 Metc. (Mass.) 353; *Williams v. Jones*, 3 H. & C. 602; *Woodman v. Jonier*, 10 Jur., N. S. 852; *Bartlett v. Baker*, 3 H. & C. 153; *Blake v. Thirst*, 2 H. & C. 20. *Compare Serandaty v. Saisse*, L. R., 1 P. C. 152; 12 Jur., N. S. 301.

Cutting Timber—Improper Use of Contractor's Dam.—The defendant contracted to have T cut timber from his land at a specified price per foot and deliver it at the mouth of a certain river, using the defendant's dams in the driving of the logs if he chose. T used the defendants' dam in the business in an unreasonable manner to the plaintiff's injury, but the defendant had nothing to do with the cutting, hauling or driving of the logs. *Held*, that the defendant was not liable. *Carter v. Berlin Mills*, 58 N. H. 52; 42 Am. Rep. 573.

¹ *Clark v. Fry*, 8 Ohio St. 358; *Carman v. Steubenville R. Co.*, 4 Ohio St. 399; *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Congreve v. Morgan*, 5 Duer (N. Y.) 495; *Vanderpool v. Husson*, 28 Barb. (N. Y.) 106; *Carman v. R. Co.*, 4 Ohio (N. S.) 399; *Matheny v. Wolffs*, 2 Duv. (Ky.) 137; *Storrs v. Utica*, 17 N. Y. 108; *Water Co. v. Ware*, 16 Wall. (U. S.) 566;

ployer under such circumstances is not limited to cases where an incompetent or unsuitable person has been employed as contractor.¹

(c) *Where Employer Prescribes Means.*—But where work which does not necessarily create a nuisance, and is in itself harmless and lawful when carefully conducted, is let to another by the employer, who merely prescribes means to accomplish the end which he is to employ at his discretion, the latter is, as to the means prescribed, the master; and if during the progress of the work a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not liable.² No liability attaches, however, where the employer simply reserves the right to prescribe *what* shall be done, but not *how* it shall be done, or *who* shall do it.³

(d) *Reservation of Right to Protect Employees.*—Where, however, an employer makes a contract to have certain work done, but reserves to itself such arrangements as are necessary for the protection of workmen, he is liable for such injuries as happen to employees of the contractors without their fault.⁴

Mayor v. Furze, 3 Hill (N. Y.) 616; Creed v. Hartman, 29 N. Y. 591; Milford v. Holbrook, 9 Allen (Mass.) 21; Brower v. Peate, L. R., 1 Q. B. D. 321; Ellis v. The Sheffield Gas Co., 23 L. J., Q. B., N. S. 42.

1. Ware v. St. Paul Water Co., 2 Abb. (U. S.) 261; Sabin v. Vt. Central R. Co., 25 Vt. 363.

Use by Contractors of Boom of Contractors.—In an action against a boom company for damages caused by flooding plaintiff's land, it appeared that defendant, at the time the damage occurred, had let to contractors the work of driving and delivering to defendant at the mouth of the "R" river, in which the defendant had built a series of dams, a large quantity of defendant's logs, and that the flooding was caused by their operations. Defendant contended that it had no control over the contractors, and was not liable for their acts. The court instructed the jury that if in order to fulfil these contracts it was necessary that such quantities of logs should be kept below the lower dam as would cause a solid jam of several miles in length, and by so doing the water was backed upon plaintiff's land, defendant was liable; but that if, under the terms of the contract, it was not necessary to so flood the river as to damage plaintiff, the contractors would alone be liable. *Held*, as favorable as defendant could ask. McDonell v. Rifle Boom Co., 71 Mich. 61.

14 C. of L.—53

2. Wabash etc. R. Co. v. Farver, 111 Ind. 195; 31 Am. & Eng. R. Cas. 134; McCafferty v. Spuyten Duyvel R. Co., 61 N. Y. 178; Robinson v. Webb, 11 Bush (Ky.) 464; Reid v. Allegheny City, 79 Pa. St. 300; Scammon v. Chicago, 25 Ill. 424; Clark v. Frye, 8 Ohio St. 379; Gilbert v. Beach, 4 Duer (N. Y.) 423; Boswell v. Laird, 8 Cal. 469; Cuthbertson v. Parsons, 12 C. B. 304; Murphy v. Curalli, 34 L. J., Exch. 14; Vanderpool v. Husson, 28 Barb. (N. Y.) 196; Cincinnati v. Stone, 5 Ohio St. 38.

3. Wood's Master and Servant 620; Allen v. Willard, 57 Pa. St. 374; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Kelley v. Mayor, 11 N. Y. 432; Pack v. Mayor, 8 N. Y. 222; Schwartz v. Gilmore, 45 Ill. 455; Blake v. Thirst, 2 H. & C. 20.

4. Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

Taking Down Building.—Where a contractor agreed to take down a building under the owner's directions and subject to his approval, such owner is responsible for any injury to a third person resulting therefrom. Linnehan v. Rollins, 137 Mass. 123; 50 Am. Rep. 287.

Under Directions and to Satisfaction of Superintendent.—On the other hand, it has been laid down in an Ohio case that the mere employment of another to do an act in itself innocent and lawful, but from the doing of which, by

(e) *Personal Interference*.—And where a person employing a contractor personally interferes, the rule as to independent contractors does not apply.¹

(f) *Injury Directly from Authorized Act*.—And this is true where the injury arises *directly* from the act the contractor is authorized to do.²

(g) *Deputing Performance of Legal Obligation*.—As where an individual or a corporation, who, under a legal obligation to do a certain thing, contracts with another to perform the duty in question to the injury of a third person, they cannot escape liability thereby.³ Thus where a statutory duty is cast upon a railroad

want of proper care, injury may result to a third person, does not make the employer responsible for such injury, the contract being that certain work should be done "according to the directions and perfect satisfaction of the superintendent." *Chambers v. Ohio L. J. & T. Co.*, 1 Dis. (Ohio) 329.

In Accordance with Plans, Specifications, etc.—And where in a Pennsylvania case the work was to be done "in a substantial and workmanlike manner," and "in accordance with the plans, specifications and instructions furnished" by the company, it was held that the word "instructions" referred to the kind of structure, etc., but the mode of accomplishing the work was left to his own skill and judgment. *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475.

1. Leaving Earth Piled in Road.—Thus where the defendant was the proprietor of some newly built houses which he had employed P to build for him, and P, in forming a drain from premises belonging to the defendant at the back of the new houses to the common sewer, had, by his servants, caused a quantity of gravel to be deposited by the roadside. The drain being finished, P employed a person to carry away the gravel, and paid him so much a load, which he charged to the defendant, but the person so employed left some on the road, and the plaintiff, whilst driving in the evening along the road, ran upon the gravel left in the road, was upset and injured. The defendant's attention had been called to the gravel left in the road by a policeman, and he had promised to remove it as soon as he could, and, after the accident, had said it was caused by the plaintiff's carelessness. It was held that the defendant was liable in damages. *Burgess v. Gray*, 1 C. B. 578.

And see *Schwartz v. Gilmore*, 45 Ill. 456.

2. The rule in such cases has been laid down as follows: Where the obstruction or defect causing the injury is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party. *Robbins v. Chicago*, 4 Wall. (U. S.) 679; *Chicago v. Robbins*, 2 Blackf. (Ind.) 418; *Stone v. Cheshire R. Co.*, 19 N. H. 42; *Palmer v. City of Lincoln*, 5 Neb. 136.

3. Bridge.—As where a statute imposed on the defendants the duty of making a bridge that would open, and they employed a contractor who made a bridge that would not open. *Hole v. Sittingbourne etc. R. Co.*, 30 L. J., Exch. 81; 6 H. & N. 488.

Drain Required by Statute.—So where a statute requiring a drain to be made by the owner of a house authorized him to make a cutting in the road, but also required him to fill up the cutting properly afterwards, and he employed a contractor to make the drain whose men neglected to so properly fill it. *Gray v. Pullen*, 34 L. J., Q. B. 265; *Hyams v. Webster*, 36 L. J., Q. B. 166; *R. R. Co. v. Board of Health*, 33 L. J., M. C. 174.

Water Company Making Excavations.—The city of St. Paul, Minn., passed an ordinance authorizing the St. Paul Water Company to lay pipes in its streets; in the ordinance authorizing such laying it was provided that such company should "protect persons

company, it cannot escape liability on the ground that the road has been in the possession of a contractor at the time who has neglected the duty in question.¹

(h) *Defective Plans*.—Where the improvements undertaken by the master are based upon defective plans, the delegation of the work to an independent contractor will not relieve the employer.²

(i) *Unskilful Arrangement of Work*.—An employer is likewise liable where there has been unskilful or negligent arrangement of the work in question.³

against damages by reason of excavations made by them in said streets, and to keep the excavations properly guarded by day and night, and to become responsible for all damages which might accrue by reason of the neglect of their employees in the premises, and that the streets and highways should not be unnecessarily encumbered or obstructed in laying said pipes. The ordinance was accepted and contract let. An accident occurred through failure to guard an excavation. It was held that the water company was liable in damages, it having contracted to protect all persons. *Water Co. v. Ware*, 16 Wall. (U. S.) 566.

1. *Duty to Fence*.—The company therefore cannot escape from liability for a failure to perform the statutory duty to fence on the ground that a contractor had possession of the road at the time in question. *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717; *H. & J. R. Co. v. Meador*, 50 Tex. 77; *Bay City etc. R. Co. v. Austin*, 21 Mich. 390.

Barriers at Crossings.—Nor can it on the same ground escape responsibility for a failure to discharge the statutory duty of providing barriers for the protection of travellers at street crossings. *Lowell v. Boston etc. R. Co.*, 23 Pick. (Mass.) 24. See generally *Pound v. Port Huron etc. R. Co.*, 54 Mich. 13; 19 Am. & Eng. R. Cas. 640; *Huey v. Indianapolis etc. R. Co.*, 45 Ind. 320; *Rockford etc. R. Co. v. Heflin*, 65 Ill. 367; *Illinois etc. R. v. Finnigan*, 21 Ill. 646; *Ft. Wayne etc. R. Co. v. Hinebough*, 43 Ind. 354; *Gardner v. Smith*, 7 Mich. 410. Compare *Griggs v. Houston*, 104 U. S. 553; 8 Am. & Eng. R. Cas. 359. Also see *Clement v. Canfield*, 28 Vt. 302; *Chicago etc. R. Co. v. Whipple*, 22 Ill. 105; *Whitney v. Atlantic etc. R. Co.*, 44 Me. 362; *Pittsburgh etc. R. Co. v. Hannon*, 60 Ind. 417.

Injury to Crops by Cattle—Defective Fence.—*Dean v. Sullivan R. Co.*, 22 N.

H. 316; *Holden v. Rutland etc. R. Co.*, 30 Vt. 208; *Smith v. Chicago etc. R. Co.*, 38 Iowa 518; *Donald v. St. Louis etc. R. Co.*, 44 Iowa 157; *Cumings v. H. etc. R. Co.*, 48 Mo. 512; *Trice v. Hannibal etc. R. Co.*, 49 Mo. 440; *Grau v. St. Louis etc. R. Co.*, 54 Mo. 240; *St. Louis etc. R. Co. v. Sharp*, 27 Kan. 134; 13 Am. & Eng. R. Cas. 595. Compare *Clark v. Hannibal etc. R. Co.*, 36 Mo. 203.

2. By reason of defendant's building operations plaintiff's adjoining property is injured, as, for example, by the insertion of a girder into an old and weak party wall. Defendant, although he has entrusted the work to independent contractors, cannot escape liability if the injury was occasioned, not by poor workmanship or materials, but by the use of defective plans and specifications. *Lancaster v. Conn. Mut. Life Ins. Co.*, 92 Mo. 460.

Reasonable Care in the Procurement of Plans.—Where part of a building falls without apparent reason, the owner is not relieved from liability for resulting damages because he used reasonable care in obtaining plans and employing a contractor to do his work. A building so defectively constructed as to be dangerous is a nuisance, and the doctrine of independent contractors does not apply. *Wilkinson v. Detroit Steel and Spring Works*, 73 Mich. 405.

3. *Altering Old Building*.—A builder is liable for injuries to his employee from the fall of a wall occasioned by the builders' unskilful or negligent arrangement of the work of altering an old building, although at the time of the casualty the work had been let out to a contractor, and was being carried on under his management and control. *Horner v. Nicholson*, 56 Mo. 220.

But it was held in an English case, where plaintiff and defendant were owners of adjoining ancient houses, and a contract was made by de-

(j) *Injury Naturally Resulting*.—Or where, in the natural course of things, injurious consequences will arise unless means are adopted by which such consequences may be prevented. In such case the master is bound to see to the doing of that which is necessary to prevent the mischief.¹

(k) *Incompetent Contractor*.—Or where the master knowingly selects an incompetent contractor.²

(l) *Defective Appliances Furnished*.—Or defective appliances are furnished for the contractor's use.³

(m) *Contractor and Overseer Combined*.—Or where the injury results from the carelessness of an overseer, who has a contract for one branch of the work only.⁴

(n) *Directions of Architect*.—Or where the contractor obligates himself to act according to the directions of an architect.⁵

(o) *Abandonment of Work*.—Where an independent contractor is obliged to discontinue work entered upon, the same being

defendant with a third person to tear down the front wall of his house for a given price, and the workmen of the contractor, in doing this, removed a timber which was inserted in the party wall between the defendant's and plaintiff's house, without taking any precautions by shoring or otherwise, in consequence of which the front wall of the plaintiff's house fell, that the defendant was not liable. *Butler v. Hunter*, 7 How. 826. And see *Bonomi v. Backhouse*, 9 H. L. C. 503; 34 L. J., Q. B. 181; *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Knight v. Fox*, 5 Exch. 721; *Hole v. Sittingbourne R. Co.*, 6 H. & N. 488.

1. *Bower v. Peate*, L. R., 1 Q. B. Div. 321. See *Butler v. Hunter*, 7 H. & N. 826.

2. 2 *Thompson on Neg.*, § 29, page 907. And see *Horne v. Nicholson*, 56 Mo. 220; *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Homan v. Stanley*, 66 Pa. St. 464; *McCleary v. Kent*, 3 Duer (N. Y.) 27; *Pickard v. Smith*, 10 C. B., N. S. 470; *Jones v. Chanton*, 4 *Thomp. & C.* 63.

3. *Scaffolding*.—O and M contracted with defendant to put a cornice on the mill, any scaffolding required for that purpose to be erected free of cost to them. Plaintiff's intestate, a workman in the employ of O and M, while engaged in the work, was killed by the fall of the scaffold erected by the defendant for that purpose. In an action to recover damages, plaintiff was nonsuited upon the ground that defendant owed no duty to deceased in re-

spect to the construction of the scaffold. This upon appeal was held error, that the scaffold being erected by defendant upon its own premises for the express purpose of accommodating the workmen, a duty was imposed upon it toward them to use proper diligence in constructing and maintaining the structure. *Coughtry v. Glove Woolen Co.*, 56 N. Y. 124; *King v. N. Y. C. etc. R. Co.*, 66 N. Y. 181.

4. *Contractor for Carpenter Work*.—If S engages C to do the carpenter work of a building at a fixed price, and to superintend the other work on the building, employing the hands and certifying their bills to S, who pays them, and C is guilty of negligence in not sufficiently guarding a pit or vault opened in the sidewalk of the premises on which the building is erected, S will be responsible for damage sustained by a person falling into the opening, in consequence of such negligence, C being the contractor for the carpenter work only. *Sawyer v. McClosky*, 20 S. 536.

5. *Schwartz v. Gilmore*, 45 Ill. 455. *Demolishment of Building*.—Under a written contract to demolish a building, containing a clause that the "work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points I agree to accept as final," held that this operated such a reservation of control over the work as prevented the contractor from being independent, and created the relation of master and servant. *Faren v. Seliers*, 39 La. An. 1011

abandoned by the employer, for injuries to a third person arising therefrom, the master is solely liable.¹

(p) *Work Completed and Turned Over*.—After a contract has been properly completed, and the work turned over and accepted, for any subsequent injury caused by the natural result of the work, the employer is responsible.²

(q) *Notice of Dangers Not Apparent*—Where one is doing work under a contract, upon the land of another, the primary obligation to protect his laborers rests upon the contractor rather than the landowner, but this is liable to be controlled by circumstances. The obligation to give warning of all dangers not apparent is one the employer owes to the contractor as much as to his own servants, and to those employed by the contractor to the same extent and for the same reasons.³

(r) *Employer Furnishing Machinery and Servants*.—So if the principal was by the terms of the contract under obligation to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, he would be liable to the agent or servant of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and keeping in repair the proper machinery or appliances, or in employing and retaining competent servants.⁴

4. *Application of Rule to Railways*⁵—(a) *Generally*.—The general doctrine now seems firmly established that a railway company is not liable for the act of a contractor's servant where the contractor has independent control, although subordinate in some sense, to the general design of the work.⁶

1. Philadelphia etc. R. Co. v. Philadelphia etc. Towboat Co., 23 How. (U. S.) 209.

2. Hyams v. Webster, L. R., 2 Q. B. 262; Bartlet v. Barker, 34 L. J., Exch. 8; Regina v. Watts, 1 Salk. 357; Mullen v. St. John, 57 N. Y. 567; Church of etc. v. Buckhart, 3 Hill (N. Y.) 193.

3. Burdick v. Cheadle, 26 Ohio St. 393; Campbell v. Sugar Co., 62 Me. 552; Owings v. Jones, 9 Mo. 108; Grady v. Walsner, 46 Ala. 381.

Owner of Mine.—A contractor agreed with the owners of a mine to do certain work therein, the owners engaging to furnish and put up such props or supports for the roof of the mine as would render the miners secure, whenever notified by the contractor that the same were necessary. *Held*, that although such notice from the contractor may not have been received by the owners, the owners, if they had actual knowledge that such supports were necessary, became liable in damages to an employee of the contractor who, without negligence on his own part,

had been injured while at work in the mine through the want of such supports for the roof. *Kelly v. Howell*, 41 Ohio St. 438.

4. Mechem on Agency, § 666; citing Samuelson v. Iron Co., 49 Mich. 164; Elliott v. Bray, 10 Allen (Mass.) 378; Coughty v. Woollen Co., 56 N. Y. 124; Tobin v. Portland etc. R. Co., 59 Me. 183; Latham v. Roach, 72 Ill. 179; Malone v. Hawley, 46 Cal. 409; Deford v. Keyser, 30 Md. 179; Pierce v. Whitcomb, 48 Vt. 127. And see *King v. New York etc. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 37.

5. See *ante*, 3 g, DEPUTING PERFORMANCE OF LEGAL OBLIGATION.

6. Redfield on Railways, 537; Quarman v. Burnett, 6 M. & W. 499; Milligan v. Wedge, 12 A. & E. 737; Knight v. Fox, 5 Exch. 221; Burgess v. Gray, 1 C. B. 578; Overton v. Freeman, 11 C. B. 867; Peachey v. Rowland, 13 C. B. 182; Rapson v. Cubitt, 9 M. & W. 710; Reddie v. London etc. R. Co., 6 Railw. Cas. 184; Steele v. South East R. Co., 16 C. B. 550; Young v. New York R.

Thus where a railroad is being constructed and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company, at the time of the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad.¹

Nor is a railroad company liable for damages resulting from the negligent management of one of its trains used and controlled by construction contractors for construction purposes on a portion of its road built under construction contract and not yet turned over to the railroad company.²

Co., 30 Barb. (N. Y.) 229; Cincinnati v. Stone, 5 Ohio St. 38.

Thus, a contractor who employs his own means and pays his own workmen in building a railroad is as to third persons independent of the railway company, although its engineer has general supervision in respect of the time of doing the work; and furthermore there is no difference in this respect between corporations and natural persons who employ independent contractors. Edmundson v. Pittsburgh etc. R. Co., 111 Pa. St. 316; 23 Am. & Eng. R. Cas. 423. See Hughes v. Cincinnati etc. R. Co., 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; New Orleans etc. R. Co. v. Reese, 61 Wis. 581; 18 Am. & Eng. R. Cas. 110; Kelly v. New York, 11 N. Y. 432; Blake v. Ferris, 1 Seld. (N. Y.) 48; Pack v. New York, 4 Seld. (N. Y.) 222; Hutchinson v. York etc. R. Co., 5 Exch. 343. And see Griggs v. Houston, 104 U. S. 553; 8 Am. & Eng. R. Cas. 359.

The question to be considered in cases of this character is whether the person causing the injury was the servant of the contractor, or of a contractor who was the undertaker for accomplishing the work, and having a separate and independent control of the employees engaged in the labor. Blackwell v. Wiswell, 24 Barb. (N. Y.) 355. And see McCafferty v. Spuyten Duyvel etc. R. Co., 61 N. Y. 178; Kansas City R. Co. v. Fitzsimmons, 18 Kan. 34; Cuff v. Newark R. Co., 6 Vroom (N. J.) 17; Pawlett v. Rutland etc. R. Co., 28 Vt. 297; West v. St. Louis etc. R. Co., 63 Ill. 545.

Funds Retained from Contract Price.

—A provision in the contract that the contractor shall be liable to the company for all negligent acts, and that the company may retain from his compensation a sum sufficient to make amends

for all injury done, does not enure to the benefit of outside persons injured by the negligence of the contractor so as to render the company liable to them. Tibbetts v. Knox & L. R. Co., 62 Me. 437.

1. Kansas City R. Co. v. Fitzsimmons, 18 Kan. 34; Painter v. Pittsburgh, 46 Pa. St. 213; Carman v. Steuben etc. R. Co., 4 Ohio St. 399; Morgan v. Bowman, 22 Mo. 538; Barry v. St. Louis, 17 Mo. 121; Hillard v. Richardson, 3 Gray (Mass.) 349; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Schular v. Hudson etc. R. Co., 30 Barb. (N. Y.) 653; Burke v. Norwich etc. R. Co., 34 Conn. 474; Murray v. Currie, L. R., 6 C. P. 24; Weynant v. New York etc. R. Co., 3 Duer (N. Y.) 360.

Assignment to President.—A contractor assigned contract to president of company, who proceeded to construct road. *Held*, that corporation was liable for injury to servant caused by negligence in course of construction. Solomon R. Co. v. Jones, 30 Kan. 601; 15 Am. & Eng. R. Cas. 207; St. Louis etc. R. Co. v. Willis, 38 Kan. 330; 33 Am. & Eng. R. Cas. 397.

2. Cunningham v. The International R. Co., 51 Tex. 503; West v. St. Louis etc. R. Co., 63 Ill. 545; Guardier v. Cormack, 2 E. D. Smith (N. Y.) 254; Salter v. Masereau, 64 N. Y. 138; Camp v. Church Warden, 7 La. An 321; C. R. & B. Co. v. Grant, 46 Ga. 417; Union Pacific R. Co. v. House, 1 Wyo. 27; Meyer v. Midland Pac. R. Co., 2 Neb. 319; Cunningham v. International R. Co., 51 Tex. 503; Schular v. Hudson etc. R. Co., 38 Barb. (N. Y.) 653.

Retention of Power to Discharge.

—The fact that the company retains the power to discharge incompetent workmen does not render it responsible for the contractor's negligence. Reddie v.

nor for personal injuries arising from rock blasting.¹

Not even when nitro-glycerine is used, providing that its use is not stipulated in the contract;² nor by the falling of stones on highway;³ nor from leaving of stones in highway.⁴

(b) *Acts with Reference to Real Estate.*—Where the work itself which the contractor is employed to do is not a nuisance the com-

London etc. R. Co., 4 Exch. 244; Hobbett v. London etc. R. Co., 4 Exch. 254; Cuff v. Newark etc. R. Co., 35 N. J. L. 17.

Work According to Specifications.—Neither does the fact that the contractor is working in accordance with specifications take away the independent character of the employment. Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; St. Louis etc. R. Co. v. Willis, 38 Kan. 330; 33 Am. & Eng. R. Cas. 397.

Right to Supervise.—Nor the retention of the right to supervise generally. Eaton v. E. & N. J. R. Co., 59 Me. 20.

Or Give General Directions.—Schular v. Hudson etc. R. Co., 38 Barb. (N. Y.) 653; Callahan v. Burlington etc. R. Co., 23 Iowa 562.

Where Employer Furnished Motive Power.—A railroad company employed a contractor to build its road, and agreed to furnish the motive power and operate the construction trains. The contractor was to handle all material, and build a certain number of miles per month. It was held that the company's engineer on a construction train was not under the contract of the company, but under that of the contractor, and that the company was not liable for injuries caused by the negligence of the engineer in too rapidly operating the train. Miller v. Minnesota etc. R. Co., 76 Iowa 655.

It has been held, in Nebraska, that when a railroad corporation enters into an agreement with a contractor to build a portion of its railroad, the locomotives, cars, etc., used in such construction to be run exclusively under the direction and control of the contractor until the road is completed and turned over to the corporation, the railroad company will not be liable for damages occasioned by the negligence of the persons running such locomotives and cars. Hitte Admr. v. R. V. R. Co., 19 Neb. 620; 29 Am. & Eng. R. Cas. 586.

And such is the general rule. West v. St. Louis etc. R. Co., 63 Ill. 545; Camp v. Church Warden, 7 La. An. 321;

Guardier v. Cormack, 2 E. D. Smith (N. Y.) 254; Salter v. Mersereau, 64 N. Y. 138.

On the other hand, the facts that being a railroad company employed a contractor to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train and an engineer to run the same. The company prohibited the running of this train at a greater rate of speed than thirteen miles per hour, and required that it should be on a side track fifteen minutes before the schedule time for each of the company's trains. Subject to these regulations, the control, management and direction of the construction train was given wholly to the contractor. The engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of the contractor, and to supply his place. The company paid the engineer's wages, but charged the same to the contractor, and deducted the amount thereof from the sum due him for his work. A mule was killed by the negligent running of this train.

Held, that the engineer was the servant of the company, and that it was liable. New Orleans etc. R. Co. v. Norwood, 62 Miss. 565; Burton v. Galveston etc. R. Co., 61 Tex. 526; 21 Am. & Eng. R. Cas. 218.

1. McCafferty v. Spuyten Duyvel etc. R. Co., 61 N. Y. 178; Tibbetts v. Knox etc. Co., 62 Me. 437; Edmundson v. Pittsburgh etc. R. Co., 111 Pa. St. 316; 23 Am. & Eng. R. Co. 423. Compare Stone v. Cheshire R. Corp., 19 N. H. 427; Cannon v. Steubenville etc. R. Co., 4 Ohio St. 339.

2. Cuff v. Newark etc. R. Co., 35 N. J. L. 17.

3. Reddie v. London etc. R. Co., 4 Exch. 244; Hobbett v. London & N. W. R. Co., 4 Exch. 254.

4. Pawlet v. Rutland etc. R. Co., 28 Vt. 297.

Poisonous Grease.—An employer is not liable for an injury occasioned to the servant of the contractor in consequence of the use by the latter of a

pany will not be liable for the contractor's negligent or unlawful acts on or about real estate.¹

(c) *Contractor Exercising Right of Eminent Domain.*—There are many authorities that hold that where a contractor, in the course of constructing a railroad, is using the right of eminent domain vested in the company and abuses that right by making an improper entry on land or doing unnecessary damage thereto, the company is not absolved from liability. It is said to be contrary to public policy in such case to allow the company by delegating its rights to escape responsibility for the misuser of them.²

(d) *Dangerous Employment.*—But where the work upon which the contractor is employed is in its nature dangerous, so that the company could reasonably foresee that damages would ensue, it cannot shelter itself from liability by throwing the blame on the contractor.³

(e) *Direct Superintendence of Company.*—Where the railroad company has direct superintendence and direction of the work in hand, both as regards the methods employed and the result at-

poisonous mixture applied to the timber upon which the servant is working, to prevent decay. *West v. St. Louis etc. R. Co.*, 63 Ill. 545.

1. *McCafferty v. Spuyten Duyvel etc. R. Co.*, 61 N. Y. 178; *King v. New York etc. R. Co.*, 66 N. Y. 181; *Cuff v. Newark etc. R. Co.*, 35 N. J. L. 17; *Reedie v. London etc. R. Co.*, 4 Exch. 244; *Steel v. South Eastern R. Co.*, 16 C. B. 550.

Unlawful Entry Upon Land.—*Eaton v. European etc. R. Co.*, 59 Me. 520, 529; *Clark v. Vermont etc. R. Co.*, 28 Vt. 103.

Injury Through Raising Embankment.—*Steel v. South Eastern R. Co.*, 16 C. B. 550.

Through Pulling Down Fence.—*Clark v. Hannibal etc. R. Co.*, 36 Mo. 202; *Clark v. Vermont etc. R. Co.*, 28 Vt. 103.

Cutting Trees.—A railroad company is not liable for wrongful act of contractor in taking trees from the land of another to build a railroad. *New Orleans etc. R. Co. v. Reese*, 61 Miss. 381; 18 Am. & Eng. R. Cas. 110.

Where Land Owner Stands by.—Where land owners stand by and permit contractors constructing road to enter upon and waste soil adjacent to right of way without objection, a court of equity may refuse to award them damages. *Murtfeldt v. New York etc. R. Co.*, 102 N. Y. 703; 25 Am. & Eng. R. Cas. 144.

Appropriation of Uncondemned Land.

—Company not liable if same was not authorized or assented to. *Wattmeyer v. Wisconsin etc. R. Co.*, 71 Iowa 626; 30 Am. & Eng. R. Cas. 384.

Kindling of Fires.—*Callahan v. B. & M. R. R. Co.*, 23 Iowa 562; *Eaton v. European etc. R. Co.*, 59 Me. 520.

2. *Leshner v. Wabash Navigation Co.*, 14 Ill. 85; *Hindee v. Wabash Navigation Co.*, 15 Ill. 72; *Chicago etc. R. Co. v. McCarthy*, 20 Ill. 385; *Chicago etc. R. Co. v. Whipple*, 22 Ill. 105; *West v. St. Louis etc. R. Co.*, 63 Ill. 545; *Chicago etc. R. Co. v. Woolsey*, 85 Ill. 370; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Vermont etc. R. Co. v. Baxter*, 22 Vt. 365; *M. & A. R. Co. v. Mayes*, 49 Ga. 355; *H. & G. N. R. Co. v. Meador*, 50 Tex. 77; *Cunningham v. Int. R. Co.*, 51 Tex. 503.

Bridge Over Navigable Stream.—Where, therefore, the company had acquired the right to construct a bridge across a navigable stream, so nevertheless that navigation was not interfered with, it was held responsible for the detention of a vessel in the stream caused by the negligence of the contractor who had been employed to build the bridge in question. *Hole v. Sittingborne etc. R. Co.*, 6 H. & N. 488.

3. *Carman v. Steubenville etc. R. Co.*, 4 Ohio St. 399; *Stone v. Cheshire R. Co.*, 19 N. H. 427.

This would not be the case, however, where the act in question was not called for by the contract, or the result of the same could have been foreseen.

tained, the employment of the contractor ceases to be an independent employment. He sinks to the position of a servant and the company is therefore liable for his negligence.¹

5. Liability of Municipalities.—Municipal corporations fall within the general rule of law that the act done which is injurious to others must be within the scope of the employment, and furthermore that it relates to matters about which the corporation is authorized to contract.²

A stipulation in a contract between a municipality and an independent contractor, that its engineer shall have power to direct changes in the time and manner of conducting the work, is not such a reservation of power as will make it liable for the injury occasioned by the negligence of the contractor.³

Tibbetts v. Knox etc. R. Co., 62 Me. 437; *McCafferty v. Spuyten Duyvel etc. R. Co.*, 61 N. Y. 178.

1. *Carman v. Steubenville etc. R. Co.*, 4 Ohio St. 399; *New Orleans etc. R. Co. v. Hanning*, 15 Wall. (U. S.) 649; *Philadelphia etc. R. Co. v. Philadelphia etc. Towboat Co.*, 23 How. (U. S.) 209.

2. 2 *Dillon's Mun. Corp.*, §§ 953, 968.

3. *Erie v. Caulkins*, 85 Pa. St. 247; *Painter v. Mayor*, 46 Pa. St. 213; *Reed v. Allegheny*, 79 Pa. St. 300; *Murphy v. Ottawa*, 13 Ont. —; 18 Am. & Eng. Corp. Cas. 379; *Clark v. Fry*, 8 Ohio 359; *Congreve v. Morgan*, 18 N. Y. 84. And see *ShIPLEY v. Fifty Associates*, 106 Mass. 194; *Grove v. Ft. Wayne*, 45 Ind. 429; *Burgess v. Gray*, 1 C. B. 578; *Pickard v. Smith*, 4 L. T., N. S. 470; *Buffalo v. Holloway*, 7 N. Y. 493; *Storrs v. Utica*, 17 N. Y. 104; *Gouedier v. Cormack*, 2 E. D. Smith (N. Y.) 254; *Creed v. Hardman*, 29 N. Y. 591; *Gilbert v. Beach*, 5 Bosw. (N. Y.) 445; *McCleary v. Kent*, 3 Duer (N. Y.) 27; *St. Paul v. Seitz*, 3 Minn. 297; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Allen v. Willard*, 57 Pa. St. 374; *Homan v. Stanley*, 66 Pa. St. 464.

Negligent Grading Under Directions of Surveyor.—A city is liable for injuries occasioned by negligent grading of street by contractor working under directions of city surveyor. *Seattle v. Busby*, 2 Wash. Ter. 25; 2 Am. & Eng. Corp. Cas. 503.

City Employee Acting Under Direction of Street Commissioner.—It was held in Vermont that an incorporated village was not liable for injuries resulting from negligence of one of its employees in piling tiles, at the direction of the village street commission, in a yard occupied in storing property, when the

village was not the owner of the tiles, and they were not in its custody or control, and the commissioner was acting as an individual for his private gain; the act not amounting to a nuisance, and the public trust not being involved. *Palmer v. St. Albans (Vt.)*, 60 Vt. 427; 20 Am. & Eng. Corp. Cas. 392.

Brick Left in Street by Contractor.—A city is liable for personal injury occasioned by falling of bricks in street erected by contractor and constituting unlawful obstruction, of which city had notice, even though city did not know that obstruction was dangerous. *Rehberg v. New York*, 91 N. Y. 137; 2 Am. & Eng. Corp. Cas. 529.

Neglect of Servant of Contractor to Replace Barriers in Highway.—Where the facts were, that a railroad corporation was authorized to construct its railway, and in the progress of its work it became necessary from time to time to remove certain barriers, which were placed by the corporation across the highway for the protection of travellers, but were adopted by the town in which the highway was situated, and in consequence of the neglect of the workmen to replace the barriers at night a traveller sustained injury; it was held that the corporation was responsible for the negligence of such workmen, although they were employed by an individual who had contracted to construct this portion of the railroad for a stipulated sum, the work being done by direction of the corporation. *Lowell v. Boston etc. R. Co.*, 23 Pick. (Mass.) 24; *For-syth v. Harper*, 11 Allen (Mass.) 419; *Hillard v. Richardson*, 3 Gray (Mass.) 349; *Linton v. Smith*, 8 Gray (Mass.) 147; *Carter v. Berlin Mills Co.*, 58 N.

A municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from the neglect to keep proper lights and guards at night around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work. For the danger arises from the very nature of the improvement, and if it can be averted only by special precautions the corporation which has authorized the work is bound to take those precautions.¹

XXIII. ASSUMPTION OF RISKS OF EMPLOYMENT—1. General Rule.—

Where an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties he assumes such risks as are incident to their discharge.² In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes, and if he fails to do so he cannot charge the

H. 52; *Wright v. Holbrook*, 52 N. H. 120; *Blake v. Ferris*, 5 N. Y. 48; *Vt. Cent. R. Co. v. Baxter*, 22 Vt. 366.

1. *Storrs v. Utica*, 17 N. Y. 104. See *HIGHWAYS*, vol. 9, p. 362.

2. *Wharton on Neg.*, § 1214; *Farrow v. Kelley*, 108 U. S. 288; *Little Rock etc. R. Co. v. Duffy*, 35 Ark. 602; 4 Am. & Eng. R. Cas. 638; *Little Rock etc. R. Co. v. Townsend*, 41 Ark. 382; 21 Am. & Eng. R. Cas. 619; *McGlynn v. Brodie*, 31 Cal. 377; *Baxter v. Roberts*, 44 Cal. 187; *Malone v. Hawley*, 46 Cal. 409; *Sweeney v. Central Pacific R. Co.*, 57 Cal. 15, 20; *Palmer v. Denver etc. R. Co. (Colo.)*, 12 Fed. Rep. 392; *Hall v. Union Pacific R. Co. (Colo.)*, 16 Fed. Rep. 744; *Summerhays v. Kansas Pacific R. Co.*, 2 Colo. 484; *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Stafford v. Chicago etc. R. Co.*, 114 Ill. 244; *Moline Plow Co. v. Anderson*, 19 Ill. App. 417; *Chicago etc. R. Co. v. Clark, Admx.*, 11 Ill. App. 104; *Simmons v. Chicago etc. R. Co.*, 11 Ill. App. 147; *Chicago etc. R. Co. v. Gregory*, 58 Ill. 272; *Indianapolis etc. R. Co. v. Flanagan*, 77 Ill. 365; *Pennsylvania Co. v. Lynch*, 90 Ill. 334; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Abend v. T. H. & G. R. Co.*, 111 Ill. 202; *Houser v. Chicago etc. R. Co. Co.*, 60 Iowa 230; 8 Am. & Eng. R. Cas. 500; *Money v. Lower Vein Coal Co.*, 55 Iowa 671; *Chicago etc. R. Co. v. Mayes*, 63 Iowa 562; *Union Pacific*

R. Co. v. Estis, 37 Kan. 715; *Smith v. Sellers*, 40 La. An. 527; *Chicago etc. R. Co. v. Mahoney*, 4 Ill. App. 262; *Camp Point Mfg. Co. v. Baillou*, 71 Ill. 417; *Chicago etc. R. Co. v. Munroe*, 80 Ill. 25; *Toledo etc. R. Co. v. Asbury*, 84 Ill. 430; *Baltimore etc. R. Co. v. Woodward*, 41 Md. 208; *Lovejoy v. Boston etc. R. Co.*, 125 Mass. 79; *Yeaton v. B. & L. R. Co.*, 135 Mass. 418; *Leary v. Boston etc. R. Co.*, 139 Mass. 580; *Russell v. Tillotson*, 140 Mass. 201; *Michigan etc. R. Co. v. Smithson*, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101; *Patterson v. Chicago etc. R. Co.*, 53 Mich. 125; *Smith v. Peninsular Car Works*, 60 Mich. 502; *McGinnis v. Canada etc. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135; *Berger v. St. Paul Minn. & M. R. Co.*, 39 Minn. 78; *Woods v. St. Paul etc. R. Co.*, 39 Minn. 435; *Olsen v. McMullen*, 34 Minn. 94; *Porter v. Hannibal R. Co.*, 71 Mo. 66; 2 Am. & Eng. R. Cas. 44; *Laning v. New York etc. R. Co.*, 49 N. Y. 521; *Owen v. New York etc. R. Co.*, 1 Lans. (N. Y.) 108; *Hickey v. Taaffe*, 105 N. Y. 26; *Mad River etc. R. Co. v. Barber*, 5 Ohio St. 541; *Walsh v. Oregon Ry. & Nav. Co.*, 10 Oreg. 250; *Pennsylvania etc. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 5 Am. & Eng. R. Cas. 508; *Rummell v. Dilworth*, 111 Pa. St. 343; *Sykes v. Packer*, 11 W. N. C. (Pa.) 494; *Pande v. Reese*, 12 W. N. C. (Pa.) 97; *Patterson v. Pittsburgh etc. R. Co.*,

consequences upon the master.¹ And this rule applies to minor servants.² But a servant does not, of course, assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof.³

76 Pa. St. 390; *Kelley v. Silver Spring Bleaching Co.*, 12 R. I. 112; *Nashville etc. R. Co. v. Elliott*, 1 Cold. (Tenn.) 612; *Houston etc. R. Co. v. Fowler*, 56 Tex. 452; 8 Am. & Eng. R. Cas. 504; *H. F. & C. R. Co. v. Conrad*, 62 Tex. 627; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Naylor v. Chicago etc. R. Co.*, 53 Wis. 661; 5 Am. & Eng. R. Cas. 460; *Behm v. Armour*, 58 Wis. 1; *Hobbs v. Stauer*, 62 Wis. 108; *Noves v. Smith*, 28 Vt. 59; *Baltimore etc. R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395. And see the following English decisions in the same line: *Bartonshill Coal Co. v. Reed*, 3 Macq. 266; *Priestly v. Fowler*, 3 M. & W. 1; *Britton v. Great Western Co.*, L. R., 7 Exch. 130; *Assop v. Yates*, 2 H. & N. 768; *Couch v. Steel*, 24 Eng. Law & Eq. 77; *Hutchinson v. York etc. R. Co.*, 5 Exch. 343; *Clarke v. Holmes*, 7 H. & N. 937; *Seymour v. Maddox*, 16 Q. B. 326; *Griffiths v. Gidlow*, 3 H. & N. 648.

1. *Walsh v. St. Paul etc. R. Co.*, 27 Minn. 367; 2 Am. & Eng. R. Cas. 144.

2. *Gartland v. Toledo etc. R. Co.*, 67 Ill. 498; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Chicago etc. R. Co. v. Harney*, 28 Ind. 28; *Ohio etc. R. Co. v. Hammersly*, 28 Ind. 371; *King v. Boston etc. R. Co.*, 9 Cush. (Mass.) 112; *McGinnis v. Canada etc. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135; *Veits v. Toledo etc. R. Co.*, 55 Mich. 120; 18 Am. & Eng. R. Cas. 11; *Nashville etc. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611. But see *Hamilton v. Galveston etc. R. Co.*, 54 Tex. 556; 4 Am. & Eng. R. Cas. 528; *Fish v. Central Pacific R. Co.*, 72 Cal. 38; *Gilbert v. Guild*, 144 Mass. 601; *De Graff v. New York etc. R. Co.*, 76 N. Y. 125; *Jones v. Florence Mining Co.*, 25 Am. L. Reg. 580, 591; *Andersson v. Morison*, 22 Minn. 274; *Reardon v. New York etc. Co.*, 51 N. Y. Sup. Ct. 134.

3. *Clapp v. Minneapolis etc. R. Co.*, 36 Minn. 6. See generally *Smith v. Peninsular Car Works*, 60 Mich. 508; *Cook v. St. P. M. & M. R. Co.*, 34 Minn. 45; *Hobbs v. Stauer*, 62 Wis. 108; *Behm v. Armour* (Wis.), 58 Wis. 1; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407;

6 Sup. Ct. Rep. 590; *Louisville etc. R. Co. v. Frawley*, 110 Ind. 13; 28 Am. & Eng. R. Cas. 308; *Galveston etc. R. Co. v. Lempe*, 59 Tex. 19; *Pittsburg etc. Co. v. Adams*, 105 Ind. 151; *Cole v. C. & N. W. R. Co.*, 67 Wis. 272; *Lopez v. Central Arizona Mfg. Co.*, 1 Ariz. 464; *Malone v. Hamley*, 46 Cal. 409; *Sanborn v. Madeira etc. Co.*, 70 Cal. 261; *Wells v. Cole*, 9 Colo. 159; *Central etc. Co. v. Haslett*, 74 Ga. 59; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Toledo etc. R. Co. v. Eddy*, 72 Ill. 138; *St. Louis etc. R. Co. v. Britz*, 72 Ill. 257; *Chicago R. Co. v. Munroe*, 85 Ill. 25; *Morris v. Gleason*, 4 Ill. App. 395; *Chicago etc. R. Co. v. Clark*, 11 Ill. App. 104; *Chicago etc. R. Co. v. Simmons*, 11 Ill. App. 147. Compare *Illinois etc. R. Co. v. Jones*, 11 Ill. App. 324. Also see *Chicago etc. R. Co. v. Lonergan*, 118 Ill. 41; *Coal Run etc. Co. v. Jones*, 19 Ill. App. 365; *Umbach v. Lake Shore etc. R. Co.*, 83 Ind. 191; *Lake Shore etc. R. Co. v. Stupak*, 108 Ind. 1; *Kitteringham v. Sioux City etc. R. Co.*, 62 Iowa 285; *Heath v. Whitebreast etc. Min. Co.*, 65 Iowa 737; *Perigo v. C. R. I. & P. R. Co.*, 55 Iowa 326; *Money v. Lower View etc. Co.*, 55 Iowa 671; *Wells v. Burlington etc. R. Co.*, 56 Iowa 520; *Mayes v. Chicago etc. R. Co.*, 63 Iowa 562; *Brown v. Chicago etc. R. Co.*, 69 Iowa 161; *Lane v. Central Iowa R. Co.*, 69 Iowa 443; *Kansas etc. R. Co. v. Peavey*, 34 Kan. 472; *Sanborn v. Atchinson etc. R. Co.*, 35 Kan. 292; *McQueen v. Central Branch etc. R. Co.*, 30 Kan. 689; 15 Am. & Eng. R. Cas. 226; *Bogenshutz v. Smith* (Ky.), 15 W. Rep. 578; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Lovejoy v. Boston etc. R. Co.*, 125 Mass. 79; *Pingree v. Leyland*, 135 Mass. 398; *Clarke v. Soule*, 137 Mass. 380; *Russell v. Tillotson*, 140 Mass. 201; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Davis v. Detroit etc. R. Co.*, 20 Mich. 205; *McGinnis v. Canada etc. R. Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135; *Gates v. Southern etc. R. Co.*, 28 Minn. 110; 2 Am. & Eng. R. Cas. 237; *Clark v. St. Paul etc. R. Co.*, 28 Minn. 128; 2 Am. & Eng. R. Cas. 240; *Fraker v. St. Paul etc. R. Co.*, 32 Minn. 54; 15 Am. &

2., Burden of Proving Servant's Knowledge.—The burden of proving that an injured servant had knowledge of an obstruction or defect before an accident is on the employer.¹

3. Latent Defects.—On the other hand, the servant does assume all risk of latent defects in machinery and appliances unknown to the master unless the master was negligent in not discovering the same.² And the question whether or not a defect is discoverable is for the jury.³ Where defects are not open and obvious, the experience, or lack of it, of the employee should be considered in determining whether or not he should be charged with knowledge of

Eng. R. Cas. 256; *Russell v. Minneapolis etc. R. Co.*, 32 Minn. 230; *Olson v. McMullen*, 39 Minn. 94; *Kelley v. Chicago etc. R. Co.*, 35 Minn. 490; *Laning v. New York etc. R. Co.*, 39 N. Y. 521; *Monaghan v. New York etc. R. Co.*, 45 Hun (N. Y.) 118; *Bahn v. Hanemeyer*, 53 Hun (N. Y.) 557; *Shaw v. Sheldon*, 103 N. Y. 667; *Mad River etc. R. Co. v. Barber*, 5 Ohio St. 541; *Wells v. Coe*, 9 Colo. 159; *Shaffer v. Haish*, 110 Pa. St. 575; *Rummell v. Dillworth*, 111 Pa. St. 343; *Wanamaker v. Burke*, 111 Pa. St. 425; *Drew v. Gaylord Coal Co. (Pa.)*, 1886, 4 Atl. Rep. 214; *Brassman v. Lehigh Valley R. Co.*, 113 Pa. St. 491.

And it may be observed in this connection, that it is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows the defects, may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed. *Cook v. St. Paul etc. R. Co.*, 34 Minn. 45; *Russell v. Minn. etc. R. Co.*, 32 Minn. 230.

Acquaintance with Machinery for Ten or Fifteen Months.—The fact that the plaintiff worked habitually with machinery in question for ten or fifteen months is competent evidence from which a jury may infer that plaintiff was acquainted with its dangerous character, but it is not conclusive. *McDade v. Washington etc. R. Co.*, 5 Mackey (D. C.) 144; 26 Am. & Eng. R. Cas. 325.

1. *Hullehan v. Green Bay etc. R. Co.*,

68 Wis. 520; 31 Am. & Eng. R. Cas. 322. See *Wells v. Burlington etc. R. Co.*, 56 Iowa 520; 2 Am. & Eng. R. Cas. 243.

2. *Ballou v. Chicago etc. R. Co.*, 54 Wis. 257; 5 Am. & Eng. R. Cas. 480; *Wedgwood v. Chicago etc. R. Co.*, 41 Wis. 478; *Smith v. Chicago etc. R. Co.*, 42 Wis. 520; *Morrison v. Phillips etc. Cons. Co.*, 44 Wis. 405; *Steffen v. Chicago etc. R. Co.*, 46 Wis. 265; *Indianapolis etc. R. Co. v. Toy*, 91 Ill. 474; *East St. Louis etc. Packing Co. v. Hightower*, 92 Ill. 139; *DeGraff v. New York etc. R. Co.*, 76 N. Y. 125; *Warner v. Erie etc. R. Co.*, 39 N. Y. 468.

Cause of Accident Uncertain.—D, plaintiff's intestate, was an engineer in the service of defendant, who was operating a railroad; while running a train D's engine was derailed, and he received injuries causing his death. In an action to recover damages, plaintiff's evidence tended to show that the track was defective at the place of derailment; the evidence upon this point was conflicting. Defendant proved without dispute that the flange of one of the wheels of the locomotive was broken at the time of the accident, and that the fracture was due to an undiscoverable flaw. The court refused a motion to dismiss the complaint, and left it to the jury to determine whether the derailment was caused by the defects in the track or the breaking of the wheel, charging them that if the death of D was caused by the latter plaintiff could not recover. *Held*, no error. *Durkin v. Sharp*, 88 N. Y. 225.

3. *Rummell v. Dillworth*, 111 Pa. St. 343; *Bunnell v. St. Paul etc. R. Co.*, 29 Minn. 305; *Leahy v. Southern Pacific R. Co.*, 65 Cal. 150; 15 Am. & Eng. R. Cas. 230; *Baker v. Alleghany etc. R. Co.*, 95 Pa. St. 211; 8 Am. & Eng. R. Cas. 141; 40 Am. Rep. 634.

them, and of the dangers arising therefrom; and the question is one of fact for the jury and not one of law for the court.¹ And so likewise is the question as to whether or not the defect was such an one as threatened the safety of the employee.²

Where plaintiff's right of action depends upon his ignorance of certain latent conditions, the complaint need not aver such ignorance, but, in order to escape liability, defendant must aver and prove knowledge on plaintiff's part.³

4. Master's Business Methods.—Furthermore the servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.⁴ But a single instance, or any number of instances (not amounting to a custom or mode of doing business), of culpable negligence of the master, will not cast upon the servant the risk of subsequent or other similar acts of negligence.⁵ Nor is a servant bound to investigate for himself a department of work with which he has nothing to do, and to set up his judgment against that of his master as to the safety of appliances in use.⁶

5. Test as to Liability.—A servant is not necessarily chargeable in remaining in the master's employment, with having assumed dangers incident to the carrying on of the business, if the danger or risk is not such that, as a prudent man, he is bound not to assume them, and to refuse to continue in the service.⁷

6. Servant Remaining at Work Without Complaint.—When a servant employed by a railroad company plainly perceives the risks

1. *Silliman v. Marsden*, 9 Atl. Rep. (Pa.) 639; *Mayes v. Chicago etc. R. Co.*, 63 Iowa 562; 8 Am. & Eng. R. Cas. 527.

2. *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 652.

3. *Cole v. Chicago etc. R. Co.*, 67 Wis. 272; *Porter v. Hannibal etc. R. Co.*, 71 Mo. 66; 2 Am. & Eng. R. Cas. 44.

4. *Hewitt v. Flint etc. R. Co.*, 67 Mich. 61; 31 Am. & Eng. R. Cas. 249; *Kelley v. Chicago etc. R. Co.*, 53 Wis. 74; 5 Am. & Eng. R. Cas. 469; *Naylor v. Chicago etc.*, 53 Wis. 661; 5 Am. & Eng. R. Cas. 460; *Behm v. Armour*, 58 Wis. 1.

Dangerous Premises.—Gen. St. Ky., ch. 7, § 3, provides that if the life of any person is lost by the wilful neglect of any other person or corporation, or of their agents or servants, punitive damages may be recovered therefor. *Held*, that where a servant is killed in working on dangerous premises, furnished by the master, and he knew the condition of the premises, and continued to use them without objection, the master is not liable, as he is not guilty

of wilful neglect. *Needham v. Louisville etc. R. Co.* (Ky.), 1887, 11 S. W. Rep. 306.

5. *Sherman v. Chicago etc. R. Co.*, 34 Minn. 259.

6. *Devlin v. Wabash etc. R. Co.*, 87 Mo. 545; *Moran v. Harris*, 63 Ga. 390; 38 Am. & Eng. R. Cas. 524.

7. *Thorpe v. Missouri Pacific R. Co.*, 89 Mo. 650.

Defective Track.—So held with reference to an engineer's continuing to run over a defective track. *Devlin v. Wabash etc. R. Co.*, 87 Mo. 545; 28 Am. & Eng. R. Cas. 524. And see *Mayes v. Chicago etc. R. Co.*, 63 Iowa 562; 8 Am. & Eng. R. Cas. 527; *Flynn v. Kansas City etc. R. Co.*, 78 Mo. 195; 18 Am. & Eng. R. Cas. 23.

Defective Boiler.—Servant using an engine with defective boiler, in obedience to requirements of officer, does not necessarily assume risk of employment, although he knows of defect, where same is not so gross but that with proper skill and care the engine might be safely used. *Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 578; 18 Am. & Eng. R. Cas. 68.

which he runs, and nevertheless remains performing the same services without complaint and without suggesting how his employment could be made less hazardous, he will be deemed to have undertaken to run the risks incident thereto.¹

1. *Davis v. Detroit etc. R. Co.*, 20 Mich. 105; *McMillan v. Saratoga etc. R. Co.*, 20 Barb. (N. Y.) 449; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389; *Crutchfield v. Richmond etc. R. Co.*, 76 N. Car. 320; *Illinois etc. R. Co. v. Jewell*, 46 Ill. 99; *Toledo etc. R. Co. v. Eddy*, 72 Ill. 138; *Green v. Coates Street etc. R. Co. v. Bresmer*, 97 Pa. St. 103; 4 Am. & Eng. R. Cas. 647; *Covey v. Hannibal etc. R. Co.*, 86 Mo. 635; 28 Am. & Eng. R. Cas. 382; *Naylor v. Chicago etc. R. Co. (Wis.)*, 53 Wis. 661; 5 Am. & Eng. R. Cas. 460; *Houston etc. R. Co. v. Myers*, 55 Tex. 110; 8 Am. & Eng. R. Cas. 114; *Louisville etc. R. Co. v. Orr*, 84 Ind. 50; 8 Am. & Eng. R. Cas. 94; *Umbach v. Lake Shore etc. R. Co.*, 83 Ind. 191; 8 Am. & Eng. R. Cas. 98; *Sweeney v. Central Pacific R. Co.*, 57 Cal. 15; 8 Am. & Eng. R. Cas. 151; *Rains v. St. L. etc. R. Co. (Mo.)*, 5 Am. & Eng. R. Cas. 610; *Phila. R. Co. v. Hughes (Pa.)*, 33 Am. & Eng. R. Cas. 348.

In *Virginia*, however, this doctrine is criticized and apparently not accepted. *Richmond etc. R. Co. v. Norment*, 84 Va. 167.

Risks Assumed by Employee--Defective Roadbed and Track.—Servant riding on a gravel train is deemed to consent to and accept risk incident to such train and side tracks. *Rosenbaum v. St. Paul etc. R. Co.*, 38 Minn. 173; 34 Am. & Eng. R. Cas. 274. See *Meloy v. Chicago etc. R. Co. (Iowa, 1888)*; 33 Am. & Eng. R. Cas. 358.

Belated Train.—Section man on hand car killed by passenger train behind time held to have assumed risk. *Railway Co. v. Leech*, 41 Ohio St. 388.

Lateness of Preceding Train.—Where by the rules of a railroad company an engineer is required to approach stations with great care, and is not entitled to notice that a preceding train is late, he must be presumed to have incurred the hazard and risk involved as an incident of the employment. *Illinois etc. R. Co. v. Neer*, 26 Ill. App. 356.

Extra Trains.—Repair man injured while on hand car, by being run over by extra train run without any warning, held to have assumed risk. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395. And see *Stricker's Case*, 51 Md. 47;

Woodward's Case, 41 Md. 298; *Wonder's Case*, 32 Md. 420; *Woody v. R. Co., L. R.*, 2 Ex. Div. 389; *McGrath v. New York etc. R. Co.*, 14 R. I. 357; 18 Am. & Eng. R. Cas. 5; *Olsen v. St. Paul etc. R. Co.*, 38 Minn. 117; 33 Am. & Eng. R. Cas. 386.

But in another case it appeared that plaintiff alleged that her intestate, who was employed by the defendant railroad company as a section hand, was directed, along with others with whom he was working, by a special order, to go to a certain place and repair a portion of defendant's track; that, while proceeding to the designated place on a hand car, they were met near a curve by a wild train running at a high rate of speed, of which no notice had been sent out, and whose approach was not indicated by any signals; and that a collision resulted, in which the intestate was injured. *Held*, that as the intestate had been assigned to a special duty by a special order, the danger resulting from the running of the wild train in the manner alleged was not one of the ordinary risks of the service which he assumed, and that the facts stated by plaintiff constituted a cause of action. *Cincinnati etc. R. Co. v. Long*, 112 Ind. 166; 31 Am. & Eng. R. Cas. 138.

Lack of Push Pole Socket.—Plaintiff's intestate and a fellow servant, employees of defendant railroad company, in obeying an order, adjusted a "push pole" from the corner of a tender to the corner of a car on a parallel track, for the purpose of pushing the car, but as the engine started one end of the pole slipped, throwing intestate under the wheels, whereby he was killed. *Held*, that plaintiff could not recover on the ground that defendant was negligent in not supplying the corners of the tender and car with "sockets" in which to place the pole, when plaintiff's evidence showed that such "sockets" were a new invention, not in common use; that their absence was obvious to intestate, and that he had been in defendant's employ in the same capacity several years, the presumption being that he knew that the "sockets" were not used by the defendant when he entered its service. *Norfolk & W. R. Co. v. Jackson (Va.)*, 1888. S. S. E. Rep. 370.

Voluntary and Unnecessary Riding on Train.—A servant of a railway company, employed by the month to watch its ties along the road, to prevent their destruction, went in obedience to orders from his employer to procure a deed in favor of the company, and voluntarily got on its train, and after performing the duty was voluntarily returning on its train, when it was thrown from the track and the employee injured. *Held*, the company was not liable. *Dallas v. Gulf etc. R. Co.*, 61 Tex. 196; 21 Am. & Eng. R. Cas. 575.

Engine Step of Unusual Height.—A brakeman assumes the risk of injury from using the step of an engine known by him to be higher than is usually the case. *New York etc. R. Co. v. Lyons*, 119 Pa. St. 324.

Dilapidated Track—Track Repairers.—Laborers on a railroad, who are repairing the track, take all the risk incident to its dilapidated condition. *Brick v. Rochester etc. R. Co.*, 98 N. Y. 211; s. c., 21 Am. & Eng. R. Cas. 605; *Philadelphia etc. R. Co. v. Schertle*, 97 Pa. St. 450.

Curves in Track.—Brakemen and other persons employed by a railroad company within the freight stations and yards of the company, when they accept the employment assume the risks arising from the nature of the curves existing in the track. *Tuttle v. Detroit etc. R. Co.*, 122 U. S. 189; 31 Am. & Eng. R. Cas. 216.

Defective Steam Cock.—A fireman assumes the risk incident to the possible bursting of a steam cock having no defect, the same occurring through his letting steam into pipes containing water, known by him to be a dangerous operation. *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206. See *Russell v. Tillitson*, 140 Mass. 201; *Taylor v. Carew Mfg. Co.* 140 Mass. 150; *Leary v. Boston etc. R. Co.*, 139 Mass. 580.

Defect in Boiler.—It was laid down in another case that although the explosion of a boiler was not caused by the fault of the deceased, yet if he was aware that the boiler was defective in those particulars which caused it to explode, there could be no recovery, even though the deceased might have exercised the greatest care to prevent the explosion, or to have kept out of reach of its injurious effects. *Morris v. Gleason*, 1 Ill. App. 510; *Compare Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 578; 18 Am. & Eng. R. Cas. 68.

Roller in Railway Shops.—Where

plaintiff's hand was crushed under a roller which he had seen worked for a long time and had worked himself for a month, and where the danger was apparent to the senses, and no skill beyond that possessed by plaintiff was necessary to avoid it, it was held that he could not recover of his employer for the injury. *Berger v. St. P. etc. R. Co.*, 39 Minn. 78.

Throwing of Mail Bags—Station Hands.—Station hands take the risk of injury from throwing mail bags into moving trains. *Coolbroth v. Maine etc. R. Co.*, 77 Me. 165; s. c., 21 Am. & Eng. R. Cas. 599.

Laboring at night without lantern by a night watchman in a freight yard who is aware of dangers he encounters. Risk of injury held to be assumed. *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20; 33 Am. & Eng. R. Cas. 314.

Unusual Use of Platform in Night Time.—Where a watchman in a railroad yard uses a platform appropriated to the transfer of freight for the purpose of running along at night in the dark, he does so at his own risk. *Hamilton v. Richmond etc. R. Co. (Ga.)* 1889; 9 S. E. Rep. 670.

A car repairer under a car was killed by another car switched on same track. The company had failed to provide him with a flag for danger signal. He had worked for several weeks without a flag. *Held*, that he had assumed the risk. *O'Rourke v. Union Pacific R. Co.*, 22 Fed. Rep. 189; 18 Am. & Eng. R. Cas. 19; *Campbell v. Pennsylvania R. Co. (Pa.)*, 24 Am. & Eng. R. Cas. 427. *Compare Luebke v. Chicago etc. R. Co.*, 59 Wis. 127; 15 Am. & Eng. R. Cas. 183; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 244; *Lake Shore etc. R. Co. v. Lavalley*, 36 Ohio St. 221; 5 Am. & Eng. R. Cas. 549; *Vose v. Lancashire R. Co.*, 2 Hurl. & N. 728; *Wedgewood v. Chicago etc. R. Co.*, 41 Wis. 483; *Bessex v. Chicago etc. R. Co.*, 45 Wis. 477; *Smith v. Chicago etc. R. Co.*, 42 Wis. 526.

Sleeping in Round House.—A railroad employee going to sleep in a round house takes the risk of being injured and cannot recover if run over, while so sleeping. *Price v. Hannibal etc. R. Co.*, 77 Mo. 508; 15 Am. & Eng. R. Cas. 168. See *Keegan v. Kavanaugh*, 62 Mo. 232; *Porter v. Hannibal etc. R. Co.*, 71 Mo. 67.

Falling of Coal from Tender.—A railroad track walker, who knew that coal was customarily overloaded on tenders,

must be deemed to have assumed the risk of injury by the fall of a piece. *Schultz v. Chicago etc. R. Co.* 67 Wis. 616.

Open Waterway and Switches.—Where a section hand, while pushing a hand car under orders from the foreman, fell into a waterway, of which he was not specially warned, and which was properly constructed, it was held that the risk was incident to the employment. *Koontz v. Chicago etc. R. Co.*, 65 Iowa 224; 18 Am. & Eng. R. Cas. 85; *Couch v. Charlotte etc. R. Co.*, 22 S. Car. 557; 28 Am. & Eng. R. Cas. 331. So held also in cases of servant falling into open ditches. *Deforest v. Jewett*, 8 Am. & Eng. R. Cas. 495; *Gibson v. Erie R. Co.*, 63 N. Y. 449.

Overturning of Engine "Bucking" Snow.—A fireman was killed by the overturning of an engine engaged in "bucking" snow. Held, that it was a risk incident to his employment. *Bryant v. Burlington etc. R. Co.*, 66 Ga. 305; 55 Am. Rep. 275; 21 Am. & Eng. R. Cas. 593. See in the same line *Naylor v. Chicago etc. R. Co.*, 53 Wis. 661; 5 Am. & Eng. R. Cas. 460; *Howland v. Milwaukee etc. R. Co.*, 54 Wis. 226; 5 Am. & Eng. R. Cas. 578; *Morse v. Minneapolis etc. R. Co.*, 30 Minn. 465; 11 Am. & Eng. R. Cas. 168.

Banks of Snow by Side of Track Left by Plough.—The being struck by snow banks left along the side of a railway track by a snow plough is a risk assumed by a railway brakeman. *Dowell v. Burlington etc. R. Co.*, 62 Iowa 629; 15 Am. & Eng. R. Cas. 153; *Brown v. Chicago etc. R. Co.*, 69 Iowa 161; *Piquegno v. Chicago etc. R. Co.*, 52 Mich. 40; 12 Am. & Eng. R. Cas. 210.

Improper Use of Side Track.—From the way and manner in which the side tracks are used with the knowledge of and without complaint from the train men. *Hewett v. Flint etc. R. Co.*, 67 Mich. 61; 31 Am. & Eng. R. Cas. 249.

Double Headers.—And a person who takes service with a railway company that uses double headers assumes all risks incident to such use. *Hawk v. Pennsylvania R. Co. (Pa.)*, 31 Am. & Eng. R. Cas. 268.

Formation of Ice on Car.—Injury caused by the formation of ice on a car is a risk assumed by a railway employee. *O'Bannon v. Louisville etc. R. Co. (Ky.)*, 1888; 6 S. W. Rep. 434; *Adkins v. Atlanta etc. R. Co. (S. Car.)*, 31 Am. & Eng. R. Cas. 281.

Cattle Upon Track.—Encountering cattle upon the track. *Sweeney v. Central Pacific R. Co.*, 57 Cal. 16; 8 Am. & Eng. R. Cas. 151; *Patton v. Central Iowa etc. R. Co.*, 73 Iowa 306.

Trains Upon Adjacent Track.—A track laborer, who, to avoid a passing train, steps from one track to another instead of to the side of the track, assumes the risk of injury from trains on the other track. *Shea v. Pa. R. Co. (Pa.)*, 11 Cent. Rep. 769.

Unblocked Frogs and Rails.—Railway employees held to assume risk of. *Wilson v. Winona etc. R. Co.*, 37 Minn. 326; 31 Am. & Eng. R. Cas. 244. And see *Lake Shore etc. R. Co. v. McCormick*, 74 Ind. 440; *Rush v. Missouri Pac. R. Co.*, 36 Kan. 129; 38 Am. & Eng. R. Cas. 484; *Haas v. Buffalo etc. R. Co.*, 40 Hun (N. Y.) 145; *Mayes v. Chicago etc. R. Co.*, 63 Ga. 563; 8 Am. & Eng. R. Cas. 527; *Carroll v. Penna. Coal Co. (Pa.)*, 1888, 15 Atl. Rep. 688.

But it has been held that whether or not it is the custom or mode of doing business of the defendant to leave frogs unprotected, so that its employees might be presumed to know that such was the custom or mode of doing business, and by continuing in the employment, to have taken on themselves the risk incident to that way of doing it, is a question for the jury. *Sherman v. Chicago etc. R. Co.*, 34 Minn. 259.

Plaintiff's husband, a yard master, owing to the fact that a guard rail in defendant's yards was unlocked, caught his foot, was run down by the train and killed. It was held that the jury must determine whether, at the time, having knowledge of the absence of the block to the said guard rail, the deceased was acting as a prudent man would under similar circumstances, and the knowledge of the deceased of the unsafe condition of the guard rail, if it was unsafe, would not defeat a recovery, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care, and caution, and that he did use all the care incident to the situation in which he was placed. *Huhn v. Missouri Pacific R. Co.*, 92 Mo. 440; 31 Am. & Eng. R. Cas. 221; *Snow v. Housatonic R. Co.*, 3 Allen (Mass.) 441; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389; *Stoddard v. St. Louis etc. R. Co.*, 65 Mo. 514; *Dewlin v. Wabash etc. R. Co.*, 87 Mo. 545; 28 Am. & Eng. R. Cas. 524; *Colorado etc. R. Co. v. Ogden*, 3.

Colo. 500; *Losure v. Graniteville Mfg. Co.*, 18 S. Car. 276; *Perigo v. Chicago R. Co.*, 55 Iowa 386; *Hawley v. Northern Central R. Co.*, 82 N. Y. 370; 2 Am. & Eng. R. Cas. 248.

Knowledge of inexperienced brakeman of danger resulting from absence of blocks is question of fact for the jury. *Mayes v. Chicago etc. R. Co.*, 63 Iowa 527; 8 Am. & Eng. R. Cas. 527.

If brakeman has waived right to recover for negligence of company in not blocking rails, such waiver must be pleaded as a defence or it cannot be relied on. *Mayes v. Chicago etc. R. Co.*, 63 Iowa 563; 8 Am. & Eng. R. Cas. 527.

Being Run Down While Cleaning Ash Pan of Engine.—A fireman was killed while cleaning the ash pan of his engine, being run into by another; *held*, that his administrator could not recover. *Wabash etc. R. Co. v. Conkling*, 15 Ill. App. 157.

Switches of a Certain Color.—A railroad employee assumes such risk as may be incident to switches painted green rather than red. *Naylor v. New York etc. R. Co.* (N. Y.), 33 Fed. Rep. 801.

Handling Freight.—Train hands assume the risk of injury from handling heavy freight. *Walsh v. St. Paul etc. R. Co.*, 27 Minn. 367; 2 Am. & Eng. R. Cas. 144.

Handling of Cars Out of Elevator.—A man employed about an elevator by a railroad company, to handle cars which it is the custom to run unattended out of the elevator and on the tracks, cannot recover for an injury by a collision of two cars running alone on the track, which he is trying to prevent. *Kelley v. Chicago etc. R. Co.*, 53 Wis. 74; 5 Am. & Eng. R. Cas. 469.

Excavating Earth.—A servant injured while digging a well cannot recover. *Galveston etc. R. Co. v. Lempe* (Tex.), 59 Tex. 19; 11 Am. & Eng. R. Cas. 201. *Compare Mulcairus v. Janesville*, 67 Wis. 24. A laborer employed to wheel earth along the edge of a bank is presumed to know the danger and take all risks. *Olson v. McMullen*, 34 Minn. 94; *Rasmussen's Admr. v. C. R. I. & P. R. Co.*, 65 Iowa 236; *Walsh v. St. P. & D. R. Co.*, 27 Minn. 367.

A servant engaged in excavating earth assumes the risk of an embankment giving way. *Simmons v. Chicago etc. R. Co.*, 110 Ill. 340; 18 Am. & Eng. R. Cas. 50.

A workman engaged in excavating a

tunnel was injured by landslide. *Held*, that he could not recover of his employer, although he was ordered there by a foreman, who also knew of the danger. *Anderson v. Winston*, 31 Fed. Rep. 528.

Where a laborer, shovelling dirt, stood between the tail of his cart and the edge of a bank, and owing to a defect in a hook in the harness, the horse got his head cramped, which made him back, forcing the laborer over the bank, it was held that on no theory could the master be charged with liability. *Kerrigan v. Hart*, 40 Hun (N. Y.) 389.

Removal of Form from Oven.—Plaintiff was employed by defendant to remove the sand or "form" from a large oven recently built by defendant's lessor. The oven fell in, injuring plaintiff. There was no evidence of knowledge on defendant's part of the dangerous condition of the oven, and there was nothing charging defendant with negligence in not possessing knowledge. *Held*, that a verdict for plaintiff must be set aside. *Nason v. West*, 78 Me. 253. See *Griffiths v. London etc. Co.*, 12 Q. B. Div. 495; 13 Q. B. Div. 259.

Running Engine Backward.—Fireman taking employment with knowledge of custom; no recovery for death caused by. *Kuhns v. Wisconsin etc. Co.*, 70 Iowa 561. *Distinguishing Mayes v. Chicago etc. R. Co.*, 63 Iowa 563; 8 Am. & Eng. R. Cas. 527.

Removal of Damaged Cars to Shop.—Employee engaged in, assumes risk of injury. *Flannagan v. Chicago etc. R. Co.*, 50 Wis. 462; 2 Am. & Eng. R. Cas. 150; *Watson v. Houston etc. R. Co.*, 58 Tex. 434; 11 Am. & Eng. R. Cas. 213; *Fraker v. St. Paul etc. R. Co.*, 32 Minn. 54; 15 Am. & Eng. R. Cas. 256.

A railroad company is not liable to its employee for injuries received by him while running a defective engine to a machine shop for repair, if he knows of the defect which made repair necessary. When the employee is not chargeable with the knowledge of such defect, the question of negligence in the use of the defective engine is for the jury. *Houston etc. R. Co. v. O'Hare*, 64 Tex. 600; *Yeaton v. Boston etc. R. Co.*, 135 Mass. 418; 15 Am. & Eng. R. Cas. 253.

Removal of Cars for Inspection.—Company held not liable for injury to servant removing train of unloaded cars for inspection when acting under

orders of foreman. *Flannagan v. Chicago etc. R. Co.*, 50 Wis. 462; 2 Am. & Eng. R. Cas. 150.

Running of Trains Reversed.—Trackman injured by, held to have assumed risk. *Kennedy v. Pennsylvania R. Co.*, (Pa.) 1889; 17 Atl. Rep. 7.

Structure Dangerously Near Track.—A servant knowing of its existence assumes risk of injury by oil house within eight inches of a railroad track. *Kelley v. Baltimore etc. R. Co.* (Pa.) 1887, 11 Atl. Rep. 659. Or lumber piled near the track. *Gaffney v. New York etc. R. Co.*, 15 R. I. 456; 31 Am. & Eng. R. Cas. 265.

Where the defendant's neglect consisted in the erection and maintenance of a dangerous structure obvious to the senses long before the accident, it was held that it was not liable, whether the structure could have been differently built or not. *Rains v. St. Louis etc. R. Co.*, 71 Mo. 164; 5 Am. & Eng. R. Cas. 610. Following *Nelson v. Atlantic etc. R. Co.*, 68 Mo. 593.

The danger of being struck by a signal post known by a railroad engineer to exist, is a risk incident to his employment. *Lovejoy v. Boston etc. R. Co.*, 125 Mass. 79.

And likewise in case of a projecting awning. *Clark v. St. Paul etc. R. Co.*, 28 Minn. 128; 2 Am. & Eng. R. Cas. 240. Or projecting water pipe. *Wilson v. Louisville etc. R. Co.*, 85 Ala. 269; *Baylor v. Delaware etc. R. Co.*, 40 N. J. L. 23. Or a projecting roof. *Gibson v. Erie R. Co.*, 63 N. Y. 449; 23 Am. Rep. 552. See *Dorsey v. Philipps etc. Construction Co.*, 42 Wis. 583.

Overhead Bridges.—A railroad employee injured by an over headbridge known by him to be too low, cannot recover from the company. *Baltimore etc. R. Co. v. Rowan*, 104 Ind. 88; 23 Am. & Eng. R. Cas. 390; *Wells v. Burlington etc. R. Co.*, 56 Iowa 520; 2 Am. & Eng. R. Cas. 243; *Riley v. Connecticut River R. Co.*, 135 Mass. 292; *Baltimore etc. R. Co. v. Stricker*, 51 Md. 47; 15 Am. & Eng. R. Cas. 181; *Illick v. Flint etc. R. Co.*, 67 Mich. 632; *Baylor v. Delaware etc. R. Co.*, 40 N. J. L. 20; *Owen v. New York etc. R. Co.*, 1 Lans. (N. Y.) 108; *Pittsburgh etc. R. Co. v. Sentemeyer*, 92 Pa. St. 276; 5 Am. & Eng. R. Cas. 508; *Brossman v. Lehigh Valley R. Co.*, 113 Pa. St. 490; 57 Am. Rep. 479. Compare *Louisville etc. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Corp. Cas. 370; *St.*

Louis etc. R. Co. v. Irwin, 37 Kan. 701. And see *Goff v. Norfolk etc. R. Co.* (Va.), 36 Fed. Rep. 299; *Hooper v. Columbia etc. R. Co.*, 21 S. Car. 541; 28 Am. & Eng. R. Cas. 433; *Louisville etc. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Cas. 370; *Brossman v. Lehigh etc. R. Co.*, 113 Pa. St. 490; 57 Am. Rep. 479. *Ballou v. Chicago etc. R. Co.*, 54 Wis. 257; 51 Am. & Eng. R. Cas. 480; *Philadelphia etc. R. Co. v. Schertle*, 97 Pa. St. 450; 2 Am. & Eng. R. Cas. 158; *Wells v. Burlington etc. R. Co.*, 56 Iowa 520; 2 Am. & Eng. R. Cas. 243.

In an action by a brakeman for damages for personal injuries caused by coming in contact with a highway bridge across the railroad track while he was riding on the top of a freight car. Code Ala. 1886, section 1144, requiring railroad companies "to blow the whistle or ring the bell at short intervals at least one-fourth of a mile before reaching a public road crossing," had no bearing on the case, and it was error to consider it. *Louisville etc. R. Co. v. Hall* (Ala.), 1889; 6 So. Rep. 277.

Jerk of Train.—When a gravel or repair train is managed as usual, and the jerk complained of is only such as would be expected to occur on a train of that character in doing its work, the employees engaged on it, or attached to it, take the risk as incident to the service, and if injured by the jerk cannot recover of the company. *Central R. Co. v. Sims* (Ga.), 1888; 7 So. E. Rep. 176; *Youll v. Sioux City etc. R. Co.*, 66 Iowa 346; 21 Am. & Eng. R. Cas. 589.

Negligent Operation of Train—Conductors.—Where the conductor in charge of a train knew every circumstance which tended to render the operation of his train hazardous, and if, in his judgment, it was not being operated in the safest manner, he had full authority to direct that such changes be made in the manner of its operation as would render it safe. Held, that if by its negligent operation he was killed, his administrator could not recover against the railroad company. *Lane v. Central Iowa R. Co.*, 69 Iowa 443. Compare *Dewey v. Chicago etc. R. Co.*, 31 Iowa 373.

Transportation of Explosives—Dangers Incident to.—Are assumed by servants. *Foley v. Chicago etc. R. Co.*, 48 Mich. 622; 42 Am. Rep. 481; 6 Am. & Eng. R. Cas. 161.

Defective Dump Car.—Where a section master on a railroad was injured

by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car, it was held that he could not recover. *Pleasants v. R. R. Co.*, 95 N. Car. 195.

Hand Car.—Servant using hand car handle, the walking beam of which was broken, and injured thereby, held to have assumed risk of injury resulting therefrom. *New York etc. R. Co. v. Powers*, 98 N. Y. 274; 21 Am. & Eng. R. Cas. 609.

Fireman on Locomotive After Twenty Trips.—A person of mature age and experience, who has been engaged in the employment of fireman on a locomotive twenty times for three hours at a time, is presumed to know the danger of the employment. *Leary v. Boston etc. R. Co.*, 139 Mass. 580; 52 Am. Rep. 733.

Well in Cellar.—An employee was engaged at some work in a dark cellar. He knew that there was in the cellar a deep well hole, but did not know whether or not it was protected by a railing. While being ordered by the foreman to "hurry the work," he fell into the well hole and was injured. In an action against his master for the damages, it was held that he had taken the risk of injury from the presence of the well hole, and that he was guilty of such a want of care as would prevent him from recovering. *Taylor v. Carrow Mfg. Co.*, 140 Mass. 150; 12 Am. & Eng. Corp. Cas. 277.

Hole in Floor.—If there is a hole in the floor over which the servant passes in the dark, and it is not guarded or lighted, and he knows its condition, but chooses to pass in the dark, he does so at his own risk. *Seymour v. Maddox*, 16 Q. B. 326. See *Hoffman v. Clough (Pa.)*, 23 W. N. C. 399; *Murphey v. Greeley*, 146 Mass. 96.

Open Hatchway.—A servant whose duty is partly to keep hatchways closed, and who enters the employment knowing that such hatchways are unguarded, assumes the risk incident thereto. *Gleason v. Excelsior Mfg. Co.*, 94 Mo. 201. See *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 458; *Price v. Hannibal etc. R. Co.*, 77 Mo. 508; *Porter v. Hannibal etc. R. Co.*, 71 Mo. 66.

Laundry Machinery.—And it was held in a New York case that a servant accustomed to using machinery cannot

recover for an injury received while putting in order a machine she was using by putting her hand too near rollers which she knew to be revolving 3,000 times a minute. *Caffey v. Chapal*, 2 N. Y. Supp. 648.

Uncovered Coupling in Rolling Mill.—Employee in mill held to have assumed risk of injury from. *Shaw v. Sheldon*, 3 N. Y. St. Rep. 679.

Rolling Mill Machinery.—Where the person injured was twenty-eight years of age, had performed many times the work in doing which he suffered the injury complained of, and was familiar with the machine and the danger, attending such work on the dangerous side is apparent on ordinary observation, the plaintiff must be taken to have assumed the risk, even if he acted by order of the foreman, and even if such risk was never explained to him. *Kean v. Detroit etc. Rolling Mills*, 66 Mich. 277.

Unnecessary obstruction in tannery, causing servant to fall into vat. Servant held to have assumed risk. *Balle v. Detroit Leather Co. (Mich.)*, 1889, 41 N. W. Rep. 216.

Defective Ladder.—Employee knowing of, but injured thereby, is not entitled to recover. *Jenney Electric Light & Power Co. v. Murphy*, 115 Ind. 566.

Defective Telephone Pole.—In an action for injuries sustained by plaintiff by the breaking of a post on which he was sent to work, where it is a disputed question whether plaintiff was or was not the employee whose duty it was to serve as inspector for defendant, a telephone company, it is error to charge that plaintiff had a right to assume that "the pole upon which he was ordered to work . . . was safe and suitable," and that it was not his duty "to inspect the pole." *Cumberland Telegraph etc. Co. v. Loomis*, 87 Tenn. 504.

Uncovered Saw.—The risk from an uncovered saw projecting over its frame and partly across a narrow passageway, over which a servant is obliged to go in the performance of his duties being apparent, is assumed by the servant in accepting and remaining in the service. *Stephenson v. Duncan*, 73 Wis. 404.

Upsetting of Derrick.—A laborer, employed by a city to work on a sewer, was injured by the upsetting of a derrick, one of the legs of which he was holding, and which was being used to draw out the earth by means of power

applied by a steam engine, the planks which protected the sides of the trench excavated for the sewer. *Held*, that the risk was assumed. *Joyce v. Worcester*, 140 Mass. 245; *citing* *Pingree v. Leyland*, 135 Mass. 398; *Yeaton v. Boston etc. R. Co.*, 135 Mass. 418; 15 Am. & Eng. R. Cas. 253.

Stamping Machine in Shingle Mill.—A boy about fourteen years old was employed in a tin shingle factory, and was injured by having his hand caught under the stamping machine. *Held*, that no recovery could be had for the injury, it appearing that the machine was not dangerous when properly used. *O'Keefe v. Thorn*, 16 Atl. Rep. (Pa.) 1889, 737.

Shaft in Emery Mill.—Engineer caught in and injured, held not entitled to recover, having assumed risk of employment. *Goodnow v. Walpole Emery Mills*, 146 Mass. 261.

Defective machinery in charcoal works, consisting of uneven track on which carriage ran, employee injured having knowledge of defect, held to have assumed risk. *Yates v. McCuillough Iron Co.*, 69 Md. 370.

Janitor in Planing Mill.—An intelligent servant of sixteen had his hand mutilated by the jointer in a planing mill. The danger was obvious, and the injury would not have happened had he not placed his hand on the table without looking. He had worked there for two weeks only, and was without previous experience with machinery. *Held*, that a verdict for defendant was properly directed. *Palmer v. Harrison*, 57 Mich. 182.

Familiar Machine Near Point of Labor.—The plaintiff had been in the employment of the defendant for two months when he was caught in a machine and injured. It was shown that he had passed the machine many times, that there was in it no peculiar or secret source of danger, and the machine was such that anyone seeing it must have seen the danger of coming in contact with it. *Held*, that there was no sufficient evidence of negligence on the part of the defendant to render it liable. *Ciriack v. Merchants Woolen Co.*, 146 Mass. 182. And see *Wuotilla v. Duluth Lumber Co.*, 33 Minn. 551; *Russell v. Minn. & St. L. R. Co.*, 32 Minn. 230; *Cook v. St. P. M. & M. R. Co.*, 34 Minn. 45; *Smith v. Peninsular Car Works (Mich.)*, 27 N. W. Rep. 662; *Colbert v. Rankin*, 72 Cal. 197.

Slippery Floor in Printing Office.—An

employer is not liable where an employee slips upon the floor and is injured by falling against the unprotected cog wheel of a press. *Clark v. Barnes*, 37 Hun (N. Y.) 389; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1.

Exposed Cogs—Planing Machine.—A workman caught his sleeve in the exposed cogs of an ordinary planing machine and hurt his hand. He had run the machine for only a day or two, but he had worked within a few feet of it for two years or more, and among similar machinery for twenty-five years. *Held*, that the injury was accidental, and the workman, who must have been familiar with the machine, could not recover on the ground that his employer was negligent in setting him to work at it without having the cogs covered. *Schroeder v. Michigan Car Co.*, 56 Mich. 132.

Defective winch on board vessel. Servant injured while using, being a machinist by trade and having knowledge of condition of winch, held to have assumed risk. *Purgree v. Leyland*, 135 Mass. 398.

Blasting Stone.—A workman engaged in blasting at a quarry assumes the risk of his employment, and cannot maintain an action against his employer for an injury sustained in consequence of his obeying an order of another workman who superintends the blasting. *Kenney v. Shaw*, 133 Mass. 501.

Explosion of Powder in Mine.—The owners of a mine are not liable for an injury sustained by a miner from the explosion of a piece of giant powder which he struck with his pick while digging among loose rock, where it was impossible for them to have guarded against the accident, and neither the foreman of the mine nor those engaged with him could have known of the presence of the powder in the rock. *Kelley v. Cable Co.*, 7 Mont. 70.

Hostler—Vicious Horse.—A person employed as a hostler, who, knowing that a certain horse is vicious, attempts to groom him without using the strap ordinarily used to prevent kicking, cannot recover damages for injuries suffered through such neglect. *Green v. Coates Street etc. R. Co.*, *Bresmer*, 97 Pa. St. 103.

Unrailed Platform.—A servant assumes risk incident to unrailed platform. *Moulton v. Gage*, 138 Mass. 390.

Improper Scaffold.—A owned a building on which B agreed, for a lump sum, to trim certain stone work, and to furnish his own scaffold, but as he did not do so, A allowed him to use one which had been hung by painters over a rotten cornice. It gave way and injured B. The court held that A was not liable: *Matthes v. Kerrigan*, 53 N. Y. Super. Ct. 431.

Incompetent Foreman.—If a workman knows that a foreman under whom he works is incompetent, but continues to work under him, making no complaint to the master, he must be held to have assumed the risk arising therefrom. *Hatt v. Nay*, 144 Mass. 186; *Davis v. Detroit etc. R. Co.*, 20 Mich. 105; *McDermott v. Hannibal etc. R. Co.*, 87 Mo. 285; 28 Am. & Eng. 528. As to running risk of injuries from incompetent fellow servants, see **FELLOW SERVANTS**, vol. 7, p. 851.

Iron Covers to Ash Pit.—Plaintiff was employed in taking cinders and ashes from a pit under a boiler and furnace. The pit was covered with two loose plates of iron, each weighing from two to three hundred pounds. He placed one of the plates on its edge and propped it on the outside with a stick. The plate fell, injuring him. He had worked there six weeks, and knew of the condition of the plate covers, and had full opportunity to know of any defects which would render the plate thus secured dangerous. *Held*, that he could not recover for the injury. *Brown v. Brown*, 71 Tex. 355.

Defective Span Rope.—It has been held that the putting up of an imperfect span rope was not such a failure of duty on the part of a ship master in the furnishing of a ship as would give a right of action against a ship, defendant having full opportunity to discover the same. *The Aglesemd*, 9 Ben. (U. S. C. Ct.) 203. And see *Coughtry v. Globe Works*, cited in *Wharton on Neg.*, § 441; *Loop v. Litchfield*, 42 N. Y. 351.

Truckman Acting as Fireman.—A truckman acting as fireman, while standing on foot board of engine waiting for it to slacken speed so that he could get off, was jolted off and injured. *Held*, that the injury was caused by one of the risks assumed by plaintiff. *Leary v. Boston etc. R. Co.*, 139 Mass. 580; 23 Am. & Eng. R. Cas. 383.

Absence of Footboards.—Where the plaintiff accepted service as a brakeman, knowing that defendant did not

usually provide footboards over open cars loaded with machinery, and it not appearing to be defendant's custom to so arrange such cars in a train so that brakemen would have to pass over them, it was held that plaintiff did not assume that risk. *Hosic v. Chicago etc. R. Co.*, 75 Iowa 683.

Defective Frog.—It has been held that although a railroad switchman knew that the point of a frog was broken, yet such knowledge would not bar recovery on his part if he did not know that the plate was broken, and would not have been injured but for the broken plate, provided a person of ordinary care and prudence would have worked about the frog with a broken point. The fact of the plate being out of repair, having caused the plaintiff to stumble, was the proximate cause of the injury. *Waldheir v. Hannibal etc. R. Co.*, 87 Mo. 37.

Iron Maul.—It was laid down in a Tennessee case that a railroad company is liable for injury to servant caused by patent defect in iron maul furnished to him by section boss. *Guthrie v. Louisville etc. R. Co.*, 11 Lea (Tenn.) 372; 15 Am. & Eng. R. Cas. 209.

Running of Construction Train Off Track.—The running of a construction train off the track by reason of the roughness of the road is not one of the risks assumed by a railroad laborer. *Trask v. California etc. R. Co.*, 63 Cal. 96; 11 Am. & Eng. R. Cas. 192.

An injury to a civil engineer employed by a railroad company in laying track on a new line of road, caused by the derailment of a train while passing over the road to the front of operations, owing to a defective roadbed, is not a risk incident to his employment, and he is entitled to recover. *Meloy v. Chicago etc. R. Co. (Iowa)*, 33 Am. & Eng. R. Cas. 358.

A detective having nothing to do with those branches of the company's service does not assume risks of the service assumed by an ordinary employee. *Pool v. Chicago etc. R. Co.*, 53 Wis. 657; 3 Am. & Eng. R. Cas. 332; 56 Wis. 227; 8 Am. & Eng. R. Cas. 360.

Rotten Ties.—Rotten railroad ties are not risks assumed by a railroad brakeman. *Houston etc. R. Co. v. McNamara*, 59 Tex. 255.

Dangerous Premises.—Where a boy of nineteen, whose ordinary work was spiking rails and shovelling, was sent to the second story of a building, to shovel ashes, the building having been badly burned the night before. The

7. Cause of Injury—Question for Jury.—The question in cases of this character as to the cause of the injury is for the jury.¹

8. Servant and Master Not on Same Footing as to Duty of Inspection.—While the servant assumes the ordinary risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed.²

floor fell and he was injured. It was held that this was not a risk incident to his employment. *Cook v. St. Paul etc. R. Co.*, 34 Minn. 45.

Untimbered Mine.—A coal miner is not precluded from recovering for an injury caused by the falling of a rock from the roof of the mine, simply because he knew the general nature of the roof, and that there were no timbers in the entry. *Kelley v. Wilson*, 21 Ill. App. 141.

Insecurity of Building in Process of Construction.—A carpenter working on the roof of a building in process of construction is not bound to inspect the condition of the walls, and does not take the risk of the building falling in consequence of their insufficiency. *Giles v. Diamond State etc. Co. (Del.)* 1887, 8 Atl. Rep. 368.

Uncovered Machinery.—Where the machinery in a flour mill was extensive and complicated, and certain parts of it shown to be dangerous; had been covered to plaintiff's knowledge, but from some of which such covering had been removed, and for several days before he was injured had been running in that condition, in an action to recover damages for injuries caused by such machinery, it was held that he could not be presumed to have assumed the risk, it not being clear that in the exercise of ordinary prudence he must necessarily have seen or ought to have known the condition of the machinery and the risk to which he was exposed. *Craver v. Christian*, 36 Minn. 413.

Obvious Defects—No Threat of Injury. A servant does not assume risk of defects in machinery or premises, the same not seeming to be fraught with danger. *Galveston etc. R. Co. v. Lempe*, 59 Tex. 19; 11 Am. & Eng. R. Cas. 204.

Boiler.—Servant using engine with defective boiler in obedience to requirement of officer does not necessarily assume risk, though he knows of defect, when same is not so gross but engine

may be safely used. *Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 578; 18 Am. & Eng. R. Cas. 68. See *Kansas City R. Co. v. Flynn*, 78 Mo. 195; 18 Am. & Eng. R. Cas. 23.

1. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; s. c., 18 Am. & Eng. R. Cas. 87.

Derricks.—As to injuries from defective derricks, see *Holden v. Fitchburg R. Co.*, 129 Mass. 268; 2 Am. & Eng. R. Cas. 94; *Derrenbacher v. Lehigh Valley R. Co.*, 87 N. Y. 636; 4 Am. & Eng. R. Cas. 624; *Baker v. Alleghany etc. R. Co.*, 95 Pa. St. 211; 8 Am. & Eng. R. Cas. 141; *Union Pacific R. Co. v. Fray*, 31 Kan. 739; 15 Am. & Eng. R. Cas. 158.

2. *Cook v. St. Paul etc. R. Co.*, 34 Minn. 45.

Switch Stand.—The peril arising from a switch stand, which extends to within nine or ten inches of a passing car, is not one assumed by a brakeman on entering the employment of a railroad company. *Pedcock v. Union Pacific R. Co. (Utah)*, 1888, 19 Pac. Rep. 191. See *Boss v. North Pacific R. Co.*, 5 Dak. 308; *Illinois etc. R. Co. v. Welch*, 52 Ill. 183.

Hoisting Apparatus in Mine.—A workman in a mine does not assume risks incident to defects in the hoisting apparatus used for lowering him to the place where he works. *Moran v. Harris*, 63 Iowa 390.

Unsuitable Rails and Defective Road-bed.—An engineer of a railroad, which is in general use, although having knowledge that the rails of the track were old, light and well worn, is not bound to pursue the enquiry, and to determine for himself and at his own peril whether the road is or is not fit for use. *Devlin v. Wabash etc. R. Co.*, 87 Mo. 545; and see *Clapp v. Minneapolis etc. R. Co.*, 36 Minn. 6; *Waldheir v. Hannibal etc. R. Co.*, 71 Mo. 514; 2 Am. & Eng. R. Cas. 146. Neither is the conductor of a train required to know of all defects and obstructions that may

9. Assumption that Machinery Is Suitable.—The servant has the right to assume that the machinery and implements furnished him by his master are safe and suitable for the business engaged in.¹

10. Master's Duty to Protect Servant.—Although an employee assumes all the hazards reasonably incident to the service in which he engages, he has a right to rely on the fact, when placed in a situation of danger, where engrossing duties are required of him, that the employer will not, without proper warning, subject him to other perils unknown to the employee, and from which the work exacted necessarily distracts his attention.² And furthermore that the usual precautions against accidents will be taken.³

exist on the road over which he runs. *St. Louis etc. R. Co. v. Irwin*, 37 Kan. 701.

Hole in Floor—Due Care.—In an action against a builder for negligence, by reason of which a subcontractor was injured, evidence was introduced to show the customs and usages of builders in reference to openings in the floors of said buildings while in the process of construction. *Held*, that such evidence was admissible upon the question whether the injured party was in due care at the time of the injury. *Murphy v. Greeley*, 146 Mass. 196.

An employee operating a carding machine does not assume the risks arising from an opening in the floor of which he had no knowledge. *Hoffman v. Clough* (Pa.), 23 W. N. C. 399.

1. *Nowd v. Mississippi R. Co.*, 50 Miss. 178; *Speed v. Atlantic etc. R. Co.*, 71 Mo. 303; *Fort Wayne etc. R. Co. v. Gildersleeve*, 33 Mich. 133; *Cone v. Delaware etc. R. Co.*, 81 N. Y. 206; 2 Am. & Eng. R. Cas. 57; *Bradbury v. Goodwin*, 108 Ind. 286; *Bogenschutz v. Smith*, 84 Ky. 330.

Defective Brake.—A brakeman having been employed but one day in a railroad yard, when, in consequence of a defective brake, he received the injury for which suit was brought. *Held*, that he could not be charged with negligence if the defect was not patent to the eye, or if he was not informed of it by others; that he had a right, in the absence of such information, to assume that the brakes were in a condition in which it was safe to mount the car and set them when ordered to do so by the yardmaster. *Northern Pacific etc. R. Co. v. Herbert*, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407; *Smith v. Car Works*, 60 Mich. 508.

Telephone Pole.—In an action for in-

juries sustained by plaintiff, by the breaking of a post, on which he was sent to work, where it was a disputed question whether plaintiff was or was not the employee whose duty it was to serve as inspector for defendant, a telephone company, it was held to be error to charge that "plaintiff had a right to assume that the pole upon which he was ordered to work . . . was safe and suitable," and that it was not his duty to inspect the same. *Cumberland etc. Co. v. Loomis*, 87 Tenn. 504.

2. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Atlas Engine Works v. Randall*, 100 Ind. 293; 50 Am. Rep. 798; *Haley v. Case*, 142 Mass. 316.

Backing Train Without Notice.—A laborer ordered to unload a car has a right to assume that other cars will not be backed down on the car while he is at work, without notice to him. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57.

3. *Schultz v. Chicago etc. R. Co.*, 44 Wis. 638; and see *Ditberner v. Chicago etc. R. Co.*, 47 Wis. 138; *Chicago R. Co. v. Sweeney*, 52 Ill. 325; *Chicago etc. R. Co. v. Donahue*, 75 Ill. 106.

In an action for damages by a servant against his master, it appeared that plaintiff had his leg broken by reason of a chain breaking, which was worked with a ratchet; that while he was working the ratchet a noise was heard, made by the chain; that the work stopped, and again the same noise was heard, and the ratchet again stopped; that defendant enquired, "What is the matter?" and was answered, "The chain is going to break;" that defendant assured him there was no danger, and told him to "go ahead on the chain;" that he did so, and it broke, and plaintiff was injured. *Held*, that plaintiff could re-

11. Dangers Subsequently Arising.—The ground cannot be taken that an employee who brings suit to recover for injuries suffered in the course of his employment, assumes only those risks that existed at the beginning of his employment; he also must take notice of all risks which arise during the course of the employment, of which he had knowledge or was bound to have knowledge.¹

12. Work Outside Scope of Employment.—The servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed; and if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work.²

13. Using Defective Machinery After Promise of Repair.—Although a servant does not assume the risk of defective machinery, by remaining a reasonable time in the employment, after the master has promised to repair the same, yet the contrary is the case if he remains after such period has elapsed. The question of reasonable time is one of fact for the jury.³

cover, as it was defendant's duty, when he saw 'that plaintiff was fearing the chain would break; before ordering him to proceed, to have examined the chain, to see if it was safe. *Hoffman v. Dickinson*, 31 W. Va. 142.

1. *Sowden v. Idaho Quartz Mining Co.*, 55 Cal. 443.

Should an employee discover that the service has become more hazardous than usual, or than he had anticipated, by reason of defective machinery, etc., the general rule is that he must quit the service or assume the risks to which he is exposed. *Missouri Furnace Co. v. Abend*, 107 Ill. 51; *Smith v. Sellars*, 40 La. An. 527.

2. *Pittsburgh etc. R. Co. v. Adams*, 105 Ind. 151.

3. *Stephenson v. Duncan*, 73 Wis. 404; *Union Mfg. Co. v. Morrissey* (Ohio), 22 Am. L. Reg. 574; *Hough v. Texas etc. R. Co.*, 100 U. S. 225; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389; *Le Clair v. First Div. St. P. & P. R. Co.*, 20 Minn. 9; *Brabbitts v. Chicago etc. R. Co.*, 38 Wis. 289; *Holmes v. Worthington*, 2 Fos. & Fin. 533; *Holmes v. Clarke*, 6 H. & N. 937; *Clarke v. Holmes*, 7 H. & N. 937; *Little Rock etc. R. Co. v. Duffey*, 35 Ark.

602; 4 Am. & Eng. R. Cas. 637; *Texas etc. R. Co. v. Kane* (Tex. 1883), 15 Am. & Eng. R. Cas. 218; *Greenleaf v. Illinois etc. R. Co.*, 29 Iowa 14; *Kroy v. Chicago etc. R. Co.*, 32 Iowa 357; *Greenleaf v. Dubuque R. Co.*, 33 Iowa 52; *Way v. Illinois etc. R. Co.*, 40 Iowa 341; *Lumley v. Caswell*, 47 Iowa 159; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Reed v. Northfield*, 13 Pick. (Mass.) 94; *Whittaker v. Boylston*, 97 Mass. 273; *I. & St. L. R. Co. v. Watson*, 114 Ind. 21; *Parody v. Chicago etc. R. Co.*, 15 Fed. Rep. 205; *Gulf etc. R. Co. v. Donnelly*, 70 Tex. 371; *Greene v. Minneapolis etc. R. Co.*, 31 Minn. 248; 15 Am. & Eng. R. Cas. 214; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102; *Shearman & Redf. on Negligence*, § 96.

Ten Days' Delay Unreasonable.—In an action by a servant against the master for injuries sustained from defective machinery, a complaint alleging that ten days prior to the accident the servant requested the master to repair the defect, giving notice that he would not remain in the service unless the repairs were made at once, and that the master then promised to make such repairs, and thus induced the servant to remain in his service until the time of the ac-

But where the instrumentality with which the servant is required to perform service is so glaringly and palpably dangerous that a man of common prudence would not use it, and with the utmost care and skill danger is still imminent, the master cannot be held responsible for the damage resulting therefrom, although the servant may have notified him of the danger, and he may have promised to repair it.¹ But where a servant, in obedience to the requirement of his master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, he is not thus made guilty of concurrent negligence, and the master is liable for a resulting accident.² And where a person operating a machine complains to his employer that it is unsafe, and the employer repairs it, and tells his employee that he has done so, it is not negligence for such employee to continue at work at the machine, although it afterwards appears that the repairs were not substantial.³

14. Servant Ordered Into Place of Danger.—But if a master or superior orders an inferior into a situation of danger, and he obeys and is injured, the law will not charge him with assumption of the risk, unless the danger was so glaring that no prudent man would have entered into it.⁴

15. Employee Voluntarily Assuming Place More Dangerous than Necessary.—An employee leaving his own place of work for one more dangerous, in violation of the directions of his employer, can recover nothing if injured after such change.⁵

cident, fails to show that the servant was injured within a reasonable period for the performance of the master's promise, and shows no cause of action, where it further alleges that the master had ample time and opportunity, and was able to repair the defect, between the time of the promise and that of the injury, but neglected to do so. *Stephenson v. Duncan*, 13 Wis. 404; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Laning v. New York etc. R. Co.*, 49 N. Y. 521; *Crutchfield v. Richmond R. Co.*, 78 N. Car. 300; *Hoey v. Dublin etc. R. Co.*, 18 W. R. 930; *Couch v. Steel*, 3 E. & B. 402; *Jones v. Roach*, 9 Jones & Sp. 248.

1. *Conroy v. Vulcan Iron Works*, 62 Mo. 35. See *Patterson v. P. & C. R. Co.*, 76 Pa. St. 389; *McQueen v. Central Branch etc. R. Co.*, 30 Kan. 689; 15 Am. & Eng. R. Cas. 226; *East Tennessee etc. R. Co. v. Smith*, 9 Lea (Tenn.) 685; 15 Am. & Eng. R. Cas. 224.

2. *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389.

The facts in the above case were as follows: Plaintiff, who was a conductor employed by a railroad company, notified the superintendent, and also the foreman of the railroad, of the dangerous condition of a switch thereon. The superintendent and foreman promised to repair the same, but directed plaintiff to use it, observing care. While carefully using it an accident was caused by the switch, whereon plaintiff was injured. *Held*, that defendant was liable.

3. *Atchison etc. R. Co. v. McKee*, 37 Kan. 592; *Texas etc. R. Co. v. Kane* (Tex. 1883), 15 Am. & Eng. R. Cas. 218.

4. *Miller v. Union Pacific R. Co.*, 12 Fed. Rep. 600; 6 Am. & Eng. R. Cas. 614; *McDermott v. Hannibal etc. R. Co.*, 87 Mo. 285; 28 Am. & Eng. R. Cas. 258.

5. *Brown v. Byroads*, 47 Ind. 435; *Cunningham v. Chicago etc. R. Co.*, 17 Fed. Rep. 882; 12 Am. & Eng. R. Cas. 217; *Wormell v. Maine Cent. R. Co.*, 79 Me. 397; 31 Am. & Eng. R. Cas. 272; *Pennsylvania Coal Co. v. Conlan*, 101

16. Accident Before Completion of Repairs.—Where, however, an employer, discovering defects in a piece of machinery, takes steps to remedy the same, but an accident occurs before the repairs are made, the question of the employer's negligence is for the jury.¹

17. Risks Attendant on Shipmaster's Orders.—In maritime service, the master of the vessel has necessarily absolute authority, and the seamen are bound to obey him, especially in emergencies; and a seaman who is ordered to do a particularly hazardous act, and does it after protesting, does not take the risk of injury, but the vessel owner is liable to him.²

18. Appliance of Which Servant Has Optional Use.—If an employer furnishes a machine or implement to an employee, the defects of which, and the dangers resulting from its use, are apparent, and leaves it to the option of such employee whether he will use it or not, and injury results to him from its use, the employer will not be liable.³

19. Inappropriate and Defective Tool.—And likewise of unauthorized use of an inappropriate tool;⁴ or where the employee uses a defective tool, by order of employer, there being no other.⁵

20. Labor Undertaken through Fear of Dismissal.—If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from

Ill. 93; 6 Am. & Eng. R. Cas. 243; Little Rock etc. R. Co. v. Eubanks, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176.

1. Murphy v. Crossan, 98 Pa. St. 495.

Shovellers in Vessel's Hold.—

Where shovellers in the hold of a vessel inform their foreman that a rope has become weakened so that its further use is dangerous to them, and material and appliances for replacing it with a safe rope are provided by the employer, the question whether it was the duty of the shovellers or their foreman or of the employer to replace the weak rope with a safe one is a question of fact for the jury. Daley v. Boston etc. R. Co. (Mass.), 147 Mass. 101; 33 Am. & Eng. R. Cas. 299. See Johnson v. Boat Co., 135 Mass. 209.

2. Thompson v. Hermann, 47 Wis. 602; Parsons on Maritime Law 463; Abbott on Shipping 177; The Palledo, 3 Ware (U. S. C. Ct.) 321; United States v. Smith, 3 Wash. (C. C.) 525; Jordan v. Warren Ins. Co., 1 Story (C. C.) 343; Flanders on Shipping, § 73; United States v. Hunt, 2 Story (C. C.) 125; United States v. Taylor, 2 Sumn. (U. S. C. Ct.) 588.

3. International etc. R. Co. v. McCarthy, 64 Tex. 632.

Scaffold.—Thus where an employee was directed to do a certain piece of work, and on the next day, while at work, fell with the scaffold upon which he stood, it was held that as he could have done the work without going upon the scaffold, and had observed, about three hours before its fall, its insecure condition, he could not recover damages from his employer. Nolan v. Schickle, 69 Mo. 336.

4. Moran v. Brown, 27 Mo. App. 487.

5. Baker v. Western etc. R. Co., 68 Ga. 699. See Greenleaf v. Dubuque etc. R. Co., 33 Iowa 52; Quaid v. Cornwall, 13 Bush (Ky.) 601; Snow v. Housatonic etc. R. Co., 8 Allen 441; Dale v. St. Louis etc. R. Co., 63 Mo. 455; Sweeney v. Berlin etc. Envelope Co., 101 N. Y. 520; 54 Am. Rep. 722; Patterson v. Pittsburgh etc. R. Co., 76 Pa. St. 389; Clarke v. Holmes, 7 Hurlst. & N. 937; East Tennessee etc. R. Co. v. Duffield, 12 Lea (Tenn.) 63; 18 Am. & Eng. R. Cas. 35; Greenleaf v. Dubuque etc. R. Co., 33 Iowa 52.

fear of losing his employment, and is injured, he cannot maintain an action against the master for the injury.¹

21. Accidental Injury from Unexpected Cause.—Likewise where accidental injury results to a servant from an unexpected cause arising in the course of his employment.²

22. Action Authorized by Statute.—One who voluntarily assumes a risk, thereby waives the provisions of a statute made for his protection.³

XXIV. WORK OUTSIDE SCOPE OF SERVANT'S EMPLOYMENT.—No recovery can be had by an employee while in performance of a service not within the scope of his duty, if his opportunity for observing the danger was equal to that of the employer.⁴

And if a servant of ordinary intelligence undertakes, although unwillingly, for fear of dismissal, duties of greater danger than contemplated by the contract of service, and is injured by reason of ignorance or inexperience, he can maintain no action against the master.⁵ But such servant can show what he said on being ordered

1. *Sweeney v. Berlin Envelope Co.*, 101 N. Y. 520; *Woodley v. Metropolitan R. Co.*, 46 L. J., Exch. 521.

Order with Oath.—Likewise where servant was ordered "with an oath." *Williams v. Churchill*, 137 Mass. 243.

Order to Hurry.—So held where injury was caused by order to hurry. *Taylor v. Carew Mfg. Co.*, 140 Mass. 150. *Compare* *East Tennessee etc. R. Co. v. Duffield*, 12 Lea (Tenn.) 63; 18 Am. & Eng. R. Cas. 35.

2. *Lindall v. Bode*, 72 Cal. 245; *Lake Shore etc. R. Co. v. McCormick*, 74 Ind. 440; 5 Am. & Eng. R. Cas. 660; *Richards v. Rough*, 53 Mich. 212; *Rodman v. Michigan etc. R. Co.*, 55 Mich. 57; 17 Am. & Eng. R. Cas. 521; *Hickey v. Toaffe*, 105 N. Y. 26.

3. *Spiva v. Osage Coal & Mining Co.*, 88 Mo. 68.

And see the following late cases involving the principle discussed in this section:

Buckley v. Gutta Percha Mfg. Co., 113 N. Y. 540; *Kern v. De Castro etc. Sugar Refining Co.*, 5 N. Y. Supp. 548; *Arabello v. San Antonio etc. R. Co.* (Tex.), 1889, 11 S. Rep. 913; *Pederson v. Rushford*, 41 Minn. 289; *Metzer v. Peninsular Car Co.*, 76 Mich. 94; *Brazil etc. Coal Co. v. Gaffney*, 119 Ind. 455; *Tudor Iron Works v. Weber*, 129 Ill. 535; *South West etc. Imp. Co. v. Andrews* (Va.), 1889, 9 S. E. Rep. 1015; *Oszkoscil v. Eagle Pencil Co.*, 6 N. Y. Supp. 501; *White v. Kennan* (Ga.), 1889, 9 S. E. Rep. 1082; *Gulf etc. R. Co. v. Williams* (Tex.), 12 S. W. Rep. 172; *Seese v. North Pacific R. Co.*, 39

Fed. Rep. 487; *Carroll v. East Tenn. etc. R. Co.*, 82 Ga. 452; *Goodrich v. New York etc. R. Co.*, 116 N. Y. 308; *Fisher v. Chicago etc. R. Co.* (Mich.), 43 N. W. Rep. 926; *Myers v. Hudson Iron Co.* (Mass.), 22 N. E. Rep. 631; *Ireland v. Gardner*, 7 N. Y. Supp. 609; *Pullutro v. Delaware etc. R. Co.*, 7 N. Y. Supp. 510; *Smith v. Irwin*, 51 N. J. L. 507; *Smith v. Winona etc. R. Co.* (Minn.), 43 N. W. Rep. 968; *Dartmouth Spinning Co. v. Achard* (Ga.), 10 S. E. Rep. 449; *Carey v. Sellers* (La.), 6 So. Rep. 813; *Madau v. White River Lumber Co.* (Wis.), 43 N. W. Rep. 1135.

4. *Houston etc. R. Co. v. Fowler*, 56 Tex. 452; 8 Am. & Eng. R. Cas. 504; *Galveston etc. R. Co. v. Lempe*, 59 Tex. 19; 11 Am. & Eng. R. Cas. 201; *Pittsburgh etc. R. Co. v. Adams*, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408; *Warnell v. Maine Central R. Co.*, 79 Me. 397; 31 Am. & Eng. R. Cas. 272; *Atlanta etc. R. Co. v. Ray*, 70 Ga. 674; 22 Am. & Eng. R. Cas. 286; *East Line etc. R. Co. v. Scott*, 68 Tex. 694; *Hawley v. Chicago etc. R. Co.*, 71 Iowa 717.

5. *Leary v. Boston etc. R. Co.*, 139 Mass. 580; 23 Am. & Eng. R. Cas. 383.

Employee Told to Do the Work or Lie Off.—The fact that plaintiff objected to the work, and defendant's foreman told him he could either work or lie off, cannot make defendant liable on the ground that plaintiff was put on different work from that which he was employed to do. *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478.

But the scope of a servant's duties are to be defined by what he was em-

ployed to perform; by what, with the knowledge and approval of the employer, he actually does perform, rather than by the mere verbal designation of his position. *Rummell v. Dillworth*, 111 Pa. St. 343; 12 Am. & Eng. Corp. Cas. 262. And see *Buzzell v. Mfg. Co.*, 48 Me. 113; *Cahill v. Hilton*, 106 N. Y. 512; *Keene v. Rolling Mills Co.* (Mich.), 33 N. W. Rep. 295; *Thompson v. Chicago etc. R. Co.*, 14 Fed. Rep. 564; *May v. Ontario etc. R. Co.*, 10 Ont. 70; 26 Am. & Eng. R. Cas. 337.

Change of Brakeman from Freight to Passenger Train.—The change of a brakeman's employment from a freight to a passenger train is a favorable one. *Adkins v. Atlanta etc. R. Co.*, 27 S. Car. 71.

Employee of Electric Light Company.—Plaintiff, an employee of defendant, whose duty it was to go up to the top of defendant's electric light tower and trim the light, was injured by the breaking of the cable of an elevator, in which he was ascending one of the towers. The evidence tended to show that, as plaintiff and the overseer were about to ascend, another employee informed them that the lights in that tower were already trimmed, but the overseer directed plaintiff to go up, notwithstanding. *Held*, that the court properly refused to charge that if plaintiff's duty was only to trim lights, and the lights in the tower in question had already been trimmed, he was not in the performance of any duty when the accident occurred, and could not recover. *Weiden v. Brush Electric Light Co.*, 73 Mich. 268.

Laborer Is Ordered to Couple Cars.—It was observed in the case of *Union Pac. R. Co. v. Ford*, 17 Wall. (U. S.) 558, in the supreme court of the United States, "If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, or he must have known that its execution was attended with danger, or at any rate, if he chose to obey, that he took upon himself the risks incident to the service." Many authorities, however, favor a somewhat contrary doctrine. See *Lalor v. Chicago etc. R. Co.*, 52 Ill. 401.

Or Act as Brakeman—*Chicago etc. R. Co. v. Bayfield*, 37 Mich. 205.

Or to Close Elevated Damper.—And

also where a common laborer employed in loading and unloading cars is injured while attempting to close a damper twenty feet above stationary boilers by order of his foreman. *Broadwick v. Detroit Union Depot Co.*, 56 Mich. 261.

Or Work on Dangerous Machine.—And likewise where a common laborer was set to work upon a dangerous machine. *O'Connor v. Adams*, 120 Mass. 427. And see *Dowling v. Allen*, 74 Mo. 13; *East Line etc. R. Co. v. Scott*, 68 Tex. 694.

Or Section Hand to Act as Brakeman.—So it was held where a section hand was ordered out on a construction train and was injured while acting as a brakeman, the duties of which position were unfamiliar to him. *Pittsburgh etc. R. Co. v. Adams*, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408.

Or Passenger Brakeman to Act as Switchman.—And likewise where a brakeman on a passenger train was injured while doing switch work by order of the division superintendent. *Jones v. Lake Shore etc. R. Co.*, 49 Mich. 573.

Fireman Ordered to Work Engine.—Where a conductor, in the absence of the engineer, ordered the fireman to work the engine, and the fireman was competent, but received an injury, it was held that the company was not liable. *Brazil v. W. etc. R. Co.*, 93 N. Car. 313.

Machinist Coupling Cars.—*Warmell v. Maine etc. R. Co.*, 79 Me. 397; 31 Am. & Eng. R. Cas. 272.

Stationary Engine—Fireman Throwing on Belt.—And where a person, employed as the fireman to run a stationary engine, was injured while assisting, by order of the engineer, to throw on a belt used in operating a pump. *Mann v. Oriental Print Works*, 11 R. I. 152.

Cook of tug handling bowline and injured thereby held not entitled to maintain action against owner. *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 304.

Ordering Boy to Adjust Belt Amongst Dangerous Machinery.—F, a boy of tender years, had been engaged by a company conducting a machine shop, as a workman or helper under the superintendence of C, and required to obey his orders; after being employed for a few months, chiefly in receiving and putting away mouldings, as they came from a moulding machine, the boy, by the order of C, ascended a ladder to a great height from the floor, among rapidly re-

to perform it, and that he protested against the requirements.¹ When it comes to extraordinary danger, it is clear that a servant must not be exposed to the same without notice.² But if the employee was in the midst of it, and had opportunity to observe the danger, damages cannot be recovered on the ground that the company knew the danger, and the employee did not.³

Where a servant is injured while temporarily engaged in more hazardous work than that for which he was employed, the question of negligence must depend on facts and circumstances of each particular case.⁴ And furthermore the mere fact that the servant was an infant does not give cause of action against the master for setting him at dangerous work.⁵ But an agreement on the servant's part to obey rules does not warrant an employer in assigning him duty outside the scope of his employment.⁶

XXV. CONTRIBUTORY NEGLIGENCE—(See vol. 4, p. 58)—**1. General Rule.**—One who, by his negligence, has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. The question is whether the plaintiff so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that, but therefor, the misfortune would not have happened. If so there can be no recovery.⁷

volving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order had his arm torn from his body. The jury by a special verdict found that this order was not within the scope of the boy's employment, but was within that of C, that the order was not a reasonable one, and that a prudent man would not have asked the boy to execute it. *Held*, that the company was liable in damages for the injuries. *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553.

1. *Jones v. Lake Shore etc. R. Co.*, 49 Mich. 573; 8 Am. & Eng. R. Cas. 221.

2. *Mich. Central R. Co. v. Smithson*, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101.

3. *Houston etc. R. Co. v. Fowler*, 56 Tex. 452; 8 Am. & Eng. R. Cas. 504.

4. *Pittsburgh etc. R. Co. v. Adams*, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408. And see *Cole v. Chicago etc. R. Co.*, 71 Wis. 114; 23 Am. & Eng. R. Cas. 274; *Warmell v. Maine Central R. Co.*, 79 Me. 597; 31 Am. & Eng. R. Cas. 272; *Kaffer v. R. Co. (Ind.)*, 1 West. Rep. 287; *Cummings v. Collins*, 61 Mo. 520; *Newlett v. R. Co.*, 67 Mo. 239; *Brown v. Byroads*, 47 Ind. 435; *McGlynn v.*

Brodie, 31 Cal. 376; *Hawk v. R. Co. (Pa.)*, 11 Atl. Rep. 459; *Russell v. Tillotson*, 140 Mass. 201; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 554; *Chicago etc. R. Co. v. Bayfield*, 37 Mich. 205; *Dowling v. Allen*, 74 Mo. 13.

Evidence of Actual Duties.—In an action by a servant injured while engaged in dangerous work for which he had not been hired, the actual duties of such servant may be shown. *Jones v. Lake Shore etc. R. Co.*, 49 Mich. 573; 8 Am. & Eng. R. Cas. 221.

5. *McGinnis v. Canada etc. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135.

6. *Jones v. Lake Shore etc. R. Co.*, 49 Mich. 573; 8 Am. & Eng. R. Cas. 221.

7. *Baltimore etc. R. Co. v. Jones*, 95 U. S. 443; *Central R. & Banking Co. v. Roach*, 64 Ga. 635; 8 Am. & Eng. R. Cas. 79; *Callahan v. Louisville etc. R. Co.*, 11 Fed. Rep. 536; 6 Am. & Eng. R. Cas. 594; *East Tennessee etc. R. Co. v. Rush*, 15 Lea (Tenn.) 145; 25 Am. & Eng. R. Cas. 502.

Minors.—And furthermore contributory negligence on the part of a minor will defeat his right to recover for an injury, as in the case of an adult. At-

Where, therefore, both the master and the seryant have equal knowledge of the danger of the service required and of the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable.¹ Likewise where the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence.²

2. Servant Must Have Been in Fault.—But a plaintiff's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing.³

las Engine Works v. Randall, 100 Ind. 293; 50 Am. Rep. 798; *Chicago etc. R. Co. v. Harney*, 28 Ind. 28; *Umbach v. Lake Shore etc. R. Co.*, 83 Ind. 891; *Brazil etc. Co. v. Cain*, 98 Ind. 282.

1. *The Atlas Engine Works v. Randall*, 100 Ind. 293; 50 Am. Rep. 798.

2. *English v. Chicago etc. R. Co.*, 24 Fed. Rep. 906; *North Pacific R. Co. v. Herbert*, 116 U. S. 642; *Johnson v. Bruner*, 61 Pa. St. 58.

3. *Western Union Tel. Co. v. Eysler*, 2 Colo. 141; *Davies v. Mann*, 10 M. & W. 545; *Baltimore etc. R. Co. v. Fitzpatrick*, 35 Md. 32; *Shearman & Redfield on Neg.*, § 28; *Fero v. Buffalo etc. R. Co.*, 22 N. Y. 215; *Cook v. Transportation Co.*, 1 Den. (N. Y.) 91.

Illustrations in the Negative.—Employee in foundry held free from contributory negligence in carrying molten metal over frozen ground. *Smith v. Peninsular Car Works*, 60 Mich. 501; or in opening oven door, where he was injured by the falling of weights hung upon defective hook. *Spicer v. South Boston Iron Co.*, 138 Mass. 426.

Railroad employee under charge of master mechanic held not guilty of contributory negligence in using piece of timber as master mechanic directed, where he was not in a position to see the danger, and the master mechanic was. *Douglass v. Texas etc. R. Co.*, 63 Tex. 564. And see *Galveston R. Co. v. Drew*, 59 Tex. 11; *Wall v. T. & P. R. Co.*, 4 Tex. L. Rev. No. 3, p. 38; *Gulf etc. R. Co. v. Sullivan*, 5 Tex. L. Rev. 115; *Tex. & P. R. Co. v. Murphy*, 46 Tex. 356.

A brakeman, obeying an unusual signal from the engineer to set the brakes, necessarily attempted a passage, which he knew to be dangerous, over an in-

tervening car, which the conductor had told him he need not go over, and which it would have been unnecessary for him to pass over if the brake on another car had been in working order, and fell and was injured. *Held*, that his knowledge of the danger of his attempt ought not to defeat his recovery, since it was his duty to obey orders. *Hosie v. Chicago etc. R. Co.*, 75 Iowa 683.

Construction Laborer—Use of Hand Car.—A construction laborer returning upon hand car from work at later hour than usual, by order of foreman, is not guilty of contributory negligence. *McKune v. California etc. R. Co.*, 66 Cal. 302; 17 Am. & Eng. R. Cas. 589.

Engineer Running Behind Time.—An engineer injured while running behind schedule time, at a speed greater than was ordinarily allowable, but which was, according to the practice of the company, excusable in belated trains, can recover. *Pennsylvania Co. v. Roney*, 89 Ind. 453; 12 Am. & Eng. R. Cas. 223.

Running Contrary to Rules.—Also in running train contrary to rules of new time table or first trip after it takes effect. *Nelson v. Chicago etc. R. Co.*, 60 Wis. 320; 22 Am. & Eng. R. Cas. 391.

Speed in Running Over Switches.—Engineer running over switch at rate of 18 to 20 miles an hour and injured by derailment of train, held not guilty of contributory negligence. *Gulf C. & S. R. Co. v. Pettis*, 69 Tex. 689. See *East Line etc. R. Co. v. Smith*, 65 Tex. 167; *Texas etc. R. Co. v. O'Donnell*, 58 Tex. 27; 10 Am. & Eng. R. Cas. 712.

Engineer Stepping from Engine to Main Track to Get Signal.—In an action

against a railroad company for causing the death of plaintiff's husband, it appeared that deceased, an engineer, in defendant's employ, pulled his train in on a switch to clear the main track for a passenger train then due. He could not see to the rear of his train from either side of his cab, on account of obstructions, and at a call from the rear brakeman stepped on the main track and directed the fireman to move the train forward. While standing on the track and looking to the rear of his train, a hand car with section men in it ran over him. The car was run at a very rapid rate of speed when at the depot. The section men could see to and beyond the place where deceased was standing. *Held*, that deceased was not guilty of contributory negligence in stepping off from the engine upon the main track to get the signals from the brakeman. *Barry v. Hannibal etc. R. Co. (Mo.)*, 11 S. W. Rep. 308. *Compare Glenn v. Columbia etc. R. Co.*; 21 S. Car. 466.

Conductor Leaving Middle of Train Contrary to Rule.—Where a conductor went forward to give the engineer warning, although the rule required him to remain in the middle of the train, it was held that the error was a reasonable one and that he was not guilty of contributory negligence. *Somerset etc. R. Co. v. Galbraith*, 109 Pa. St. 32; 23 Am. & Eng. R. Cas. 375.

In Use of Defective Ladder.—*Richmond etc. R. Co. v. Moore*, 78 Va. 93; 15 Am. & Eng. R. Cas. 239.

In Mounting Moving Car to Prevent Collision.—Brakeman.—*Kelley v. Chicago etc. R. Co.*, 50 Wis. 381; 2 Am. & Eng. R. Cas. 65.

Bundle Falling from Hatchway.—Employee struck by while walking beneath it, although knowing that the hatchway was used for that purpose, held not guilty of contributory negligence. *Post v. Stockwell*, 44 Hun (N. Y.) 28.

Illustrations in the Affirmative.—Engineer Running at High Speed.—The plaintiff, a locomotive engineer in the service of defendant, was running a train over its road immediately after a very heavy storm, which he knew had caused numerous slides and washouts along the whole line of road. He knew that no section men had been along the line after the storm, and that he had to rely on his own watchfulness to guard against danger. He was going around a curve where he knew he would be liable to meet dan-

gerous places, but could not see or detect danger more than 130 feet ahead. He unnecessarily continued at a rate of speed so great that it was impossible for him to stop his train within the distance that he could see a washout, and consequently ran into one and was injured. It was held that plaintiff could not recover, he being guilty of contributory negligence. *Sweeney v. Minneapolis etc. R. Co.*, 33 Minn. 153; 22 Am. & Eng. R. Cas. 302. As to injury arising from act of God see *Rodgers v. Central Pacific R. Co.*, 67 Cal. 606. And see *Pennsylvania Co. v. Roney*, 89 Ind. 453; 12 Am. & Eng. R. Cas. 223.

Where an accident occurred while deceased was running his train over a bridge undergoing repair, it was held that the railroad company could not be held, it not appearing that the accident would have occurred if the train had been running at a proper rate of speed. *St. Louis etc. R. Co. v. Morgart (Ark.)*, 1888; 8 S. W. Rep. 179.

An engineer cannot be allowed to recover against the company for injuries received in a collision with another train, where his own train as well as the other was out of time. *Georgia etc. R. Co. v. McDade*, 59 Ga. 73.

Conductor—Failure to Discover Condition of Cars.—Where the printed rules of a railroad company required each conductor, before moving a train, to inform himself of the condition of the cars composing it, and the conductor failed to do so, and was injured by reason of defective brakes, it was held that he could not recover. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 590.

Failure to Remove Ice from Platform.—The intestate was employed as a car repairer. On the day of the accident he was sent by his foreman to repair a water tank. It stood upon standards eleven or twelve feet high. At the base of the tank was a deck averaging thirty-five inches in width. The work to be done required him to let off the water in the tank and get inside. The intestate let off the water and went to dinner. On coming back he slipped off the deck, which had become covered with ice, and was killed. *Held*, that as he took no precautions to prevent slipping he was negligent and no recovery could be had. *English v. Chicago etc. R. Co.*, 24 Fed. Rep. 906.

Car Repairer Not Leaving Signal.—Where two car repairers went under a car, neglecting either to put out a flag, or to put a third man on guard, other

cars were switched upon them, killing one of them, held no recovery could be had. *Renfro v. Chicago etc. Co.*, 86 Mo. 302; *Hallihan v. Hannibal etc. R. Co.*, 71 Mo. 113; 2 Am. & Eng. R. Cas. 117.

In Failing to Ask Assistance.—A night car repairer, employed to work on cars while on the track, was required to place a draft iron upon a car, which he directed to be switched onto a side track, where it was stopped at the place indicated by him. His assistant was absent, but plaintiff knowing of such absence, and of the condition of the road, started to do the work himself, and in attempting to lift the iron to its place slipped on some ice and was injured. There were other employees near, who were ready to and did assist him when called. *Held*, that the company was not liable. *Way v. C. & N. W. R. Co.*, 76 Iowa 393; and see *Dunlap v. Barney Mfg. Co.*, 148 Mass. 51; *Missouri etc. R. Co. v. McElyea*, 71 Tex. 381.

There is a want of ordinary care in the voluntary attempt of an employee of a railroad company, discharging the duties of a helper to a hostler, to get upon a switch engine in motion by the step at the rear right hand side of the cab of the engine, where he had no duty to perform in the cab of the engine, and when a safer place for him to get upon the engine would be the rear footboard, which was used for this purpose by that class to which he belonged. *Union Pacific R. Co. v. Estes*, 37 Kan. 715.

Mounting Tender.—Plaintiff was a fireman on an engine in defendant's switch yard, and while getting upon the tender he caught hold of a hand hold on it, which, being insecurely fixed, gave way, and he fell to the track and was run over. The engine and tender were moving at the rate of about two miles an hour, the tender in front. There was a step at the cab on the engine intended for the engineer and fireman to get off and on the engine. *Held*, that the plaintiff, in imprudently mounting the tender at the end approaching him, contrary to the orders of the company, and in failing to wait until the cab step came opposite to him, where he could have entered with safety at the entrance made for his use, was guilty of such contributory negligence as to defeat his right to recover against the railroad company. *Murray v. Gulf etc. R. Co.* 73 Tex. 2; 38 Am. & Eng. R. Cas. 177.

Failure to observe overhead bridge

in plain sight by brakeman, who was struck thereby and injured, held to constitute contributory negligence. *Stoneback v. Thomas Iron Co. (Pa.)*, 2 Cent. Rep. 604; *Cleveland etc. R. Co. v. Rowan*, 66 Pa. St. 399.

Projecting person beyond side of car constitutes contributory negligence. *Brown v. Chicago etc. R. Co.*, 69 Iowa 161; *St. Louis etc. R. Co. v. Markes*, 41 Ark. 542. See *Pool v. Chicago etc. R. Co.*, 53 Wis. 657; 3 Am. & Eng. R. Cas. 332; *Baltimore etc. R. Co. v. Jones*, 95 U. S. 439; *St. Louis etc. R. Co. v. Freeman*, 36 Ark. 41; *Little Rock etc. R. Co. v. Parkhurst*, 36 Ark. 371; *Daggett v. Iowa City*, 34 Iowa 284; *Houston etc. R. Co. v. Hampton*, 64 Tex. 427; 22 Am. & Eng. R. Cas. 291.

Flying Switch Contrary to Orders.—A railroad employee injured in making a "flying switch" cannot recover in the face of a rule of said company prohibiting such act, he having knowledge thereof. *Pilkington v. Gulf etc. R. Co.*, 70 Tex. 226; *Galveston etc. R. Co. v. Ryan*, 70 Tex. 56; *Reagan v. St. Louis R. Co.*, 93 Mo. 348; *Alexander v. Louisville etc. R. Co.*, 83 Ky. 590; *Greenwald v. Marquette R. Co.*, 49 Mich. 197; 8 Am. & Eng. R. Cas. 133.

Switchman Between Two Tracks.—In the absence of any special circumstances, an experienced switchman, who is proceeding with his customary duties between two tracks, where the observance of care will enable him to perform such duties in safety, cannot be said to be so absorbed in his duty as to exempt him from the necessity of exercising care for his own safety, and his failure to do so constitutes contributory negligence. *Cincinnati etc. R. Co. v. Long*, 112 Ind. 167. In illustration of the same principle see *Goodfellow v. Boston etc. R. Co.*, 106 Mass. 461; *Indianapolis etc. R. Co. v. McClaren*, 62 Ind. 566; *Lake Shore etc. R. Co. v. Miller*, 25 Mich. 274; *St. Louis etc. R. Co. v. Manly*, 58 Ill. 300; *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; 48 Am. Rep. 719; *Telfer v. Northern R. Co.*, 30 N. J. L. 188. *Beach Cont. Neg.* 394; *Bresnahan v. Michigan Central R. Co.*, 49 Mich. 410; 8 Am. & Eng. R. Cas. 147.

Handling Machine in a Careless Manner.—In an action for negligently causing the death of plaintiff's intestate, evidence that deceased, while in defendant's employ, was dragging a machine by a portion of it not intended for such purpose, and was moving backward in a stooping posture, and

that the machine breaking, deceased fell into an elevator well, guarded as he knew, by only one bar, which was rather high, shows contributory negligence sufficient to prevent a recovery. *Rogen v. Morgan's Sons Co.*, 1 N. Y. Supp. 273.

Jumping from Moving Train.—Plaintiff was one of a gang of laborers working with a gravel train. When the train was about to start, the foreman called out "All aboard," but plaintiff did not hear him. Seeing others getting aboard, however, he jumped on while the train was moving, and the gravel slipping from under him, he fell off and had his arm run over and cut off. It was held that the company was not liable. *Novock v. Michigan etc. R. Co.*, 63 Mich. 121; *Martensen v. Chicago etc. R. Co.*, 60 Iowa 705; 11 Am. & Eng. R. Cas. 233.

Volunteer Signalling Train.—A, who was not an employee of defendant railway company, was requested by a watchman to go up the track to a bridge and notify the conductor of an approaching train that there was a broken rail on the track, and being anxious to prevent loss of life A did so, and signalled the train to stop. The conductor stopped his train but started on again, and while the train was running at about four miles an hour, A, fearing that his signal had been misunderstood, attempted to get upon the train to speak to the conductor, but fell off and was injured. It was held that he could not recover. *Blair v. Grand Rapids etc. R. Co.*, 60 Mich. 154; 24 Am. & Eng. R. Cas. 430. See in the same line *Eason v. Sabine etc. R. Co.* (Tex.), 6 Tex. L. Rev. 178; *Mayton v. Texas etc. R. Co.*, 63 Tex. 77; *Barstow v. Old Colony R. Co.*, 143 Mass. 535; 28 Am. & Eng. R. Cas. 473.

Day laborer riding on engine pilot is guilty of contributory negligence. *Baltimore etc. R. Co. v. Jones*, 95 N. S. 439. Citing *Hickey v. Boston etc. R. Co.*, 14 Allen (Mass.) 429; *Todd v. Old Colony etc. R. Co.*, 3 Allen (Mass.) 18; *Gavett v. Manchester etc. R. Co.*, 16 Gray (Mass.) 501; *Lucas v. New Bedford etc. R. Co.*, 6 Gray (Mass.) 64; *Ward v. R. Co.*, 2 Abb. (N. Y.) Pr. U. S. 411; *Galena etc. R. Co. v. Yarwood*, 15 Ill. 468; *Doggett v. Illinois etc. R. Co.*, 34 Iowa 284.

Mounting Moving Engine with Patent Defects.—*Rayburn v. Central Iowa R. Co.*, 74 Iowa 637; *Dowell v. Vicks-*

burg etc. R. Co., 61 Miss. 519; 18 Am. & Eng. R. Cas. 42.

Unnecessarily Mounting a Boiler.—*East Tennessee R. Co. v. Toppins*, 10 Lea (Tenn.) 58; 11 Am. & Eng. R. Cas. 222.

Failure to Step Off Track to Avoid Injury.—A train hand sent back at night to signal an approaching train, saw it coming, although it had no headlight, but upon its emerging from a curve in a cut he discovered that the engine was very close upon him, and in getting off the track upon which he was standing his foot was caught by the rail, and in extricating his foot his hand was caught by the train and crushed. It was held that the plaintiff's negligence in not stepping from the track sooner would prevent recovery. *Glenn v. Columbia etc. R. Co.*, 21 S. Car. 466; and see *Gibbons v. Chicago etc. R. Co.*, 66 Iowa 231; *Myers v. Indianapolis etc. R. Co.*, 113 Ill. 386; *Cincinnati etc. R. Co. v. Long*, 112 Ind. 166; 31 Am. & Eng. R. Cas. 138; *Indianapolis etc. R. Co. v. McClaren*, 62 Ind. 568; *Lake Shore R. Co. v. Miller*, 25 Mich. 279; *St. Louis R. Co. v. Manly*, 58 Ill. 300. *Black Cont. Neg.* 394. *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; 12 Am. & Eng. R. Cas. 77; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Chicago R. Co. v. Sweeney*, 52 Ill. 325; *Cincinnati etc. R. Co. v. Butler*, 103 Ind. 31; 23 Am. & Eng. R. Cas. 262; *Schofield v. Chicago etc. R. Co.*, 114 U. S. 615; 19 Am. & Eng. R. Cas. 353; *Holland v. Chicago R. Co.*, 5 McCrary (U. S.), 549.

Where the facts were as follows: A person who had obtained permission from the station agent of a railroad corporation to come to the station for the purpose of learning telegraphy, was warned by the agent not to walk on the railroad track. He left the station to go to a certain point on an errand which he had volunteered to do for the station agent. Knowing that a train was approaching, he walked upon the track with his back toward the direction from which it was coming. He was run down and killed. It was held that he was guilty of such negligence as would prevent recovery. *Barstow v. Old Colony etc. R. Co.*, 143 Mass. 535; 28 Am. & Eng. R. Cas. 473.

Failure to Leave Hand Car with promptness.—Where the section men in a hand car were ordered by their foreman to abandon their car on account of an approaching train and one of them, being much slower in doing so than the

rest, was injured, it was held that he could not recover for injuries suffered. *International etc. R. Co. v. Hester*, 64 Tex. 401; 21 Am. & Eng. R. Cas. 535.

Failure to take precautions to prevent the freezing of limbs by section hand engaged in shovelling snow, held to constitute contributory negligence. *Farmer v. Chicago etc. R. Co.*, 67 Iowa 136.

Keeping Derrick Rope Wet.—Where a servant is employed in operating a derrick, and is with others charged with duty of keeping rope wet, and he fails to do so, whereby it breaks, and he is injured. *Union Pacific R. Co. v. Fray*, 31 Kan. 739; 15 Am. & Eng. R. Cas. 158.

Ignoring Warning of Danger.—Where the evidence showed that plaintiff, engaged in undermining a wall, was warned of the danger, and the accident was caused by his own negligence in stepping on the timber supporting the wall, *held*, that he had no right of action. *Campbell v. Lunsford*, 83 Ala. 512.

Plaintiff's intestate was working on a stone by the side of defendant's track, and was warned by defendant's foreman to beware of approaching trains. He got out of the way twice, but the third time remained, through forgetfulness, and the stone was struck by the train and overturned, killing him. *Held*, that he was guilty of such contributory negligence that he could not recover. *Columbus etc. R. Co. v. Bradford*, 86 Ala. 575.

Handling of Electrical Apparatus.—Employee of electric light company held guilty of contributory negligence. *Piedmont etc. Illuminating Co. v. Patterson (Va.)*, 1888; 6 So. Rep. 4.

Failure to avoid elevator well hole known by employee in mill to exist constitutes contributory negligence, and there can be no recovery for an injury received by falling into it. *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Seymour v. Maddox*, L. R., 16 Q. B. 326. See *Gleason v. Excelsior Mfg. Co.*, 94 Mo. 201.

Improper Use of Circular Saw.—Plaintiff, a workman at a lumber mill, was ordered by the foreman to fix up a dump car. He took a piece of scantling and proceeded to cut it with a circular saw. In doing so he leaned over, holding the scantling with one hand on each side of the saw; and when the scantling was cut through he fell across the saw, and his arm was cut off.

Held, that he was guilty of contributory negligence, and that a verdict for defendant was properly directed. *Lindstrand v. Delta Lumber Co.*, 94 Mich. 201.

Riding in Engine Cab Contrary to Orders.—A foreman of a crew of wreckers who boards a "wild train" to reach the scene of a wreck, and contrary to regulations rides in an engine cab, is guilty of contributory negligence. *Abend Admr. v. Terre Haute etc. R. Co.*, 111 Ill. 204; 17 Am. & Eng. R. Cas. 614.

Riding on Rear Platform of Tender.—*Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600; 28 Am. & Eng. R. Cas. 397.

Passing around end of freight car unprovided with steps, etc. *Chicago etc. R. Co. v. Warner*, 118 Ill. 538.

Remaining in Dangerous Place.—Coal miner standing on track in shaft and struck by descending car, held not entitled to recover. *Woodward Iron Co. v. Jones*, 80 Ala. 123.

It was held, in a California case, that an employee in a mining tunnel, who, knowing that the roof of the tunnel was in an unsafe condition at a certain point, while employed in making it safe, sat down under the dangerous point during a suspension of the work and was killed, was guilty of contributory negligence, and that no recovery could be had of the master. *Bunt v. Sierra Buttes etc. Min. Co.*, 24 Fed. Rep. 847; *citing McGlynn v. Brodie*, 31 Cal. 370; *Kielley v. Belcher S. Min. Co.*, 2 Sawy. (U. S.) 502.

Doing a Dangerous and Unnecessary Act.—Where plaintiff had his hand crushed by keeping hold of a wheel in order to stop certain machinery, it not being necessary to do so, yet being safe if he had not kept his hand on longer than was necessary to stop the machine, it was held that plaintiff was plainly guilty of contributory negligence, and the fact that the owner of the machinery had failed to furnish mechanical appliances to stop it did not make him liable. *White v. Sharp*, 27 Hun (N. Y.) 94.

Going to Sleep When Sent to Watch.—*East Tennessee etc. R. Co. v. Rush*, 15 Lea (Tenn.) 145.

Walking into hole in broad daylight. *Louisville etc. R. Co. v. Wolfe*, 80 Ky. 82; 5 Am. & Eng. R. Cas. 625.

Falling Through Defective Steps.—*Stroble v. Chicago etc. R. Co.*, 70 Iowa 55; 18 Am. & Eng. R. Cas. 14.

3. Recovery Notwithstanding Servant's Negligence.—It is also well settled that a plaintiff may recover, notwithstanding his own negligence exposed him to the injury in question, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid doing the injury,¹ or wilfully inflicted the damage.²

4. Reasonable Diligence of Employee as to Tools and Machinery.—While a servant must use due diligence in guarding against injury from improper or unsafe tools furnished by his employer, he may rely, to some extent at least, on faithful performance by the master.³

Using Car After Being Ordered to Get Another—Where a section master on a railroad was injured by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car, it was held that the injury was the result of his own carelessness, and that he could not recover. *Pleasants v. The Railroad*, 95 N. Car. 196.

Use of Hand Instead of Stick.—An employer is not liable for injury to an employee who, though familiar with the machinery, used his hand where he should have used a stick. *Wetjen v. So. White Lead Co.*, 5 Mo. App. 597.

Attempt to Board Moving Train.—A servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly equipped and that some of its appliances were defective. *Dowell v. Vicksburg etc. R. Co.*, 61 Miss. 519; 18 Am. & Eng. R. Cas. 42.

A brakeman in the employ of a railroad company went to adjust a switch in the dark. According to the rules of the company he should have immediately got upon the train before it started and reported that the switch was all right. He failed to do this, but waited to get upon the train until the same was in motion, when, in endeavoring to do so, he slipped, fell and was injured. It was held that he had been guilty of such contributory negligence as to preclude recovery. *Chambers v. Western North Car. R. Co.*, 91 N. Car. 471. And see *Kelley v. Chicago etc. R. Co.*, 50 Wis. 381; 2 Am. & Eng. R. Cas. 65.

Playing with Machinery.—A boy injured while playing with a machine, on

which he was not employed, and which he had been cautioned to keep away from, cannot recover. *Rock v. Indian Orchard Mills*, 142 Mass. 522.

1. *Kansas etc. R. Co. v. Cranmer*, 4 Colo. 524. See *Shearman & Redfield on Neg.*, § 36; *Denver etc. R. Co. v. Olsen*, 4 Colo. 239; *Schumacher v. St. Louis etc. R. Co.*, 39 Fed. Rep. 175.

2. *Louisville etc. R. Co. v. McCoy* (Ky.), 1883; 15 Am. & Eng. R. Cas. 278; *Beems v. Chicago etc. R. Co.*, 58 Iowa 150; 10 Am. & Eng. R. Cas. 658; *Frazer v. South etc. R. Co.*, 81 Ala. 185; 28 Am. & Eng. R. Cas. 565; *Smoot v. Mobile etc. R. Co.*, 67 Ala. 13; *Wells v. Coe*, 9 Cal. 159; *Rowland v. Cannon*, 35 Ga. 105; *Illinois etc. R. Co. v. Patterson*, 93 Ill. 270; *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Ray v. Jeffries* (Ky.), 5 S. W. Rep. 867; *Coombs v. Purrington*, 42 Me. 332; *Osborne v. Knox etc. R. Co.*, 68 Me. 49; 31 Am. & Eng. R. Cas. 272; *Warmell v. Maine etc. R. Co.*, 79 Me. 397; *Hart v. St. Louis etc. R. Co.*, 94 Mo. 255; *Cornwall v. Charlotte etc. R. Co.*, 97 N. Car. 11; *Louisville etc. R. Co. v. Mahoney*, 7 Bush (Ky.) 235; *Digby etc. v. Kenton Iron Co.*, 8 Bush (Ky.) 166.

Exception to the Rule.—There are exceptions, however, to this rule, as where the person injured, knowing of the neglect of the party charged, voluntarily, with the intention of causing his own injury, places himself where the injury could not be avoided, either before or after the discovery of his condition. *Louisville etc. R. Co. v. McCoy* (Ky.), 1883; 15 Am. & Eng. R. Cas. 277.

3. *Guthrie v. Louisville etc. R. Co.*, 11 Lea (Tenn.) 372; 15 Am. & Eng. R. Cas. 209.

Conductors should ascertain whether brakes are in proper condition before starting; if he fails to do so, and is injured by defective brake, he cannot recover, though car inspector also failed

5. Negligence Through Terror.—Where an employee, in the course of his employment, finds himself in imminent peril, through the negligence of the employer, and in the terror of the moment adopts an unsafe course exposing him to greater peril, such action on his part will not prevent a recovery.¹

6. Questions for Court and Jury.—Where the facts are undisputed, and only one inference can be drawn from them, it is the duty of the court to decide, as matter of law, whether or not there was negligence.² But where the evidence is conflicting, the duty of discovering the truth devolves upon the jury, the court announcing the legal principles applicable to any state of facts found by them to be true.³

to make examination. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

1. *Central R. Co. v. Roach*, 64 Ga. 635; 8 Am. & Eng. R. Cas. 79; *East Tennessee etc. R. Co. v. Gurvey*, 12 Lea (Tenn.) 46; 17 Am. & Eng. R. Cas. 568; *Schall v. Cole*, 107 Pa. St. 1; *Gumz v. Chicago etc. R. Co.*, 52 Wis. 672; *Schultz v. Chicago etc. R. Co.*, 44 Wis. 638; *Mark v. St. Paul etc. R. Co.*, 30 Minn. 493; *Stevenson v. Chicago etc. R. Co. (Mo.)*, 18 Fed. Rep. 493; *Lalor v. Chicago etc. R. Co.*, 52 Ill. 401; *Bell v. Hannibal etc. R. Co.*, 72 Mo. 50; 4 Am. & Eng. R. Cas. 580.

In an action by a locomotive engineer to recover for the breaking of his arm in attempting to quickly reverse the lever in order to stop the train after the engine had left the track, if plaintiff acted with reasonable skill and prudence in reversing the lever, in view of the haste and sudden emergency in which he was required to act, he did not contribute to his own injury. *Knapp v. Sioux City etc. R. Co.*, 71 Iowa 41; following *Knapp v. Sioux City etc. R. Co.*, 65 Iowa 91; 18 Am. & Eng. R. Cas. 60.

2. *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20. And see *Barnes v. Sowden*, 119 Pa. St. 53; *Wabash etc. R. Co. v. Locke*, 112 Ind. 404; *Pittsburgh etc. R. Co. v. Spencer*, 98 Ind. 186; 145 Mass. 468; *Counsell v. Hall*, 14 N. E. Rep. 530; *Pleasant v. Raleigh R. Co.*, 95 N. Car. 195; *Herring v. Wilmington etc. R. Co.*, 10 Ired. (N. Car.) 640; *Avera v. Lexton*, 13 Ired. (N. Car.) 247; *Smith v. North Carolina R. Co.*, 64 N. Car. 238; *Anderson v. Steamboat Co.*, 64 N. Car. 399.

3. *Baltimore etc. R. Co. v. Kean*, 65 Md. 394; 28 Am. & Eng. R. Cas. 580; *Ormsby v. Union Pacific R. Co.*, 2 McCrary (U. S.) 48; *Somerset etc. R.*

Co. v. Galbraith, 109 Pa. St. 32; 23 Am. & Eng. R. Cas. 375; *Colorado Electric Co. v. Lubbers*, 11 Colo. 505; *Kansas Pacific R. Co. v. Ward*, 4 Colo. 30; *Kane v. North Cent. R. Co.*, 128 U. S. 91; *Pleasants v. Raleigh etc. R. Co.*, 95 N. Car. 196; *Hatfield v. Chicago etc. R. Co.*, 61 Iowa 434; 11 Am. & Eng. R. Cas. 153; *Fink v. Mo. Furnace Co.*, 16 Mo. App. 61; *Kain v. Smith*, 89 N. Y. 375. And see *Miller v. Union Pacific R. Co. (Colo.)*, 12 Fed. Rep. 600; 6 Am. & Eng. R. Cas. 615; *Pringle v. Chicago etc. R. Co.*, 64 Iowa 613; 18 Am. & Eng. R. Cas. 91; *Hawley v. North Cent. R. Co.*, 82 N. Y. 370; 2 Am. & Eng. R. Cas. 248; *Central R. & Banking Co. v. Roach*, 64 Ga. 635; 8 Am. & Eng. R. Cas. 79; *Houser v. Chicago etc. R. Co.*, 60 Iowa 230; 8 Am. & Eng. R. Cas. 500; *Meloy v. Chicago etc. R. Co.*, 33 Am. & Eng. R. Cas. 358; *Atchison etc. R. Co. v. McCandliss*, 33 Kan. 366; 22 Am. & Eng. R. Cas. 296; *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

Brakeman Killed by Overhead Bridge.

—It appeared that defendant put into its train one car of a different kind and higher than those generally used; that while deceased was standing on said car, whither he had gone in discharge of his duty as brakeman, the train passed under a bridge and defendant was thrown off and killed; that several persons were looking towards him at the time, but gave him no warning, seeming to apprehend no danger. *Held*, that the questions of negligence and contributory negligence were alike for the jury. *Stirk v. Central R. & Banking Co.*, 79 Ga. 495. And see *Clark v. Richmond etc. R. Co.*, 78 Va. 709; 18 Am. & Eng. R. Cas. 78; *Riley v. Connecticut etc. R. Co.*, 135 Mass. 292; 15 Am. & Eng. R. Cas. 181.

7. Burden of Proof.—Contributory negligence is purely a matter of defence as to which the burden of proof is on the defendant.¹

8. Proof Necessary to Establish.—The mere fact that an employee has performed work knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he performed that which was dangerous in a negligent manner.² And that such negligence was the proximate cause of the injury complained of.³ And of course such negligence must be that

Trainman Ascending Ladder in Car.—In an action for injuries caused by moving a car inside of which plaintiff had ascended by a ladder, it was properly left to the jury to say whether, under the circumstances, plaintiff was guilty of contributory negligence in not himself giving notice to those in charge of the train that he was to ascend the ladder. *Pierce v. Central Iowa R. Co.*, 73 Iowa 140.

Walking Over Train—Sudden Jerk.—The act of a servant in walking over a train of flat cars while the same are in motion, or even stepping from one of such cars to another while the train is in motion, is not negligence *per se*. In an action by him to recover damages for injuries sustained by a fall occasioned by a sudden jerk of the cars, the question of contributory negligence is for the jury. *Atchison etc. R. Co. v. McCandless Adm.*, 33 Kan. 366; 22 Am. & Eng. R. Cas. 296. And see *G. H. & S. A. R. Co. v. Smith*, 59 Tex. 406; *Doss v. Missouri etc. R. Co.*, 59 Mo. 27; *Filer v. New York etc. R. Co.*, 49 N. Y. 47; *Georgia R. R. etc. Co. v. McCurdy*, 45 Ga. 288; *Pa. R. Co. v. Kilgore*, 32 Pa. St. 292.

Miner Injured by Descending Car.—The plaintiff, while in the employ of defendant, was passing from a mine pit, on an incline track, upon which was run a "skip car," but which was generally used by the men in passing to and from the pit, it being the most convenient but not the only way, where he was struck by the descending car, which was being lowered, by the foreman's direction, without the usual signal of warning. *Held*, in an action for the injury received, that the question of plaintiff's contributory negligence was properly submitted to the jury. *Luke v. Wheat Min. Co.*, 71 Mich. 364.

Stepping from Moving Pay Car.—For an employee of a railroad company who had boarded the pay train to receive the amount due him, and, having completed his business, to attempt to alight from the train, which was then

moving, is not such contributory negligence *per se* as will prevent recovery for injuries sustained, and it is for the jury to determine whether such acts should prevent recovery, or only mitigate damages. *Louisville etc. R. Co. v. Stacker*, 86 Tenn. 343.

Killing of Brakeman Through Separation of Train.—Plaintiff's son, an experienced brakeman, when last seen alive, was performing his duty in setting the brakes on a freight car on which he was riding. A minute later, the train having separated at the first coupling in front of him, he was thrown to the ground, run over by the rear end of the train, and killed. Although there was no other evidence bearing on the question of negligence, or of freedom from it, on his part, *held*, that the court was justified in submitting it to the jury in an action against the company for negligence. *Burns v. Chicago etc. R. Co.*, 69 Iowa 450.

1. *Bogenschutz v. Smith*, 84 Ky. 330; *Cole v. Chicago etc. R. Co.*, 67 Wis. 272; *Whitsett v. Chicago etc. R. Co.*, 67 Iowa 150; 22 Am. & Eng. R. Cas. 336. And see *Piquegno v. Chicago etc. R. Co.*, 52 Mich. 40; 12 Am. & Eng. R. Cas. 210.

Where a defendant relies upon such a defence, he must prove it, and in the absence of proof to the contrary, plaintiff must be presumed to have been without fault. *Baltimore etc. R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395.

2. *Mobile etc. R. Co. v. Holborn*, 84 Ala. 133.

3. *Thomp. on Neg.* 1151-1157; *Cornwall v. Charlotte R. Co.*, 97 N. Car. 11; *Owens v. R. Co.*, 28 N. Car. 502; *Stucke v. Milwaukee etc. R. Co.*, 9 Wis. 202; *Chicago etc. R. Co. v. Goss*, 17 Wis. 428; *Rothe v. Milwaukee etc. R. Co.*, 21 Wis. 256; *Potter v. Chicago etc. R. Co.*, 21 Wis. 372; *Cunningham v. Lyness*, 22 Wis. 245; *O'Connors v. Missouri Pacific R. Co.*, 94 Mo. 150; *Henry v. Lake Shore etc. R. Co.*, 49 Mich. 495; 8 Am. & Eng. R. Cas. 110.

of the plaintiff or of some person for whose acts he is responsible.¹

9. Failure to Look for Hidden Danger.—An inexperienced employee is not precluded by contributory negligence from recovering from an employer for an injury from a hidden danger in machinery.²

10. Knowledge of Danger Not Usually Incident.—In an action growing out of the death of defendant's employee through exposure in defendant's service to a danger not commonly connected with the employment, knowledge of such danger is not to be presumed in proof of contributory negligence, but must be brought home to the deceased.³

11. Slight Want of Care.—A slight want of ordinary care on plaintiff's part will not necessarily prevent a recovery for injuries suffered.⁴ And it is not necessary, in order to enable a party to recover for injuries done to his property caused by the negligence of others, that he should be entirely free from all negligence himself; but if his negligence is slight, and that of the other party is gross, or if his is remote, and that of the other party is the proximate cause of the injury, he may recover.⁵

12. Care Required in Use of Appliances.—While the law requires of an employer a high degree of care in furnishing his workmen with safe tools, it also, in the case of a skilled workman operating with a dangerous tool, requires a correspondingly high degree of care on his part in its use.⁶ Such person is bound to exercise his thinking faculties and give careful attention, and if he fails to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury.⁷

And the proximate-ness or remote-ness of contributory negligence depends rather on the causal connection between plaintiff's act and the result than on their closeness in time. *Cunningham v. Lyness*, 22 Wis. 245.

1. *Stetler v. Chicago etc. R. Co.*, 46 Wis. 497; *Flannagan v. Chicago etc. R. Co.*, 50 Wis. 462.

2. *Dowling v. Allen*, 6 Mo. App. 195.

Employee of Oil Company.—A green hand told to wipe a plate attached to a machine, which outwardly indicated no danger, is not guilty of contributory negligence in failing to have examined the machine, and to have discovered the hidden danger. *Howard Oil Co. v. Fanner*, 56 Tex. 452.

3. *Smith v. Peninsular Car Works* 60 Mich. 501; 12 Am. & Eng. Corp. Cas. 269; *Colbert v. Rankin*, 72 Cal. 197.

4. *Griffin v. Town of Willow*, 43 Wis. 509; *Ward v. Milwaukee R. Co.*, 29 Wis. 144; *Dreher v. Fitchburg*, 22 Wis. 675; *Walker v. Westfield*, 39 Vt. 246. Compare *Potter v. Chicago etc. R. Co.*, 21 Wis. 372.

5. *Union Pacific R. Co. v. Rollins*, 5 Kan. 167; *Caulkins v. Mathews*, 5 Kan. 191. See in this connection *The New World v. King*, 16 How. (U. S.) 469; *Galena etc. R. Co. v. Jacobs*, 20 Ill. 478; *Jones on Bail*, 5, 7, 8.

6. *Wormell v. Maine Central R. Co.*, 79 Me. 397; 31 Am. & Eng. R. Cas. 272; *Chicago etc. R. Co. v. Mahoney*, 4 Ill. App. 262; *Cornwall v. R. Co.*, 97 N. Car. 11.

Laborer in Woolen Factory—Defective Card.—It cannot be said, as a matter of law, that a servant was not in the exercise of due care because two days before he had seen the fan of a carding machine running in the wrong direction, as it did when he was injured. *White v. Nonantum Worsted Co.*, 144 Mass. 276; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93; 6 Am. & Eng. R. Cas. 243; *Wabash R. Co. v. Elliott*, 98 Ill. 481; 4 Am. & Eng. R. Cas. 651.

7. *Stone v. O. C. Mfg. Co.*, 4 Oreg. 52; *Pittsburgh etc. R. Co. v. McClurg*, 56 Pa. St. 295; *North Pa.*

13. Due Care Must be Shown.—Where a statute does not otherwise provide, the rule requiring the plaintiff, in an action for negligence, to show that at the time of the injury complained of he was in the exercise of due care, is the same whether the action is brought under a statute or at common law. The doctrine of contributory negligence governs both classes of actions.¹

14. Presumption Where Servant Is Killed While on Duty.—Where a servant is killed while on duty, the law will presume, in the absence of contrary evidence, that the deceased exercised due care.²

etc. *R. Co. v. Heileman*, 49 Pa. St. 60; *Pittsburgh etc. R. Co. v. Evans*, 53 Pa. St. 250; *Rush v. Davenport*, 6 Iowa 443; *Mobile etc. R. Co. v. Thomas*.

1. *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Thompson v. Bridgewater*, 7 Pick. (Mass.) 188; *Adams v. Carlisle*, 21 Pick. (Mass.) 146; *Munn v. Reed*, 4 Allen (Mass.) 431; *Plumley v. Birge*, 124 Mass. 57; *Denison v. Lincoln*, 131 Mass. 236.

2. *Kansas City etc. R. Co. v. Flynn*, 78 Mo. 195; 18 Am. & Eng. R. Cas. 23; *Cahill v. Hilton*, 106 N. Y. 512; *Donovan v. Gay*, 97 Mo. 448.

Killing of Brakeman in Absence of Witnesses.—In an action to recover damages for injuries resulting in the death of a brakeman, it appeared that there was no witness to the transaction. *Held*, that under such circumstances evidence of the prior habits of the deceased as to care, prudence and sobriety is admissible as tending to prove that he was not guilty of contributory negligence, but where there were witnesses who saw the transaction, such evidence is not admissible. *Chicago etc. R. Co. v. Clark*, 11 Ill. App. 104.

Female Keeper of Boarding Car—Jerk of Train.—Plaintiff and his wife were keeping a boarding car in connection with a construction train, and just as the car was about to be moved the wife was standing with the conductor near the door to see where it would be placed. The car started with a jerk, and she was thrown out upon the track. *Held*, proper to charge that defendant was liable if the injury was caused by the negligence of its servants, although there may have been negligence on her part, unless she could, by the exercise of ordinary care, have avoided the consequence of defendant's negligence. *Brown v. Sullivan*, 71 Tex. 470.

Use of Defective Hand Car.—In an action against a railroad company for injuries to an employee alleged to have been caused by a defect in a hand car

and in a rail, a charge that the promise of the section master to repair the rail some days before, and the fact that he had sent the car to the shop for repairs and had again put it in use, might be considered on the question of contributory negligence, is not a charge upon the weight of evidence where the uncontradicted evidence shows the facts recited in it. *Missouri Pac. R. Co. v. James* (Tex.), 10 S. W. Rep. 332.

Where Car Repairers Worked Under Car Without Guard.—Two railroad employes were inspecting and making light repairs on a train, working in couples, the object being that one should watch while another worked. Both were under a car when the train was started, and one was killed. *Held*, that an instruction that "if you find that O and N were working together, and were instructed that one should keep watch to warn the other, then it was contributory negligence for them to both go under the car together, and if you find that, having been so instructed, they were both under the car together, then plaintiff cannot recover," was improperly refused. *Oleson v. Chicago, B. & N. R. Co.*, 38 Minn. 412.

Employee in Hand Car Run Down by Engine.—And furthermore, an instruction that if an employee, running a hand car ahead of an engine he knew to be about to follow, by keeping a vigilant watch might have run his hand car from the track and avoided the collision, he could not recover, could not properly be given in view of testimony that showed he was given to understand by the engineer and conductor of the engine that it would not start within double the time that actually elapsed before he was struck. *Hawley v. Chicago etc. R. Co.* (Iowa), 29 N. W. Rep. 787.

Catching Foot in Guard Rail.—*Hulm v. Missouri Pac. R. Co.*, 92 Mo. 440; 31 Am. & Eng. R. Cas. 221. And see *Indianapolis etc. R. Co. v. Burdge*, 94

XXVI. LIABILITY OF SERVANT TO MASTER.—1. In Cases of Contracts.

—In all cases where the servant contracts for the master without authority, or when having authority to contract for him he exceeds it, he thereby becomes personally responsible to his employer in damages arising through such action on his part.¹

2. In Cases of Wrongful Acts.—As the contract of service is mutual, the employer has a claim against the employee for his wrongful acts or neglect of duty; and it is held that the employer does not waive this claim by paying the servant and continuing him in his service.² And a master can also recover from his servant although he pays without suit, or where even he has paid nothing.³

3. Suit Against Servant—Defence by Master.—A servant requesting his master to defend a suit for injuries occasioned by the serv-

Ind. 46; 18 Am. & Eng. R. Cas. 192. See generally CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 15. Likewise the latest cases. *Bajus v. Syracuse etc. R. Co.*, 5 N. Y. Supp. 804; *Sobeiski v. St. Paul etc. R. Co.* 41 Minn. 169; *Interstate etc. Co. v. Fox*, 41 Kans. 715; *International etc. R. Co. v. Hester*, 64 Tex. 401; 21 Am. & Eng. R. Cas. 535; *Central R. & B. Co. v. Kitchens (Ga.)* 1889, 9 S. E. Rep. 827; *Doyle v. Baird*, 6 N. Y. Supp. 157; *International etc. R. Co. v. Tarver (Tex.)*, 1889, 11 S. W. Rep. 1043; *Schumacher v. St. Louis etc. R. Co.*, 39 Fed. Rep. 174; *Guthrie v. Maine etc. R. Co.*, 81 Me 572; *Humphreys v. Newport News etc. Co. (W. Va.)*, 10 S. E. Rep. 39; *Central R. & B. Co. v. Dickson*, 82 Ga. 629; *Quick v. Indianapolis etc. R. Co. (Ill.)* 1889, 22 N. E. Rep. 709; *Schmidt v. Liestekow (Dak.)*, 43 N. W. Rep. 820; *Parker v. Georgia Pac. R. Co. (Ga.)*, 10 S. E. Rep. 233; *Lockhart v. Little Rock etc. R. Co.*, 40 Fed. Rep. 631; *Hartwig v. Bay State etc. Co.*, 118 N. Y. 664; *Stewart v. New York etc. R. Co.*, 8 N. Y. Supp. 19; *Shenandoah Val. R. Co. v. Lucoda (Va.)*, 10 S. E. Rep. 422; *Williams v. Delaware etc. R. Co.*, 116 N. Y. 628; *Sutherland v. Troy etc. R. Co.*, 8 N. Y. Supp. 83; *Ballou v. Georgia Pac. R. Co. (Ga.)*, 10 S. E. Rep. 352; *Smith v. Wrightsville etc. R. Co. (Ga.)*, 10 S. E. Rep. 361; *Union Pac. R. Co. v. Springsteen*, 41 Kans. 724; *Kansas City etc. R. Co. v. Kier*, 41 Kan. 661; *St. Louis etc. R. Co. v. Rice*, 51 Ark. 467; *Kossman v. Stutz*, 5 N. Y. Supp. 764; *McDonald v. Chicago etc. R. Co.*, 41 Minn. 439; *Carroll v. East Tenn. etc.*

R. Co., 82 Ga. 452; *Philadelphia etc. R. Co., v. Huber*, 128 Pa. St. 63; *Central R. Co. v. Neighbors (Ga.)*, 10 S. E. Rep. 115; *Goodrich v. New York etc. R. Co.*, 116 N. Y. 398; *Strawbridge v. Bradford*, 128 Pa. St. 200.

1. *Wood's Master and Servant* 663; *Bell's Principles* 224; *Frazer's Master and Servant* 192; *Patterson v. Gandasequi*, 15 East 62; *Owen v. Gooch*, 2 Esp. 567; *Church of St. Peter v. Varian*, 28 Barb. (N. Y.) 644; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Stephen's Nisi Prius*, 2337-8; *Green v. New River Co.*, 4 T. R. 589; *Cassiday v. M'Kenzie*, 4 W. & S. (Pa.) 282.

2. *Stoddard v. Treadwell*, 26 Cal. 294; *Page v. Hodge*, 63 N. H. 610; *White v. Phillipston*, 10 Metc. (Mass.) 108; *Walcott v. Swampscott*, 1 Allen (Mass.) 101; *Baltzen v. Nicolay*, 53 N. Y. 467.

Engineer of Tug Boat—An engineer of a tug boat has been held to be liable to his employer for any damage thereto by fire or otherwise which could be fairly attributable to any act done or omitted by him as a natural result, or just consequence, even though not directly so attributable. *Gilson v. Collins*, 66 Ill. 136.

3. The servant of a common carrier negligently injured a piano in his charge for transportation, and his master paid the amount of the damage to the owner without suit. Held, that he could recover the amount from the servant; and, furthermore, that he could have recovered it even if he had not paid it, since his liability to the owner would have been a sufficient ground of action. *Smith v. Foran*, 43 Conn. 250.

ant's misconduct is liable for the costs and counsel fees therein.¹

4. Double Employment.—Where one employs an agent who is already in the service of another principal, with full knowledge of his first employment, and concurrently therewith, the second contract must be construed in the light of the duties imposed by the first, and the agent will not be liable to the second employer for a failure of duty if caused solely by the obligations imposed by the first employment.²

5. Servant Known to be Incompetent.—But the fact that the servant employed is known to be incompetent will preclude a recovery against him for an injury resulting from his want of experience.³

XXVII. LIABILITY OF SERVANT TO THIRD PERSON.—A servant is liable in damages to a third person suffering through his carelessness or negligence or unlawful act.⁴ But not for failing to perform his master's obligations.⁵

XXVIII. LIABILITY TO COSEVANT.—One servant may maintain an action against a coservant for injuries suffered through the latter's negligence.⁶

XXIX. MASTER'S LIABILITY TO HIS SERVANT FOR NEGLIGENCE.—
1. Generally.—A master is ordinarily liable in damages to his servant who is injured through his negligence.⁷

1. *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

2. *Southern Ex. Co. v. Frink*, 67 Ga. 201.

3. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 589.

4. *Brown v. Lent*, 20 Vt. 529; *Mitchell v. Harmony*, 14 How. (U. S.) 115; *Richardson v. Kimball*, 28 Me. 463; *Althorf v. Wolfe*, 22 N. Y. 355; *Hewitt v. Swift*, 3 Allen (Mass.) 420; *Phelps v. Waite*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Suydam v. Moore*, 8 Barb. (N. Y.) 358.

5. *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Bank v. Bank*, 7 N. Y. 459; *Henshaw v. Noble*, 7 Ohio St. 226; *R. R. Co. v. Collins*, 5 H. & N. 969.

A servant is not liable for his master's wrongful conversion of a chattel that had been lawfully taken by the servant with the owner's consent. *Silver v. Martin*, 59 N. H. 580.

6. *Osborne v. Morgan*, 130 Mass. 102; *overruling Albro v. Jaquith*, 4 Gray (Mass.) 99; *Wright v. Roxbury*, 2 Ct. of Sess. Cas. (3rd series) 748; *Swainson v. Northeastern R. Co.*, 3 Exch. Div. 341; *Wiggett v. Fox*, 11 Exch. 382; *Griffiths v. Wolfram*, 22 Minn. 185; *Hinds v. Harbon*, 58 Ind. 21; *Hinds v. Duenacker*, 66 Ind. 547;

Degg v. Midland R. Co., 1 H. & N. 773. Compare *Southcote v. Stanley*, 1 H. & N. 247.

7. *Walker v. Balling*, 72 Ala. 204; *Smoot v. Mobile etc. R. Co.*, 67 Ala. 13; *Louisville etc. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Trask v. California etc. R. Co.*, 63 Cal. 96; 11 Am. & Eng. R. Cas. 192; *McGlynn v. Brodie*, 31 Cal. 380; *Conlin v. Santa Fe etc. R. Co.*, 36 Cal. 410; *Malone v. Hawley*, 46 Cal. 409; *Bee-son v. Green Mt. etc. Mon. Co.*, 57 Cal. 20; *Leahy v. Southern Pac. R. Co.*, 65 Cal. 152; *Colorado etc. R. Co. v. Ogden*, 3 Colo. 409; *Wells v. Coe*, 9 Colo. 159; *Wilson v. Willimantic etc. Co.*, 50 Conn. 433; *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38; 8 Am. & Eng. R. Cas. 85; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407; *Baker v. Western Atlantic R. Co.*, 68 Ga. 699; *Kranz v. White*, 8 Ill. App. 583; *Paint Mfg. Co. v. Ballou*, 71 Ill. 417; *Allerton Packing Co. v. Egan*, 86 Ill. 253; *Chicago etc. R. Co. v. Platt*, 89 Ill. 141; *Packing Co. v. Hightower*, 92 Ill. 139; *Chicago etc. R. Co. v. Longan*, 118 Ill. 41; *Lake Shore etc. R. Co. v. McCormick*, 74 Ind. 440; 5 Am. & Eng. R. Cas. 474; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Nordyke etc. Co. v. Van*

(a) *Where no Evidence of Negligence Is Adduced.*—Where, in an action against an employer for injuries or death alleged to have been caused by his negligence, there is no evidence of such negligence, it is the duty of the court to withdraw the case from the jury, and to give binding instructions in favor of the defendant.¹ For the highest duty of man is to protect human life, or the person of a human being, and that duty is never performed so as to escape responsibility until all possible care, under the circum-

Sant, 99 Ind. 188; Louisville etc. R. Co. v. Orr, 84 Ind. 50; 8 Am. & Eng. R. Cas. 94; Umbach v. Lake Shore etc. R. Co., 83 Ind. 191; 8 Am. & Eng. R. Cas. 98; Bradbury v. Goodwin, 103 Ind. 286; Krueger v. Louisville etc. R. Co., 111 Ind. 51; Hammond v. Schweitzer, 112 Ind. 246; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; Crowley v. Burlington etc. R. Co., 65 Iowa 658; 18 Am. & Eng. R. Cas. 56; Baldwin v. St. Louis etc. R. Co., 72 Iowa 45; Atchison, Topeka etc. R. Co. v. Halt, 29 Kan. 149; The Solomon R. Co. v. Jones, 30 Kan. 601; Atchison etc. R. Co. v. McKee, 37 Kan. 592; Atchison etc. R. Co. v. Moore, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; Atchison etc. R. Co. v. Moore, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; Solomon R. Co. v. Jones, 30 Kan. 601; Hannibal etc. R. Co. v. Fox, 31 Kan. 586; Needham v. Louisville etc. R. Co., 85 Ky. 423; Louisville etc. R. Co. v. McCoy (Ky.) 1883, 5 Am. & Eng. R. Cas. 277; Bogenschutz v. Smith, 84 Ky. 330; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Beaulieu v. Portland Co., 48 Me. 291; Shanny v. Androscoggin Mills, 66 Me. 420; Wonder v. Baltimore etc. R. Co., 32 Mo. 411; King v. Boston etc. R. Co., 9 Cush. (Mass.) 112; Cayzer v. Taylor, 10 Gray (Mass.) 274; Coombs v. New Bedford etc. Co., 102 Mass. 572; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Ford v. Fitchburg Railroad, 110 Mass. 240; Sullivan v. India Mfg. Co., 113 Mass. 396; Summersell v. Fish, 117 Mass. 312; Arkerson v. Denison, 117 Mass. 407; O'Connor v. Adams, 120 Mass. 427; Wheeler v. Wason Mfg. Co., 135 Mass. 294; Lawless v. Connecticut R. Co., 136 Mass. 1; Clark v. Soule, 137 Mass. 380; Spicer v. South Boston Iron Co., 138 Mass. 426; Keith v. New Haven etc. Co., 140 Mass. 175; Hewitt v. Flint etc. R. Co., 67 Mich. 61; Gates v. Southern Minn. R. Co., 28 Minn. 110; 2 Am. & Eng. R. Cas. 227; Madden v. Minneapolis

etc. R. Co., 32 Minn. 303; Tierney v. Minneapolis etc. R. Co., 33 Minn. 311; Gibson v. Pacific R. Co., 46 Mo. 163; Parsons v. Missouri Pac. R. Co., 94 Mo. 286; Reber v. Tower, 11 Mo. App. 199; Covey v. Hannibal etc. R. Co., 27 Mo. App. 170; Covey v. Hannibal etc. R. Co., 86 Mo. 635; 28 Am. & Eng. R. Cas. 382; Stephenson v. Ravenscroft, 25 Neb. 678; Warner v. Western etc. R. Co., 94 N. Car. 250; 25 Am. & Eng. R. Cas. 432; Collyer v. Pennsylvania R. Co., 49 N. Y. L. 59; Corcoran v. Holbrook, 59 N. Y. 517; Kain v. Smith, 80 N. Y. 458; Painton v. North Central R. Co., 83 N. Y. 7; Burke v. Witherbee, 98 N. Y. 562; Pantzer v. T. F. I. M. Co., 99 N. Y. 368; Sizer v. Syracuse R. Co., 7 Lans. (N. Y.) 67; Thorn v. New York Ice Co., 53 Hun (N. Y.) 497; Cullen v. National Sheet Metal Roofing Co., 53 Hun (N. Y.) 562; Barrett v. Singer Mfg. Co., 1 Sweeney (N. Y.) 545; Little Miami etc. R. Co. v. Fitzpatrick, 42 Ohio St. 318; 17 Am. & Eng. R. Cas. 578; Johnson v. Bruner, 61 Pa. St. 58; Patterson v. Pittsburgh etc. R. Co., 76 Pa. St. 389; Baker v. Allegheny etc. R. Co., 95 Pa. St. 211; Philadelphia etc. R. Co. v. Hughes, 119 Pa. St. 305; 35 Am. & Eng. R. Cas. 348; Payne v. Reese, 100 Pa. St. 301; Gunter v. Graniteville Mfg. Co., 15 S. Car. 443; *Ex parte* Johnson, 19 S. Car. 492; Sanders v. Ebiwan Phosphate Co., 19 S. Car. 559; Missouri Pac. R. Co. v. Lyde, 57 Tex. 505; Missouri Pac. R. Co. v. Crenshaw, 71 Tex. 340; 9 S. W. Rep. 262; Clark v. Richmond etc. R. Co., 78 Va. 709; 18 Am. & Eng. R. Cas. 78; Wedgewood v. Chicago etc. R. Co., 41 Wis. 478; 44 Wis. 44; Behm v. Armour, 58 Wis. 1; Thompson v. Hermann, 47 Wis. 602; Hough v. Texas etc. R. Co., 100 U. S. 213; Union Pac. R. Co. v. Fort. 17 Wall. (U. S.) 553; Hough v. Texas & P. R. Co., 100 U. S. 213.

1. Philadelphia etc. R. Co. v. Schertte, 97 Pa. St. 450; 2 Am. & Eng. R. Cas. 158.

stances, has been exercised.¹ Where the master is a corporation, its officers and agents are charged with a master's duty.² Likewise manufacturers hiring the services of convicts.³ A receiver is also liable for injuries arising from negligence where the company in his charge would be liable, but only to the extent of property in his hands.⁴

(b) *Relation of Master and Servant Must be Shown to Exist.*—The basis of such liability is the relation of master and servant, and proof of such relation is indispensable to a recovery.⁵ One who, without being requested or authorized by the master to do so, assists servants at their work, is deemed to be their fellow servant within the meaning of the general rule, so as to limit the liability of the master to him, even though he would not be regarded as a servant in such a sense as to make the master liable to strangers for his negligence. This is so where such assistance is given at the request of the servants; and it makes no difference in his favor that the person rendering such assistance does so unasked or even against the will of the master, or of the servants, or both. On the other hand, if his assistance is rendered at the request of the mas-

1. *Shumacher v. St. Louis etc.*, 39 Fed. Rep. 174.

2. *Ford v. Fitchburg Railroad*, 110 Mass. 240; *Holden v. Fitchburg Railroad*, 129 Mass. 268; *Lawless v. Connecticut etc. R. Co.*, 136 Mass. 1; *Toledo v. Cone*, 41 Ohio 149.

Negligence in Railroad Construction.—And where a railroad company is formed, the construction of the road will, in the absence of any showing to the contrary, be presumed to be done by the corporation, and it will be responsible for injuries arising from negligence in such construction. The *Solomon R. Co. v. Jones*, 30 Kan. 601.

3. **Injury to Convict Through Defective Machine.**—Thus a convict was injured while working at a machine designed to mould the soles of shoes, the same being furnished by defendant, who hired the services of a large number of convicts, employing them in the manufacture of shoes. It was held, suit being brought to recover damages therefor, that while the usual relation of master and servant did not exist, because the labor furnished was compulsory, yet the defendant owed a duty to the convict which required him to furnish machinery fitted to and sufficient for the work and to keep the same in constant repair. *Hartwig v. Bay State S. & L. Co.*, 43 Hun (N. Y.) 425.

Defective Bunk.—But the lessees of a penitentiary are not responsible in damages for personal injuries inflicted

upon a convict resulting from defective construction of a sleeping bunk, the bunk having been constructed by a sergeant having charge of the convicts and under the immediate supervision of one of the penitentiary commissioners. *Cunningham v. Moore*, 55 Tex. 373; 40 Am. Rep. 812.

4. *Paige v. Smith*, 99 Mass. 395; *Murphy v. Holbrook*, 20 Ohio St. 437; *Sprague v. Smith*, 29 Vt. 421; *Blumenthal v. Brainerd*, 38 Vt. 402; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Ohrby v. Ryde Commrs.*, 5 B. & S. 743; *Whitehouse v. Fellows*, 10 C. B. (N. S.) 765; *Ruck v. Williams*, 3 H. & N. 308. See RECEIVERS.

5. *Bullock v. Gaffigan*, 39 Leg. Int. 338; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; 36 Am. Rep. 535; *Lendberg v. Brotherton Iron Min. Co.*, 75 Mich. 84; *Chicago etc. R. Co. v. Clark*, 26 Neb. 645; *Missouri Pac. R. Co. v. Texas etc. R. Co.*, 38 Fed. Rep. 816; *Kern v. Sugar Refining Co.*, 5 N. Y. Supp. 548; *Hunt v. Walch*, 5 N. Y. Supp. 802; *Interstate etc. R. Co. v. Fox*, 41 Kan. 715; *Sobieski v. St. Paul etc. R. Co.*, 41 Minn. 169; *Kansas City etc. R. Co. v. Kier*, 41 Kan. 661; *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724; *Doyle v. Beaird*, 6 N. Y. Supp. 517; *Louisville etc. Co. v. Hall*, 87 Ala. 708; *Georgia R. & Banking Co. v. Nelms* (Ga.) 1889, 9 S. E. Rep. 1049; *Twitchell v. Grand Trunk R. Co.*, 39 Fed. Rep. 419; *McGovern v. Central Vt. R.*

ter, he becomes for a time a servant in every legal sense.¹ But the rule is otherwise where the person injured is not a mere volunteer, but assists for the purpose of aiding or advancing his own or his master's business. Though performing a service which may be beneficial to both parties, his doing so in his own behalf, or in the behalf of his master, however beneficial may be his assistance to the master of the other servants, gives him the right to be protected against their negligence. The act done by him should, however, be a prudent and reasonable one, and not a wrongful interference and intermeddling with business in which he has no concern.² But where the services are rendered by request of the man in charge, though the person assisting expect no pay, and is employed for a mere temporary purpose, he is, for the time being, a servant and entitled to the same protection as any other servant.³ But not unless the employee has express authority to make the request, or occupies such a position toward the employer and the act to be done, that the authority can be fairly implied.⁴

Co., 6 N. Y. Supp. 838; Guthrie v. Maine Central R. Co., 81 Me. 572; Seese v. North Pac. R. Co., 39 Fed. Rep. 487; Strawbridge v. Bradford, 128 Pa. St. 200; Goodrich v. New York etc. R. Co., 116 N. Y. 398; Rietman v. Stolte, 120 Ind. 314; Lehigh etc. Coal Co. v. Hayes, 128 Pa. St. 294; Hungerford v. Chicago etc. R. Co., 41 Minn. 444; Daley v. American Printing Co. (Mass.), 1889, 22 N. E. Rep. 439; Gorman v. Minneapolis etc. R. Co., 78 Iowa 509; Otis v. Cowles Electric etc. Co., 7 N. Y. Supp. 251; Doyle v. St. Paul etc. R. Co. (Minn.) 1889, 43 N. W. Rep. 787; Appeal of Standard Mfg. Co. (Pa.) 1889, 18 Atl. Rep. 637; Central R. Co. v. Lanier (Ga.), 10 S. E. Rep. 279; Howard v. Delaware etc. Canal Co., 40 Fed. Rep. 195.

Lessor and Servant of Lessee.—A lessor is not liable to a servant of the lessee for damages resulting from the negligence of the latter, unless some duty remained upon the lessor from a failure to perform which the injury arose. It would make no difference that the servant injured was originally employed before the lease by the lessor, was ignorant of the lease, and supposed that he was still so employed. *Crusellie v. Pugh*, 67 Ga. 430; 44 Am. Rep. 724.

1. *Shear & R. on Negligence*, § 182; *McKinney on Fellow Servants*, § 19.

And see in this connection *Sweeney v. Old Colony R. Co.*, 10 Allen (Mass.) 368; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Carleton v. Franconia Iron*

Works, 99 Mass. 216; *Pittsburgh v. Gries*, 22 Pa. St. 54; *Eaton v. Delaware etc. R. Co.*, 57 N. Y. 382; *Southcote v. Stanley*, 1 H. & N. 247; *Axford v. Prior*, 14 W. R. 611; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *Chapman v. Rothwell*, El. B. & E. 168; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Terbutt v. R. Co.*, L. R., 6 Q. B. 73; *Gibbs v. Liverpool Docks*, 3 H. & N. 164. And see *Degg v. Midland R. Co.*, 1 H. & N. 773; *Holmes v. North Eastern R. Co.*, L. R., 4 Ex. 257; *Wright v. London etc. R. Co.*, L. R., 10 Q. B. 298; 1 Q. B. D. 252; *Bachelor v. Fortescue*, 47 J. P. 808; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *New Orleans etc. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356.

2. *Mechem on Agency*, § 669. *Citing Osborne v. Knox etc. R. Co.*, 68 Me. 49; 28 Am. Rep. 16; *Mayton v. Texas etc. R. Co.*, 63 Tex. 97; 51 Am. Rep. 637; *Degg v. Midland R. Co.*, 1 H. & N. 773; *Potter v. Faulkner*, 1 Best & S. 800; *Street R. Co. v. Bolton*, 43 Ohio St. 224; 54 Am. Rep. 803; *Eason v. S. & E. I. R. Co.*, 65 Tex. 577; 57 Am. Rep. 606; *Wright v. London etc. R. Co.*, 1 Q. B. Div. 252; *Holmes v. North Eastern R. Co.*, L. R., 4 Exch. 254.

3. *Mayton v. Texas etc. R. Co.*, 63 Tex. 77; *Eason v. Sabine etc. R. Co.*, 6 Tex. L. Rev. 178; *McIntyre R. Co. v. Bolton*, 43 Ohio St. 224; *Johnson v. Ashland Water Co.*, 71 Wis. 553.

4. *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

(c) *Pivotal Point in Such Actions.*—In such actions, the true question for the jury is not whether the master could have done something to have prevented the injury; but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken.¹

(d) *Performance of Personal Service for Superior Officer.*—Nor is a railroad company liable to an employee for an injury occurring while performing an individual service for his superior officer under the latter's directions.²

(e) *Injury from Master's Direct Personal Act.*—And furthermore, if injury results to the servant from the direct act or negligence of the master, as where he is personally present superintending the work and giving orders, he is answerable in damages to the same extent as if the relation of master and servant did not exist.³

2. Master's Duty to Furnish Machinery.—One of the most important obligations on the part of a master is to furnish his servant

Assisting Brakeman by Permission of Yardmaster.—A person who without pay assists as a brakeman in making up a railroad train by the direction or with the express permission of a yardmaster who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, and it will be liable to him for an injury resulting from the use of a defective brake. *Central Trust Co. v. Texas etc. R. Co.*, 32 Fed. Rep. 448.

Passenger Assisting Street Car Driver.—The plaintiff was passenger on defendant's railroad, on a car northward bound. The railway was a single track with occasional side tracks for the passage of cars moving in opposite directions. The north bound car having been drawn beyond the side track, where it was to have met the south bound car, it became necessary to push it back to the side track, so that the cars could pass and each proceed to its destination. At the request of the driver of the north bound car, the plaintiff assisted him in pushing the car back to the side track. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the south bound car. *Held*, that the plaintiff did not engage in the service of defendant as a mere volunteer, that he could not be looked upon as a fellow servant with the driver of the south bound car, and that he could recover for injury sustained.

McIntire R. Co. v. Bolton, 43 Ohio St. 224.

Son of Employee Assisting His Father.—A railroad company is liable in damages for negligently backing a freight car so as to injure the minor son of an employee of another company, assisting his father in rightfully repairing a car. *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; 5 Am. & Eng. R. Cas. 341.

1. *Leonard v. Collins*, 70 N. Y. 90.

2. *Hurst v. Chicago etc. R. Co.*, 49 Iowa 76.

Evidence Necessary to Warrant a Recovery.—In order to recover, the plaintiff must establish by a fair preponderance of proof that the defendant was guilty of negligence, and that the injury complained of was the natural and ordinary result of such negligence, and that the negligence was the proximate cause of the injury, which a reasonable, prudent and cautious person ought to have apprehended might result from the act which he did. *Harris v. Union Pac. R. Co.*, 3 Colo. 25.

But the fact that the plaintiff was hurt without his own fault or negligence cuts no figure in the absence of evidence going to show the defendant to be legally chargeable with the injury. *Henry v. Lake Shore etc. R. Co.*, 49 Mich. 495; 8 Am. & Eng. R. Cas. 110.

3. *Lorentz v. Robinson*, 61 Md. 64.

Unusual—Arising Through Master's Negligence.—Where a servant is injured, not by anything occurring in his employment, or that is incident thereto,

with such appliances for his work as are suitable and may be used with safety; and this, by implication of the law, is a stipulation in every contract for service; and if the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable for damages, unless he can clearly show that he has used due care in the selection or manufacture of the same.¹ The rule also applies to the question of furnishing a sufficient number of persons skilled enough to perform the labor of the employment in safety and properly.² And it is furthermore true that the ignorance of the master as to the defect is no excuse, if he did not use ordinary care in the selection or care of the machine or appliance causing the injury.³ Where the master manu-

but by a temporary peril to which he and other servants are exposed by the negligent, positive act of the employer, without any negligence on the servant's part, he is entitled to recover damages from the employer on account of such injury. And it is not necessary that the servant should have given notice of such temporary peril and demanded its removal. *Fairbank v. Haentzsche*, 73 Ill. 236.

1. *Weems v. Mathieson*, 4 McQueen (Sc.) 215; *Feltham v. England*, L. R., 2 Q. B. 46; *Warner v. R. Co.*, 39 N. Y. 468; *Chicago R. Co. v. Sweet*, 45 Ill. 202; *Northcote v. Bachelder*, 111 Mass. 322; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 418; *Noyes v. Smith*, 28 Vt. 39; *Kranz v. White*, 8 Ill. App. 583. Compare *Robinson v. Blake Mfg. Co.*, 143 Mass. 528. See FELLOW SERVANTS, vol. 7, p. 825.

A refusal to charge that the fact of the suitability or unsuitability of the instrument was to be proved like any other fact is not error, where the issue is not the unsuitability of the instrument employed, but rather whether it was used in a prudent manner. *Texas Mex. R. Co. v. Douglass*, 69 Tex. 604.

Where Weight Did Not Belong to Machine.—A part of a machine used in a cotton mill consisted of a pulley, over which a chain passed, to one end of which was hung a weight. An extra weight was hung by a rawhide lacing to a hook made of wire, fastened into the chain to which the other weight hung. The extra weight did not come with the machine, and was not specially intended as a weight. It had been used on the machine for about two years for the purpose of using more rapidly a part of the machine, but the weight had been off at times during the two years, and the machine operated successfully

without it, although better with it. A person who was employed upon the machine was injured by the falling of the weight, in consequence of the breaking of the lacing. Held, in an action for such injury, that, there being no dispute how the weight was attached, or as to its purpose, it was rightly ruled that the weight was a part of the machine. *Rice v. King Philip Mills*, 144 Mass. 646.

Business System.—A master is also liable for injuries arising from a failure to pursue a proper business system. *Sword v. Cameron*, 1 Sec. Ses. (Scotch Rep.) 493; *Barton's Hill Coal Co. v. Reed*, 3 M'Q. 289; *Stone v. Cheshire R. Co.*, 19 N. H. 427.

Electric Light Company—Proper Appliances.—Where plaintiff's intestate, while employed in putting up telegraph wires for defendant company, fell from a telegraph pole and was killed, through failure of defendant to furnish the means and appliances required for the safe and efficient performance of such work, defendant was held liable in damages. *Clairain v. Western Union Tel. Co.*, 40 La. An. 178.

2. *Moss v. Pac. R. Co.*, 49 Mo. 167.

It has been held, in *England*, that the master is the proper judge of the number of servants requisite for any particular work. *Skipper v. The E. C. R. Co.*, 9 Exch. 223.

3. *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Noyes v. Smith*, 28 Vt. 59; *Ryan v. Fowler*, 24 N. Y. 410; *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Seaver v. Boston etc. R. Co.*, 14 Gray (Mass.) 466; *Snow v. Housatonic etc. R. Co.*, 8 Allen (Mass.) 441; *Wonder v. Baltimore etc. R. Co.*, 32 Mo. 411; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Buzzell v. Laconia Mfg. Co.*, 48 Me.

factures the machinery in use, he will have done his duty if he exercises reasonable care in the selection of workmen and material and the examination of the same upon completion.¹

3. Liability of Railroad Companies.—Cases involving injuries to the employees of railroad companies through the negligence thereof may well be said to be ever present in the courts for adjudication, and in discussing the liability of masters in general in this regard, it will be necessary to consider in detail the particular liabilities of such companies to their employees. And where an employer has failed to furnish a particular apparatus, unless it be shown that the injury was occasioned by the want of it, he is not liable.²

(a) *Rule of Liability—Passengers and Employees.*—The rule of liability of a railroad company for negligence is not the same in the case of an employee as in the case of a passenger. In the case of an employee no presumption of negligence on the part of the company arises from the accident alone; its negligence must be clearly shown in order to warrant a recovery.³

(b) *Suitable Track and Roadbed*—(a) *Liability Generally.*—A railroad company is liable to its employes for injuries sustained by reason of its negligence in failing to keep its track in proper condition.⁴ But a railroad company is not bound to furnish an absolutely safe track; its duty being to use all reasonable care in keeping it in good order and condition.⁵ It is also negligence in a

113; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Flike v. Boston etc. R. Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Haskins v. New York etc. R. Co.*, 65 Barb. (N. Y.) 129; *Owen v. New York etc. R. Co.*, 1 Lans. (N. Y.) 108; *Mad River etc. R. Co. v. Barber*, 5 Ohio St. 541; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389.

1. *Hard v. Vermont Central R. Co.*, 32 Vt. 473; *Chicago etc. R. Co. v. Swett*, 45 Ill. 197.

2. *Gordon v. Reynolds Card Mfg. Co.*, 54 Hun (N. Y.) 278.

3. *East Tennessee etc. R. Co. v. Maloy*, 77 Ga. 237.

4. *Richmond etc. R. Co. v. Norment*, 84 Va. 167; *Knapp v. Sioux City etc. R. Co.*, 71 Iowa 41; *Central R. Co. v. Mitchell*, 63 Ga. 173; 1 Am. & Eng. R. Cas. 145; *Hewitt v. Flint etc. R. Co.*, 67 Mich. 61; *Rosenbaum v. St. Paul etc. R. Co.*, 38 Minn. 173; 34 Am. & Eng. R. Cas. 274; *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176; *Pool v. Chicago etc. R. Co.*, 56 Wis. 227.

Failure to Spike Rails.—In an action to recover for the death of a fireman, caused by the tender leaving the track at a certain place, it was held that it was immaterial whether the rails were

properly spiked at other places, or at that place, unless the failure so to spike them caused or contributed to the accident. *Kuhn v. Wisconsin etc. R. Co.*, 70 Iowa 561; following *Ruggles v. Nevada*, 63 Iowa 185.

To Ballast Track.—It is negligence in a railroad company to leave the spaces between the ties of a railroad track used for construction purposes unfilled, and it is responsible for an injury to one of its brakemen caused by stepping between the ties and falling, where it appears that he was engaged about his duties in the night time, and was ignorant of the defect in the track. *Gulf etc. R. Co. v. Redeker*, 67 Tex. 181. *Compare Philadelphia etc. R. Co. v. Schertte*, 97 Pa. St. 450; 2 Am. & Eng. R. Cas. 159; *Rosenbaum v. St. P. & D. R. Co.*, 38 Minn. 173; 34 Am. & Eng. R. Cas. 274.

5. *Devlin v. Wabash etc. R. Co.*, 87 Mo. 545; 28 Am. & Eng. R. Cas. 524; *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412; 28 Am. & Eng. R. Cas. 341.

Dilapidated Road in Process of Repair.—Duty of company to servant to keep track in good order must be considered with qualification when road has become dilapidated and is in process of reconstruction, in which work em-

railroad company to fail to keep its roadbed in a safe condition.¹

(b) *Evidence to Prove Negligence.*—Where a defective track is alleged to have been the cause of an accident, it is enough to prove such a state of things as to the condition of the track shortly before or after as will induce a reasonable presumption that the condition is unchanged.²

(c) *Use of Track by Several Companies.*—Where two or more chartered railroads use the same track, such track, though the exclusive property of one of the companies, is, for the time being, the

ployees are engaged. *Rochester etc. R. Co. v. Brick*, 98 N. Y. 211; 21 Am. & Eng. R. Cas. 605.

1. *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412; *Baltimore etc. R. Co. v. Roman*, 104 Ind. 88; 23 Am. & Eng. R. Cas. 390; *Chicago etc. R. Co. v. Johnson*, 116 Ill. 206; *Central R. Co. v. Mitchell*, 63 Ga. 173; 1 Am. & Eng. R. Cas. 145; *Porter v. Hannibal etc. R. Co.*, 71 Mo. 66; 3 Am. & Eng. R. Cas. 44; *Norden v. Fitchburg R. Co.*, 129 Mass. 268; 2 Am. & Eng. R. Cas. 94; *Clark v. St. Paul etc. R. Co.*, 28 Minn. 128; 2 Am. & Eng. R. Cas. 240; *Wells v. Burlington etc. R. Co.*, 56 Iowa 520; 2 Am. & Eng. R. Cas. 243; *Hawley v. Northern etc. R. Co.*, 82 N. Y. 370; 2 Am. & Eng. R. Cas. 248.

Injury While Repairing Roadway.—A brakeman on a gravel train, employed in repairing defective roadway, may recover for injuries inflicted by cars running off track in consequence of bad condition of roadway, where plaintiff has not had opportunity to discover such defects. *Madden v. Minneapolis & St. L. R. Co.*, 32 Minn. 303; 18 Am. & Eng. R. Cas. 63.

Roadway Recently Belonging to Another Company.—But in an action against a railway company for negligent injury to an employee from a defect in a roadway which has just come under its control from another company, there can be no presumption that defendant had sufficient time to remedy the defect. *Batterson v. Chicago etc. R. Co.*, 49 Mich. 184; 8 Am. & Eng. R. Cas. 123.

Rotten Ties.—In an action against a railroad company for injuries to an engineer caused by the derailment of his engine, it appeared that the ties were rotten at the place where the accident occurred, and that another train passing over the place a short time before had caused the rails to spread. *Held*, that the company was liable in allow-

ing the rotten ties to remain in the track. *Gulf etc. R. Co. v. Pettis*, 69 Tex. 689; and see *Knapp v. Sioux City etc. R. Co.*, 71 Iowa 41; *Hewitt v. Flint etc. R. Co.*, 67 Mich. 61; *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460.

Alighting on Track Instead of Roadbed.—Brakeman after uncoupling car from engine and thinking latter had stopped, jumped on track when the engine ran over him, held that he could introduce evidence that condition of roadbed was such that he could only alight on the track. *Pringle v. Chicago etc. R. Co.*, 64 Iowa 613; 18 Am. & Eng. R. Cas. 91.

Embankments.—The giving way of a railroad embankment is *prima facie* evidence of negligence in its construction. *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

2. *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176.

Reasonable Time After Accident.—It was held in above case that evidence of the condition three years before trial, and twenty-one months after the accident, is inadmissible. So held where the evidence referred to the condition of the track three years after the accident. *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

Evidence of Experts.—Where a train was running backward at the time of an accident, and there was evidence that the track was in the same condition at that time as when it was seen by an expert witness, it was held that it was proper for the expert to state whether, if the track was in the same condition, it would be more dangerous to run the train backward than forward. *Kuhn v. Wisconsin etc. R. Co.*, 70 Iowa 561; *Rosenbaum v. St. Paul etc. R. Co.*, 38 Minn. 173; 34 Am. & Eng. R. Cas. 274.

Plaintiff's son, who was a brakeman

track of each company so using it, and the proprietary company is not responsible to its employees for personal injuries which they sustain solely by reason of the negligent use of the track by the employees of another company. The redress for such injuries is against the company whose employees are at fault.¹ A company operating its trains over the road of another company must likewise see that the track is in safe condition.²

(d) *Obstructions on Track—Adjacent Structures.*—A company is likewise liable if it fails to keep its track free from obstructions,³ and structures dangerously near the same.⁴ But a railroad company

on one of the defendant's freight trains, was killed on account of a separation of the train. The train was passing over a portion of the track where there was a sag, then a rise, or "hog's back," and then a down grade, and the separation took place when the front end of the train was on the down grade and the central portion was on the "hog's back." *Held*, that the opinion of an expert was not admissible to show how the brakes should have been applied to prevent the breaking of the train, but that it was a question for the jury, to be determined from the facts in regard to the weight of the train, the depth of the sag, the character of the "hog's back," and all the circumstances of the case. *Burns v. Chicago etc. R. Co.*, 69 Iowa 450.

1. *Georgia R. & Banking Co. v. Friddell*, 79 Ga. 489; *Kain v. Smith*, 80 N. Y. 458.

Engineer Hauling for Another Company on Its Road.—A railroad company sending its locomotive engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company, is not responsible to the engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged that the employer company knew of such bad condition or want of adaptation, and concealed its information. *Dunlap v. Richmond etc. R. Co.*, 81 Ga. 136. But see *Stetler v. Chicago etc. R. Co.*, 46 Wis. 497; *Phila. W. & B. R. Co. v. State etc.*, 58 Md. 372; *Sellers v. Richmond etc. R. Co. (N. Car.)*, 25 Am. & Eng. R. Cas. 451; *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1.

Defect in Rolling Stock of One Company and Track of Another.—It was held in *Augusta etc. R. Co. v. Killian*, 79 Ga. 234, that if the injury was caused by a defect in the trucks of the cars of the

company employing plaintiff no recovery could be had, but if caused both by defect of the trucks of the cars of the one company and the track of the other, the latter company is responsible in proportion to the extent its tracks contributed to the injury. And see *Sawyer v. Minneapolis etc. R. Co.*, 38 Minn. 103; 23 Am. & Eng. R. Cas. 396.

Voluntary Use of Defective Road.—But the voluntary though unnecessary use of the decayed road of another company, without inspection, is negligence. *Stetter v. Chicago etc. R. Co.*, 46 Wis. 497; 49 Wis. 609.

2. *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1.

Use by Several Companies of One Station.—And where two railroad companies use a station jointly, each is bound to the observance of the same care for the safety of the servant of the other company about the station as for its own. *Illinois Central R. Co. v. Frelka*, 110 Ill. 498; 18 Am. & Eng. R. Cas. 7.

Employee Having Two Masters.—An employee of two or more persons or corporations operating a railroad may maintain an action against either for an injury resulting from defective machinery furnished by them for use in the course of his employment; their liability is several as well as joint. *Kain v. Smith*, 80 N. Y. 458.

3. *Wilson v. Denver etc. R. Co.*, 7 Colo. 101; 15 Am. & Eng. R. Cas. 192; *Bassex v. Chicago etc. R. Co.*, 45 Wis. 477.

4. **Tank Spout.**—*Atlanta etc. R. Co. v. Woodruff*, 66 Ga. 707.

Awning.—Railroad companies have been held to be negligent in permitting an awning of a station house to overhang the track. *Illinois etc. R. Co. v. Welch*, 52 Ill. 183; *Clark v. St. Paul etc. R. Co.*, 28 Minn. 128; 2 Am. & Eng. R. Cas. 240.

is not to be regarded as negligent in erecting and maintaining contrivances or things for use in the operation of its road for the reason that they are dangerous to the persons operating their trains.¹

(e) *Failure to Block Switches and Frogs*.—A railroad company has been held not to be guilty of negligence in failing to block its switches² or frogs.³ And it has been held in *Michigan* that a railroad company is under no legal obligation to maintain a station agent at a flag station where there is an unblocked siding for the protection of its employees.⁴

(c) *Engines*.—It is negligence for a railroad company to fail to

Telegraph Pole. Or a telegraph pole to stand within eighteen inches of the same. *Chicago etc. R. Co. v. Russell*, 91 Ill. 298.

Cattle Chute.—Where a railway company erects a "cattle chute" in such close proximity to its track as to endanger the lives of its employees, in the proper operation of its trains, it is negligence. *Allen v. Burlington etc. R. Co.*, 57 Iowa 623; 5 Am. & Eng. R. Cas. 620.

Switch Stand.—*Pidcock v. Union Pacific R. Co. (Utah)*, 19 Pac. Rep. 191.

Stump of Tree.—Likewise where a brakeman, unfamiliar with the fact that a stump was dangerously near the track, was ordered to see if the wheels were sliding, and, while looking with his head outside the train, was struck by the stump, the existence of which was known to the employe of the company, who gave the order unaccompanied by any special warning. *Riley v. West Virginia etc. R. Co.*, 27 W. Va. 145.

Post Erected by Station Master.—Also where a brakeman, while descending from a car on a moving train, was struck by a post erected by the station agent near the track for his own use, and in no way connected with the operation of the road. *Kearns v. Chicago etc. R. Co.*, 66 Iowa 599; 22 Am. & Eng. R. Cas. 287.

Or Beam.—*Arabello v. San Antonio etc. R. Co. (Tex.)*, 1889, 11 S. W. Rep. 913.

Water Crane Near Track.—Engineer leaning out of the engine, looking for signal of conductor, which he neglected to give, was struck by it and killed. *Held*, that negligence of conductor was not proximate cause of accident, and company was not liable. *Gould v. Chicago etc. R. Co.*, 66 Iowa 590; 22 Am. & Eng. R. Cas. 289.

Allowing Snow Bank to Remain—But a railroad company has been held not

to be guilty of negligence in allowing snow bank to remain as left by plough. *Burlington etc. R. Co. v. Dowell*, 62 Iowa 629; 15 Am. & Eng. R. Cas. 153. Or failing to place signals at, or give notice by bell or whistle when approaching the same. *Brown v. Chicago etc. R. Co.*, 69 Iowa 161.

1. *Gould v. Chicago etc. R. Co.*, 66 Iowa 590; 22 Am. & Eng. R. Cas. 289.

2. **New Device for Blocking.**—Where an action for damages was based upon the fact that a switch at the junction in which plaintiff's feet were caught was unblocked, it was held, the evidence showing that unblocked switches had been in use on the various railroads all over the country for years, that a failure to use a new device for blocking did not render the company liable for injury caused thereby. *Chicago etc. R. Co. v. Londergan*, 118 Ill. 41; 28 Am. & Eng. R. Cas. 491.

3. **When to Do So Would be Dangerous.**—Particularly if it does not appear that in doing so it would not entail greater dangers than it would avert. *McGinnis v. Canada etc. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135. And see *Griffith v. Burlington etc. R. Co.*, 72 Iowa 645; 31 Am. & Eng. R. Cas. 227; *Mayes v. Chicago etc. R. Co.*, 63 Iowa 563; 8 Am. & Eng. R. Cas. 527; *Rush v. Mo. Pac. R. Co.*, 36 Kan. 129; 28 Am. & Eng. R. Cas. 484; *Lake Shore etc. R. Co. v. McCormick*, 74 Ind. 440; 5 Am. & Eng. R. Cas. 474; *Burlington etc. R. Co. v. Coates*, 62 Iowa 486; 15 Am. & Eng. R. Cas. 265; *Wilson v. Winona etc. R. Co.*, 37 Minn. 326; 31 Am. & Eng. R. Cas. 244; *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440; 31 Am. & Eng. R. Cas. 221.

4. *Hewitt v. Flint etc. R. Co.*, 67 Mich. 61; 31 Am. & Eng. R. Cas. 249.

use safe and appropriate engines.¹ And to this end it must have the boilers of its engines properly tested.²

(d) *Cars*.³—It is also negligence for a railroad company to fail to furnish suitable passenger and freight cars.⁴ But it has been held that a railroad company is not liable for failure to place a hand hold on top of a freight car.⁵ Ordinarily an employer is bound to use due diligence in providing and maintaining safe machinery and instrumentalities to be used by his employees without regard to the ownership of the same, and a railway corporation, with respect to the cars of other companies, which are to be moved and handled by its employees is bound to use due diligence and care in seeing that the cars are safe to be so handled by its servants; and such railway company cannot divest itself of this duty to its servants for their safety and protection by a contract with such other companies whose cars are used that the latter shall keep them in repair.⁶

1. *Chicago etc. R. Co. v. Rung*, 104 Ill. 641; 11 Am. & Eng. R. Cas. 218; *Atchison etc. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206. Cases of defective throttle valves.

Having No Other Engine at Hand Is No Excuse.—A railroad company is not relieved from the charge of negligence in sending out an employee with a defective engine simply because it did not have sufficient time after notice of the defect to repair it, and had no other engine in proper condition to send out. *Green v. Minneapolis etc. R. Co.*, 31 Minn. 248.

Notice to Company by Employee of Defect.—It was held in one case, with reference to a defective locomotive, the evidence showing that the defect had existed for some time, that it was known to the engineer, who had often told the foreman of the round house, his immediate superior, of its dangerous condition, that the company had notice thereof, and was guilty of gross negligence in using the engine. *Chicago etc. R. Co. v. Rung*, 104 Ill. 641; 11 Am. & Eng. R. Cas. 218.

2. **Failure to Apply Steam or Hydraulic Test.**—The application of the steam test for boilers being shown to be neither practicable nor generally approved, on account of its danger, and the hydraulic test being extraordinary and rarely used, except when engines are first put in use, or fail to work well, or when they are overhauled periodically, the failure of a railroad company to have either or both of these tests applied to the defective boiler does not authorize the imputation of negligence.

Louisville etc. R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514.

3. See **COUPLING CARS**, vol. 4, p. 417.

4. Where a switchman, under whose direction trains were made up, discovered a defect in a car, communicated that fact to the general office by a telephone which had been placed in the yards for such purpose, and received the reply, "If she will hold together, send her off," it is to be presumed that such direction came from one having authority to give it, in the absence of evidence to the contrary. *Reed v. Burlington etc. R. Co.*, 72 Iowa 166; 31 Am. & Eng. R. Cas. 190.

Formation of Poisonous Grease.—A railroad company has been held to be not liable for injury arising from poisonous grease forming on bearings; as on the boxing of a wheel, when nothing has ever occurred to suggest danger of such occurrence. *Kitteringham v. Sioux City etc. R. Co.*, 62 Iowa 285; 18 Am. & Eng. R. Cas. 14. *Compare Potts v. Plunkett*, 9 Ir. C. L. 290; *Waffling v. Coster*, 40 L. J. Exch. 43.

5. *Fair v. Pennsylvania R. Co. (Pa.)*, 12 Cent. Rep. 530. And see *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468.

6. *Chicago etc. R. Co. v. Avery*, 109 Ill. 314; 17 Am. & Eng. R. Cas. 649; *Getter v. New York etc. R. Co.*, 2 Keys (N. Y.) 154; *Mackin v. Boston etc. R. Co.*, 135 Mass. 201; 15 Am. & Eng. R. Cas. 196; *Ballou v. Chicago etc. R. Co.*, 54 Wis. 257; 5 Am. & Eng. R. Cas. 480; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Falkner v.*

A railroad company is also responsible for an injury occasioned by want of proper care and prudence in the management of a train under their exclusive care, discretion and control, though the train belongs to another company.¹ But it is not negligence for a railroad company to receive, in the ordinary course of business, the cars of another company and to transport them, although they may not be fitted with the most approved appliances.² And furthermore, the transportation company is not bound to inspect such foreign car until the same has been in its charge and use a reasonable time. But if such company permits a defective and dangerous car belonging to another company to come into its yards or upon its tracks and remain for so many days that it might, by the exercise of a high degree of diligence, discover its condition, it will be liable for an injury occasioned to an employee in consequence.³

(e) *Buffers, Poles, Ladders, Brakes, etc.*—A railroad company must also use safe and proper buffers;⁴ likewise push poles suited to the purposes of their use;⁵ also ladders free from serious defect.⁶

Erie R. Co., 40 Barb. (N. Y.) 324; Warner v. Erie R. Co., 39 N. Y. 468; Toledo etc. R. Co. v. Conroy, 68 Ill. 560; Shanny v. Androscoggin Mills, 66 Me. 420; Flannagan v. Chicago etc. R. Co., 50 Wis. 462; 2 Am. & Eng. R. Cas. 150; Guttridge v. Mo. Pac. R. Co., 94 Mo. 468; Chicago etc. R. Co. v. Avery, 109 Ill. 314; Gottlieb v. New York etc. R. Co., 100 N. Y. 462; 24 Am. & Eng. R. Cas. 421; Keith v. New Haven etc. R. Co., 140 Mass. 175; 23 Am. & Eng. R. Cas. 421; Texas etc. R. Co. v. Carlton, 60 Tex. 397; 15 Am. & Eng. R. Cas. 350.

1. Fletcher v. Boston etc. R. Co., 1 Allen (Mass.) 9.

2. Baldwin v. Chicago etc. R. Co., 50 Iowa 680.

Repeating of Original Test.—Neither is such transporting company bound to repeat the tests which are proper to be used in the original construction of such cars, but may assume that all parts of the cars which appear to be in good condition are so in fact. Ballou v. Chicago etc. R. Co., 54 Wis. 257; 5 Am. & Eng. R. Cas. 480.

Latent Defects.—Nor to guard against defects undiscoverable by suitable inspection. Mackin v. Boston etc. R. Co., 135 Mass. 201; 15 Am. & Eng. R. Cas. 196; Smith v. Potter, 46 Mich. 258; 2 Am. & Eng. R. Cas. 140; Fay v. Minneapolis etc. R. Co., 30 Minn. 231; 11 Am. & Eng. R. Cas. 193.

3. Chicago etc. R. Co. v. Bragonier, 11 Ill. App. 516.

Foreign Cars Regularly Transported.

—But where the cars of one company pass regularly and for an extended period into the use of another, the latter is bound to exercise the same care to ascertain and cure defects in such cars as in the case of its own rolling stock. Gottlieb v. New York etc. R. Co., 29 Hun (N. Y.) 637; St. Louis etc. R. Co. v. Valirius, 56 Ind. 511.

4. Ellis v. New York etc. R. Co., 95 N. Y. 546; 17 Am. & Eng. R. Cas. 641; Indianapolis etc. R. Co. v. Flanagan, 77 Ill. 365.

5. Norfolk & W. R. Co. v. Jackson (Va. 1888), 6 S. E. Rep. 220.

6. Carey v. Chicago etc. R. Co., 67 Wis. 608; Goodman v. Richmond etc. R. Co., 81 Va. 571.

Defective Bung.—M was conductor of freight train on R. & D. R. R., running from Greensboro to Richmond. A car was taken into train during the night at Burkeville, the handle of the ladder whereof had been broken off long enough for the fracture to appear weather-worn. Next morning at Powhatan station, M, attempting to descend this ladder, face towards it, caught at, and would have caught the handle, had it been in its place, but fell and was killed. Held, defendant was guilty of negligence in permitting the car ladder to remain out of order, which negligence caused M's death, and renders defendant liable for damages. Richmond etc. R. Co. v. Moore, 78 Va. 93; 15 Am. & Eng. R. Cas. 239.

A railroad company must also furnish brakes, stout and well made.¹ But, in the absence of proof to the contrary, there is a presumption that iron used in the construction of a car brake is of good quality.² The company is also bound to provide platform lumber cars with side stakes;³ and footboards over open cars.⁴

In an action against a railroad company for personal injuries, plaintiff testified that he was injured while attempting to board a moving freight train in discharge of his duties as defendant's brakeman, and that the accident was caused by want of the ordinary step to the ladder by which he attempted to mount, of which defect he was not aware, but which he might have seen had he looked. The conductor and another brakeman testified that plaintiff was not in the discharge of his duties; others testified that plaintiff had been forward for a drink of water, and that he had so stated since the accident. Plaintiff's physicians testified that plaintiff told them that he was injured in jumping from the engine, and through no fault of defendant. No one except plaintiff saw the accident. *Held*, that there was such a preponderance of testimony in favor of defendant that a judgment for plaintiff would be reversed. *Mo. Pacific R. Co. v. Walker* (Tex.), 7 S. W. Rep. 791; *Williams v. Clough*, 3 H. & N. 258; *Potts v. Plunkett*, 33 Law T. 111; 9 Ir. C. L. 290.

Defective Ladder on Foreign Car—The facts being as follows: The plaintiff was injured in consequence of a defective step ladder on one of defendant's freight cars. He was not in the service of the defendant company, but of another company which was then using the car in its own business. The car had been sent over the road of the latter company, which connected with that of the defendant, consigned to a point in another State; but, on its return, it was transferred beyond the point of junction at which it should have been returned to defendant, and was loaded with freight consigned to a distant point on such connecting road. It was held that the defendant owed no duty to the plaintiff in respect to the condition of the car growing out of contract or otherwise, and that an action could not be maintained. *Sawyer v. Minneapolis etc. R. Co.*, 38 Minn. 103; 33 Am. & Eng. R. Co. Cas. 394.

1. *Texas etc. R. Co. v. McAttee*, 61 Tex. 695; *Central Trust Co. v. Tex. etc. R.*

Co., 32 Fed. Rep. 448; *Wonder v. Baltimore etc. R. Co.*, 32 Md. 411; 3 Am. Rep. 143; *Chicago etc. R. Co. v. Taylor*, 69 Ill. 461; *Chicago etc. R. Co. v. George*, 19 Ill. 510; *Illinois etc. R. Co. v. Jewell*, 46 Ill. 99; *Chicago etc. R. Co. v. Swett*, 45 Ill. 197.

Flaw in Brake Rod—A company is responsible for an injury suffered by an employee through a flaw in the rod of a car brake which might have been discovered by an ordinarily careful inspection, the plaintiff having had no reasonable opportunity to make. *Johnson v. Richmond etc. R. Co.*, 81 N. Car. 446. But a defect which did not exist when last inspected, inspections being frequently made, is not such a one as will hold an employer liable in case of an injury arising therefrom. *Chicago etc. R. Co. v. Hagar*, 11 Ill. App. 498.

Improper Brake Pin—A brake, which had been examined and found in good order a short time before, fell when plaintiff attempted to use it, and he was thrown under the car. There was no evidence as to whether the brake pin fell out or broke, or that proper inspection could have prevented the accident. *Philadelphia R. Co. v. Hughes*, 119 Pa. St. 301; 33 Am. & Eng. R. Cas. 348.

Continuing to Use Old Fashioned Brake—Where Evidence Was Contradictory—Where the evidence showed that the accident was occasioned by the fracture of an old fashioned brake which was less effectual than a more modern make, but as to safety of which compared with old form plaintiff's evidence was contradictory, it was held that there was no evidence of negligence for the jury. *Disher v. New York etc. R. Co.*, 94 N. Y. 622; 15 Am. & Eng. R. Cas. 223.

2. *Philadelphia etc. R. Co. v. Hughes*, 119 Pa. St. 301; 33 Am. & Eng. R. Cas. 348.

3. *Bushby v. New York etc. R. Co.*, 107 N. Y. 374.

4. *Hosie v. Chicago etc. R. Co.*, 75 Iowa 683; *St. Louis etc. R. Co. v. Harper*, 44 Ark. 524.

(f) *Allowing Disobedience of Orders.*—A railway company is likewise negligent in allowing its orders to be disobeyed.¹

(g) *Running Trains—Speed.*—A railroad company is liable for injury arising from the reckless or careless running of its trains.² Or the sudden starting of the same without notice.³ Or the run-

1. *Southern Kan. R. Co. v. Crocker*, 41 Kan. 747; *Kern v. De Castro etc. Sugar Refining Co.*, 5 N. Y. Supp. 548; *Schultz v. Moon*, 33 Mo. App. 329; *Bajus v. Syracuse etc. R. Co.*, 5 N. Y. Supp. 804; *Rikel v. Ferguson*, 5 N. Y. Supp. 774; *Hotis v. New York etc. R. Co.*, 6 N. Y. Supp. 605; *Nichols v. Bush etc. Mfg. Co.*, 6 N. Y. Supp. 601; *Louisville etc. R. Co. v. Hall*, 87 Ala. 708; *McCarthy v. Horn*, 5 N. Y. Supp. 917; *Fredenburg v. North Central R. Co.*, 114 N. Y. 582; *Carpenter v. Merc. Nat. R. Co.*, 39 Fed. Rep. 315; *Nadau v. White R. Lumber Co.* (Wis. 1880), 43 N. W. Rep. 1135; *Oehme v. Cook*, 7 N. Y. Supp. 764.

Habitual Abuse of Rules and Regulations.—The right of a railway engineer to recover will not be defeated by the fact that at the time of the accident he was violating a rule of the railroad company forbidding engineers to permit firemen to operate the engine except when they are themselves present upon them, there being evidence to the effect that at the time of the accident, and for years before, there was an established usage on the part of defendant's engineers, known and acquiesced in by the superior officers, to allow firemen to make short moves, the engineer not being at the time on the engine, but near enough to give directions. *Barry v. Hannibal etc. R. Co.*, 98 Mo. 62; *Hayes v. Bush etc. Mfg. Co.*, 41 Hun (N. Y.) 407.

Injury to Passenger Through Servant's Breach of Rule.—Defendant recovered a judgment against a railroad company for personal injuries received by him while in the company's employ as a freight conductor. At the time of the injury, a passenger was riding on the freight train with the consent of defendant, who knew that this was against a rule of this company. The passenger was injured at the same time as defendant, and sued the company therefor. *Held*, that defendant being insolvent the company could enjoin the collection of his judgment to the amount sued for by the passenger until that suit was decided, and, if judgment was rendered against the company therein, have it,

satisfied out of defendant's judgment as the proximate cause of the injury to the passenger was, as between the railroad company and defendant, defendant's permitting him to ride on the freight train against the rule. *Memphis etc. R. Co. v. Greer*, 87 Tenn. 697.

Operation of Engine by Fireman—Usage.—In a *Missouri* case it was held that plaintiff's right to recover was not defeated by the fact that at the time of the accident he was violating a rule of the railroad company forbidding engineers to permit firemen to operate the engine except when they themselves were upon them, there being evidence to the effect that at the time of the accident, and for years before, there was an established usage on the part of defendant's engineers, known and acquiesced in by the superior officers, to allow firemen to make short moves, the engineer not being at the time on the engine, but near enough to give directions. *Barry v. Hannibal etc. R. Co.*, 98 Mo. 62.

2. *Dick v. Indianapolis etc. R. Co.* (Ohio), 38 Ohio St. 389; 8 Am. & Eng. R. Cas. 101; *Wright v. London etc. R. Co.*, L. R., 10 Q. B. 252. But see *Jackson v. Kansas City etc. R. Co.*, 31 Kan. 761; 15 Am. & Eng. R. Cas. 178, a case of the reversal of an engine in switching and making up trains.

Failure to give signal held not to be negligence, where employee at elevator was injured owing to failure of employee of elevator company to give usual signal, viz: to cry "the cars are coming." *Speed v. Atlantic & Pac. R. Co.*, 71 Mo. 303; 2 Am. & Eng. R. Cas. 77.

3. *Chicago etc. R. Co. v. Bingenheimer*, 116 Ill. 226; *Campbell v. New York etc. R. Co.*, 35 Hun (N. Y.) 506.

Collision While Unloading Freight.—In an action to recover for personal injuries resulting from alleged negligence, it appeared the defendant company put the plaintiff and others of its servants to work unloading a railroad freight car standing on a spur of a side track having connection with other tracks only at one end, and being a track not used for passing trains, and there being nothing to lead the laborers to believe the

ning of its trains at an immoderate rate of speed.¹ And the fact that an engineer is under instructions to make certain time does not modify or dispense with a standing rule as to the care to be observed in approaching stations.² Of course, evidence that a train was run at an immoderate rate of speed is improperly admitted where negligence of that kind is not pleaded.³

4. Duty to Protect Servant.⁴—A railroad company is liable for negligence in failing to protect a servant when exposed to danger.⁵ And the duty to protect, of course, applies to employers of every description.⁶

car they were unloading would be disturbed, and while so engaged the loaded car was violently struck by other cars which became detached from an engine used in switching cars in the yard, whereby the plaintiff was injured. It was held that it was the duty of the defendant not to have brought on this peril without timely notice to the laborers so engaged; that either the cars ought not to have been brought into the position they were, without notice, or it should have been first ascertained that no danger to the laborers could result therefrom, and that the failure to do so was gross negligence. *The Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57.

1. *Thompson on Neg.* 418.

Rate of Speed in Moving Cars—Instructions.—It is not erroneous to tell the jury that it would not be negligence to move the cars at a rate of speed not greater than five or six miles an hour. *Brazee v. Western etc. R. Co.*, 93 N. Car. 313.

Throwing of Mail Bag from Rapidly Moving Train.—But the fact that a train was running past a station at the rate of thirty or thirty-five miles an hour does not render a company liable for injury to its servants at a station caused by throwing of mail bag from such train. *Muster v. Chicago etc. R. Co.*, 61 Wis. 325; 18 Am. & Eng. R. Cas. 113.

Unlawful Rate Within City Limits.—And the fact that a train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the railway as between it and its employee, where there is no evidence that the injury to the latter was caused by collision with any object. *Lockwood v. Chicago etc. R. Co.*, 55 Wis. 50; 6 Am. & Eng. R. Cas. 151.

2. *Illinois etc. R. Co. v. Neer*, 26 Ill. App. 356.

3. *Kuhn v. Wisconsin etc. R. Co.*, 70 Iowa 561.

4. See *post*, DUTY TO PROTECT MACHINERY.

5. Omission to Provide Warm Car.—Where a railroad track was badly drifted with snow, A, an employee, was induced to go out in the night time to shovel, by the promise that a car should be kept near by in which he could be warmed. This was not done and his feet were frozen. It was held that he could recover. *Hyatt v. Hannibal etc. R. Co.*, 19 Mo. App. 634; *Dick v. Indianapolis etc. R. Co.*, 38 Ohio St. 389; 8 Am. & Eng. R. Cas. 101.

Promise of Vice Principal to Protect.—In *Missouri*, it is held that the servant of a railway company may rely on the vice principal's promise to protect him while at work on a side track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. *Moore v. Wabash etc. R. Co.*, 85 Mo. 588; 21 Am. & Eng. R. Cas. 509; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277.

Watchman Near Dangerous Bank.—The under boss of a gravel train gang was directed by his immediate superior to take men and dig out a car which had been partly covered and derailed by a fall of gravel from a high bank near by. He proceeded to dig out the car and while so employed was killed by the embankment caving in. Prior to that time the custom had been to station a watchman to give notice to the workmen of danger from the falling bank, but it was omitted on that occasion. The company was held to be liable. *Burlington etc. R. Co. v. Crockett*, 19 Neb. 138; 24 Am. & Eng. R. Cas. 390.

6. *Nelson v. Johansen*, 18 Neb. 180; 53 Am. Rep. 806; *Larson v. Berquist*, 34 Kan. 334; 55 Am. Rep. 249. Cases of the improper exposure of an infant servant.

Hole in Floor.—But it has been held not to be negligence for a master to leave a small hole in a floor, useful for the purposes for which the room is used, and not in the ordinary line of travel, partially unprotected for a few days while changes and repairs are being made.¹

Failure to Provide Fire Escape.—If a manufacturing establishment has a mill properly constructed for its ordinary business, it is not, in the absence of a statutory requirement, responsible to a employee for not providing a means of escape from a fire which is not caused by the negligence of the corporation.² And it is likewise the duty of the employer to use all reasonable and necessary means to protect one employed against any superadded danger that might be expected to arise from extrinsic causes.³

Wheeler v. Mason Mfg. Co., 135 Mass. 294. Servant injured by unguarded saw with which he was working. But see *Thorsen v. Babcock*, 68 Mich. 523, where a boy working on sawdust carrier was injured.

Injury from Falling Brick.—Where a laborer was killed by the falling of a brick upon his head, the evidence tending to show a want of protection against such an accident, it was held that a verdict against the owner of the building should not be disturbed. *Ford v. Lyons*, 41 Hun (N. Y.) 512.

1. *Wannamaker v. Burke*, 111 Pa. St. 423; *Wheeler v. Mason Mfg. Co.*, 135 Mass. 294.

Unguarded Rollers.—A boy was engaged to work on a train of rollers in a spike mill; after having been at work a few days he was, while fulfilling his duty, caught by the cogs of the rollers, drawn in and hurt; a board protection extended along the rollers, but stopped short of the point at which the boy had to stand to perform part of his work about the rollers; had the board extended three feet further than it did he could have done his work in safety. *Held*, there was sufficient evidence of negligence on the part of the employer and mill owner to require the submission of the case to the jury. *Rummell v. Dilworth*, 111 Pa. St. 343.

2. *Jones v. Granite Mills*, 126 Mass. 84.

Door Sill Slightly Defective.—In *Wilson v. Allen Paper Car Wheel Co.*, 29 Fed. Rep. 840, it was held that an employer was not negligent in providing door sill one and one half inches higher than floor, over which truck driver was compelled to drive a loaded truck.

3. *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277;

Hough v. Texas etc. R. Co., 100 U. S. 213.

Promise of Foreman that Cars Should Not be Moved.—Plaintiff, who was a car repairer, was ordered by his foreman to go under certain cars and repair a defective drawbar, said foreman assuring him that he would see that the cars were not moved. No red flag was put out according to the rules of the company; notwithstanding the foreman's promise, the cars were moved and the plaintiff injured. *Held*, that the company was liable. *Moore v. Wabash etc. R. Co.*, 85 Mo. 588; 21 Am. & Eng. R. Cas. 509.

Declaration of Foreman that Rail was Free and Clear.—Where a railroad section hand was ordered to take up a rail and was told by the foreman that it was free and clear, when the contrary was the case, and the rail rebounded and injured the hand, it was held that he could recover. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463.

Lashing Spare Wheel—Failure to Give Seaman Notice.—Defendant, master of a vessel, caused the spare wheel, which in its ordinary condition rested loosely and unfastened upon the drum of the steam wheel, to be lashed so that it would rotate with the drum, thus rendering the apparatus dangerous to one engaged in cleaning it. No notice of the changed condition of the wheel was given to libellant, a seaman, in consequence of which, while the latter was engaged in his duty of cleaning the apparatus, his hand was caught and so injured as to require amputation. *Held*, that defendant was liable for the injury in the sum of \$4,000. *Withcofsky v. Wier* (N. Y.), 32 Fed. Rep. 301. And see *Watson v. The Houston & T. C. R. Co.*, 58 Tex. 434; 11 Am. & Eng. R. Cas. 213.

But a railroad company is not absolutely bound to make all necessary guards against danger caused by ordinary storms, and to guard against landslides, washouts and obstructions, which might endanger the lives of its employees.¹

5. Duty to Fence Machinery.—Neither does the neglect to fence the ordinary machinery of a servant's employment, of itself, make a master liable to him for an injury preventible by such precautions.² But where a statute requires machinery to be fenced, a failure to do so is negligence *per se*, and the master is liable unless it fully appears that the servant assumed the risk.³

6. Ropes, Chains and Mine Machinery.⁴—An employer is likewise liable for injury arising from a defective rope.⁵ Suitable chains

1. *Gates v. Southern Minn. R. Co.*, 28 Minn. 110; 2 Am. & Eng. R. Cas. 237.

Extraordinary Storm.—A company is not liable on the ground of negligence for injuries caused by accidents occasioned by storms of extraordinary violence. *Houston etc. R. Co. v. Fowler*, 56 Tex. 452; 8 Am. & Eng. R. Cas. 504. See *Gates v. Southern Minn. R. Co.*, 28 Minn. 110; 2 Am. & Eng. R. Cas. 237.

2. *Sullivan v. India Mfg. Co.*, 113 Mass. 396.

Failure to Box Cogs.—Where, in an action against a railroad company to recover damages for personal injury received by an employee in attempting to oil an iron punch, driven by iron cog wheels which were six or seven feet from the floor of the shop, the evidence offered showed that it was not usual to box or fence such machinery, and that it was so arranged with a tight and loose pulley that the same could be immediately brought to a standstill by throwing the belt upon the loose pulley. It was held that the failure or negligence to box or fence such cog wheels was not of itself culpable negligence on the part of the company. *Sanborn v. Atchison etc. R. Co.*, 35 Kan. 292. See *Stone v. Oregon Mfg. Co.*, 4 Oreg. 52.

3. *Clarke v. Hohmes*, 7 H. & N. 942; *Gibbs v. Crombie*, 2 Ct. of Sess. Cas. (4th ed., Sc.) 210.

Statute Referring to Minors.—A lad about thirteen years old was employed as a slate picker in a coal breaker. Another lad, who was attending the machinery, called to him to bring to him the oil can, and he left his post and, in taking the can, fell into a pair of rollers breaking coal, where he was severely injured. It appeared that the rollers were covered with a box upon the top of which was an opening covered by a

plank which was displaced at the time of the accident, and was so often before with the knowledge of the injured boy. *Held*, that the provision in the Act of March 3rd, 1870, that all machinery where boys work shall be properly "fenced off" was intended to mean properly protected, and that in providing this cover for the rollers the employer did his whole duty under the act. *Honor v. Albrightson*, 63 Pa. St. 475.

4. See *post*, LATENT DEFECTS.

5. *Dixon v. Rankin*, 14 Sec. Ses. (Sc.) 493; *Boardman v. Brown*, 44 Hun (N. Y.) 336; rope used in excavation of tunnel.

An employer is liable in damages to an employee who is injured through the stretching of the rope of a derrick. *Courtney v. Cornell*, 49 N. Y. Super. Ct. 286.

Derrick Rope Two Years Old.—An employee of a railroad company was killed while at work by the breaking of a rope on a derrick in use and belonging to the company. It was shown that the rope externally appeared sound, but had been in use for two or three years, and continually exposed to the weather, and there was evidence that it was actually rotten when the break occurred. There was evidence also that such a rope, after exposure for a year or more, becomes unsound, although this one betrayed no outward sign of decay. *Held*, that there was evidence for the jury upon the question whether such a rope was a sound one, and if not, the railroad company would be liable for one injured by reason of such unsoundness. *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211; 40 Am. Rep. 639.

Where Suitable Rope Is Furnished—Failure to Use.—In an action for inju-

also must be furnished an employee.¹ Likewise machinery and appliances in coal mines.² Also proper rails in the yards of manufacturing establishments.³ Proper and unworn nuts should alone be used on machinery.⁴

7. Accidental and Improbable Injuries.—A master is not liable where the cause of the injury was purely accidental.⁵ Nor can an employer be held liable as for negligence in omitting to guard

ries sustained by plaintiff while working for defendant on a derrick, caused by the breaking of a rope, there was no evidence that the foreman was not fully competent, or that the other workmen needed to be more competent, or that any of the apparatus was in any way defective. The evidence showed that defendants had furnished a supply of new rope for any that might be defective, and there was a sufficient supply of tackle also furnished. *Held*, that plaintiff could not recover. *McKinnon v. Norcross*, 148 Mass. 533.

Rope Carefully Examined by Both Parties.—Plaintiff, who was an experienced well digger, was employed to clean out a well, and the rope furnished him to enable him to descend into it was examined carefully both by plaintiff and defendant's overseer, and pronounced a good one and sufficient for the purpose for which it was to be used. *Held*, that plaintiff could not recover for injuries caused by the breaking of the rope. *Reid v. Central R. & B. Co.* 81 Ga. 694.

1. *Murphy v. Phillips*, 35 L. J., N. S. 477.

2. Defective Cage.—A person employed as cager at the bottom of the shaft of a coal mine, who is injured in the performance of his duty by a lump of coal falling from the top of the shaft from an uncovered cage, is entitled to recover damages under the provisions of the Missouri act of March 23rd, 1881, requiring the cage to be covered "so as to keep safe, as far as possible, persons descending into and ascending out of said shaft," although he may not be strictly within the letter of the clause. *Durrant v. Lexington Coal Min. Co.*, 97 Mo. 62.

Cable and Hook.—But the owner of a coal mine is not liable for an injury arising from the use of a hook attached to a cable used in drawing cars, it not appearing that such use had caused accidents before. *Burke v. Witherbee*, 98 N. Y. 562.

3. Defective Brake—Mining Car.—Intestate was a "door boy" in the defend-

ant's mines, his duty being to open and close doors, one of which was the "intake," or door out of which the cars were run. As cars came on the main track loaded, the brakes were applied and the wheels blocked by a "spragger" until the train was made up, when the brakes were loosened and of its own momentum it went down the track, and at a signal the "door boy" would open the "intake" door, to do which he had to cross the track. The only lights were the miners' lamps, one of which the train runner carried on the front car. The accident occurred by the weight of one car starting the others, the brakes of same being defective, and but one "spragger" was on duty at the time, instead of two, as usual. Intestate's position was in a space of about five feet wide between the mine wall and the track, at the "intake" door. The train with no runner on collided with the door, killing intestate instantly. *Held*, evidence of defendant's negligence sufficient to sustain a verdict for plaintiff. *Southwest Va. Imp. Co. v. Smith* (Va. 1888); 7 S. E. Rep. 365; *Osborne v. Morgan*, 137 Mass. 1.

4. Plaintiff, an employee of defendant, was injured by the falling of a pulley, caused by a wheel working from its shaft impinging upon and unscrewing the nut holding it on the shaft. The nut should have been fastened so that the friction would tighten it. The defect was known to defendant, but not to plaintiff. Held, that the defendant was liable. Columbia etc. R. Co. v. Hawthorn, 3 Wash. Ter. 353. See *Berger v. St. Paul etc. R. Co.*, 39 Minn. 78; *Foster v. Pusey* (Del. 1888), 14 Atl. Rep. 545.

5. Gassaway v. Georgia Southern R. Co., 69 Ga. 347.

Falling of Coal from Tender.—An injury to a track walker in the employ of a railroad by a piece of coal falling upon him from the tender of a passing engine, in which the coal was piled up above the top, was held to be a pure accident for which no action would lie.

against accidents that are not likely to happen.¹ And the fact that the accident was unusual or extraordinary does not tend to prove negligence on the part of a railroad company.² Nor is an employer negligent in pursuing a certain line of conduct, where nothing has ever occurred to suggest it to be negligence in the master in so doing.³

8. Latent Defects.—An employer is not liable to a servant injured through a latent defect, whose existence he did not suspect.⁴ But otherwise if he should have known of the defect, but failed to learn of its existence, through negligence.⁵

9. Use of Machinery for Improper Purpose.—Nor is a master liable

Schultz v. Chicago etc. R. Co., 67 Wis. 616; 28 Am. & Eng. R. Co., 404.

Order to Hurry.—A railroad company is not liable to a servant injured while obeying a command to hurry to supper. *Piquegno v. Chicago etc. R. Co.*, 52 Mich. 40; 12 Am. & Eng. R. Cas. 210.

Planing Machine.—A fairly intelligent youth of sixteen had his hand mutilated by the jointer in a planing mill, where for two weeks he had been at work. He had had no previous experience with such machinery, but the dangerous nature of the jointer was manifest to anyone who looked at it, and he would not have been hurt if he had not laid his hand, without looking, upon the table in which the jointer operated. *Held*, that the injury was accidental, and he could not recover for it. *Palmer v. Harrison*, 57 Mich. 182.

1. *Sjogren v. Hall*, 53 Mich. 274; *Steffen v. Chicago etc. R. Co.*, 46 Wis. 259; *Deford v. State*, 30 Md. 179; *McHenry v. Marr*, 39 Md. 510.

2. *Kuhn v. Wisconsin etc. R. Co.*, 70 Iowa 561.

3. *Kitteringham v. Sioux City etc. R. Co.*, 62 Iowa 285.

4. As concealed defects in the timbers of a bridge. *Toledo etc. R. Co. v. Conroy*, 61 Ill. 162. Or railroad switch. *Ladd v. New Bedford R. Co.*, 119 Mass. 412. Or ladder. *Chicago etc. R. Co. v. Platt*, 89 Ill. 141.

5. *Grizzle v. Frost*, 3 F. & F. 622; *Roberts v. Baxter*, 44 Cal. 187; *R. Co. v. Fort*, 17 Wall. (U. S.); *Clarke v. Holmes*, 7 H. & N. 944; *Mellors v. Shaw*, 1 B. & S. 437; *Ashworth v. Stanwix*, 30 L. J., Q. B. 333; *Roberts v. Smith*, 2 H. & N. 213; *Stupp v. R. Co.*, 9 Exch. 223; *Louisville etc. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *McDermott v. Pacific R.*

Co., 30 Mo. 115; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Painton v. Northern etc. R. Co.*, 83 N. Y. 7; *McGatrick v. Wason*, 4 Ohio St. 566; *Mad River etc. R. Co. v. Barber*, 5 Ohio St. 541; *Philadelphia etc. R. Co. v. Hughes*, 119 Pa. St. 301; 33 Am. & Eng. R. Cas. 549.

Fall of Pulley.—Plaintiff, an employee of defendant, was injured by the falling of a pulley, caused by a wheel working from its shaft, impinging upon and unscrewing the nut holding it on the shaft. The nut should have been so fastened that the friction would tighten it. The defect was known to defendant, but not to plaintiff. *Held*, that the injury was caused by a latent defect, for which defendant was liable. *Columbia etc. R. Co. v. Hawthorn*, 3 Wash. Ter. 353. See *Berger v. St. Paul etc. R. Co.*, 39 Minn. 78; *Foster v. Pusey* (Del.), 14 Atl. Rep. 545.

Spring in Drawbar.—Such as a defective spring in a drawbar, of which no one had knowledge. *Atchison etc. R. Co. v. Wagner*, 33 Kan. 660.

Internal Defect in Timber.—Or an undiscoverable defect in the timbers of a car. *Parsons v. Missouri etc. R. Co.*, 94 Mo. 286. And see *Ryan v. Fowler*, 24 N. Y. 410; *Wright v. New York etc. R. Co.*, 23 N. Y. 562; *Noyes v. Smith*, 28 Vt. 59; *Seymour v. Madox*, 5 Eng. L. & Eq. 265; *Priestly v. Fowler*, 3 Mees. & Welsh 1; *Couch v. Steel*, 22 Eng. L. Eq. 77.

Defective Rope.—A master is not liable to a servant who is injured by reason of a defective rope, which was not known to exist by the master. *Nelson v. Dubois*, 11 Daly (N. Y.) 127.

Where a servant was killed by the breaking of a rope on his master's derrick on the first day of his using it in his master's work, the rope being

where a machine was used for a dangerous and improper purpose, and one for which it was not provided or intended.¹

10. Exposure to Hidden Danger.—A master is also negligent in exposing his employee to dangers not obvious, or fairly incident to the employment.²

11. Introduction of Unusual Machinery.—An employer who introduces, without notice to his employees, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, is liable in damages.³

12. Selection of Machinery.—The duty to furnish safe machinery does not require that the machinery used shall be the best and latest improved of its kind, but only that it shall be reasonably safe and suitable for the purpose.⁴

two or three years old and rotten, though apparently sound, it was held that the question of negligence was for the jury. *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211; 40 Am. Rep. 634.

1. *Felch v. Allen*, 98 Mass. 572. Compare *Boardman v. Brown*, 44 Hun (N. Y.) 336.

2. *Jenny Electric L. & P. Co. v. Murphy*, 15 Wes. Rep. 507; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Malone v. Hawley*, 46 Cal. 408; *Baltimore etc. R. Co. v. Woodward*, 41 Md. 268; *Perry v. Marsh*, 25 Ala. 659; *Strahlendorf v. Rosenthal*, 30 Wis. 676; *Paulmeir v. Erie R. Co.*, 34 N. J. 151; *Illinois etc. R. Co. v. Welch*, 52 Ill. 183; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Lanning v. New York etc. R. Co.*, 49 N. Y. 521; *R. Co. v. Caven*, 9 Bush (Ky.) 559; *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124; *Bech v. Carter*, 68 N. Y. 283; *Deford v. Keyser*, 30 Md. 179; *Gadley v. Hagarty*, 20 Pa. St. 387.

Ice and Snow Blocked Track.—So held where a railroad company sent out cars upon a track blocked with snow and ice, in consequence of which plaintiff was injured. *Fifield v. Northern R. Co.*, 42 N. H. 225.

Exposure to Escaping Gas.—Where a gas company, by negligence, permits the escape of poisonous gases into a room not properly arranged so as to let it pass out, and knows of such escape and the danger of inhaling the same, and either the company or its superintendent duly authorized to employ and discharge, manage, direct and control its employees or workmen,

orders a servant to do certain work in such room, and the servant, in obedience to such order, without knowledge of the danger to which he is exposed, and without fault or negligence on his part, undertakes to do the work and is overcome by the gas so escaping, whereby he falls and receives an injury from which he dies, the company will become liable to the personal representative of such deceased servant, in damages, for his death. *Citizens' Gas etc. Co. v. O'Brien*, 118 Ill. 174.

3. *O'Neil v. St. Louis etc. R. Co.*, 9 Fed. Rep. 337; 6 Am. & Eng. R. Cas. 614; *Walsh v. Peete Salve Co.*, 110 Mass. 23.

4. *Hickey v. Taaffe*, 105 N. Y. 26; *Chicago etc. R. Co. v. Londergan*, 118 Ill. 41; 28 Am. & Eng. R. Cas. 491; *Chicago etc. R. Co. v. Smith*, 18 Ill. App. 119; *Lake Shore etc. R. Co. v. McCormick*, 74 Ind. 440; 5 Am. & Eng. R. Cas. 474; *Louisville etc. R. Co. v. Orr*, 84 Ind. 50; 8 Am. & Eng. R. Cas. 94; *McGinnis v. Canada etc. R. Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 5 Am. & Eng. R. Cas. 508; *Payne v. Reese*, 100 Pa. St. 301; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 249; *Toledo etc. R. Co. v. Asbury*, 84 Ill. 429; *St. Louis etc. R. Co. v. Valerius*, 56 Ind. 512; *Muldowney v. Illinois C. R. Co.*, 39 Iowa 615; *Shanny v. Androscoggin Mills*, 66 Me. 520; *Cumberland R. Co. v. State*, 45 Md. 229; *Arkerson v. Dennison*, 117 Mass. 407; *Botsford v. Mich. etc. R. Co.*, 33 Mich. 256; *Le Claire v. First Div. etc. R. Co.*, 23 Minn. 9; *Nolan v. Shackle*, 3 Mo. App. 300;

Railroad companies are ordinarily in duty bound to adopt new inventions as soon as they have been tested and practically found to be more safe than appliances in use.¹

The question of suitability of a certain machine or appliance is for the jury.² But it should not be left to the jury to say what machines, appliances, or tools, should be used by a master, in order to escape liability for injury to an employee caused by the negligence of a co-employee.³ The degree of care required of a master in furnishing safe machinery for the use of his servant is to be measured by the circumstances; as the kinds of machinery necessary, the nature of the business, the incidental hazards, etc.⁴

A master cannot claim immunity upon the ground that he has exercised due care in selecting mechanics of competent skill in the selection or construction of such machinery.⁵

Fifield v. Northern R. Co., 42 N. J. 225; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Booth v. Boston etc. R. Co.*, 67 N. Y. 593; *Hardy v. Carolina etc. R. Co.*, 76 N. Car. 5; *Mullan v. Philadelphia etc. R. Co.*, 78 Pa. St. 25; *Nashville etc. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *International R. Co. v. Doyle*, 49 Tex. 190; *Dasey v. Phillips etc. Co.*, 42 Wis. 583; *Hough v. Texas etc. R. Co.*, 100 U. S. 213; *Toledo etc. R. Co. v. Flanigan*, 77 Ill. 365; *Laning v. New York etc. R. Co.*, 49 N. Y. 521; *Ryan v. Fowler*, 24 N. Y. 510; *Seaver v. Boston R. Co.*, 14 Gray (Mass.) 466; *Park v. O'Brien*, 23 Conn. 239; *Norris v. Litchfield*, 35 N. H. 271; *Wright v. New York etc. R. Co.*, 25 N. Y. 562.

1. *Burns v. Chicago etc. R. Co.*, 69 Iowa 450; *Louisville etc. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Fort Wayne etc. R. Co. v. Gildersleeve*, 33 Mich. 133; *Botsford v. Michigan etc. R. Co.*, 33 Mich. 256; *Western etc. R. Co. v. Bishop*, 50 Ga. 465; *Wonder v. Baltimore etc. R. Co.*, 32 Md. 441; *Salters v. Delaware etc. Canal Co.*, 3 Hun (N. Y.) 338; *Stack v. Patterson*, 6 Phila. (Pa.) 225; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Dynen v. Leach*, L. J., Exch. 221. *Compare St. Louis etc. R. Co. v. Valerius*, 56 Ind. 511; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Kelley v. Silver Spring Min. Co.*, 7 Rep. 60.

2. *Philadelphia etc. R. Co. v. Heenan*, 103 Pa. St. 124.

3. *Cappins v. New York etc. R. Co.*, 43 Hun (N. Y.) 26.

4. *Jones v. New York Central etc. R. Co.*, 22 Hun (N. Y.) 284.

5. *Atchison etc. R. Co. v. McKee*, 37 Kan. 592; *Collyer v. Pennsylvania etc.*

R. Co., 49 N. J. L. 59; *Walker v. Bolling*, 22 Ala. 294; *Wells v. Coe*, 9 Cal. 159; *Miller v. Union Pacific R. Co.*, 3 Colo. 492; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; *Krueger v. Louisville etc. R. Co.*, 111 Ind. 51; 31 Am. & Eng. R. Cas. 329; *Atchison etc. R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 108; *Thompson v. Drymala (Minn.)*, 1 N. W. Rep. 955; *Reber v. Tower*, 11 Mo. App. 199; *Lutz v. Geisel*, 23 Mo. App. 676; *Herriman v. Chicago etc. R. Co.*, 27 Mo. App. 435; *Brothers v. Carlton*, 52 Mo. 372; *Flike v. Boston etc. R. Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Malone v. Hathaway*, 64 N. Y. 5; *Pantzar v. Tilly Foster Min. Co.*, 99 N. Y. 368; *Benzing v. Steinway*, 101 N. Y. 547; *Bushby v. New York etc. R. Co.*, 107 N. Y. 374; *Sioux City etc. R. Co. v. Smith (Neb.)*, 36 N. W. Rep. 285; *Missouri Pac. R. Co. v. McElvea (Tex.)*, 9 So. W. Rep. 313; *Houston etc. R. Co. v. Rand (Tex. 1882)*, 9 Am. & Eng. R. Cas. 399; *Brabbitts v. Chicago etc. R. Co.*, 38 Wis. 289; *Bessex v. Chicago etc. R. Co.*, 45 Wis. 477; *Herbert v. North Pac. R. Co.*, 3 Dak. 38; 8 Am. & Eng. R. Cas. 85; *Michigan Central R. Co. v. Smithson*, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101; *Ellet v. St. L. etc. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; *Smith v. Sioux City etc. R. Co.*, 15 Neb. 483; 17 Am. & Eng. R. Cas. 561; *Cowles v. Richmond etc. R. Co.*, 84 N. Car. 309; 2 Am. & Eng. R. Cas. 90; *Hain v. Smith*, 80 N. Y. 458; 2 Am. & Eng. R. Cas. 545; *Cleveland etc. R. Co. v. Keary*, 3 Ohio St. 201; *Berea Stone*

The question of due care in the selection of machinery is ordinarily for the jury.¹ But it is the duty of the court to determine whether the proof is sufficient to authorize the jury to find due care.²

13. Evidence as to Sufficiency.—When the sufficiency of a machine, instrument or appliance is in question, evidence of similar accidents from the same cause is competent.³ Evidence is also admissible to prove that after an accident the machine which caused it was repaired or improved, as tending to establish that it was not safe at the time of the accident.⁴

14. Sufficiency Not Warranted.—There is no implied warranty on the part of a master that the tools furnished are sound and fit for the purposes intended.⁵

15. Repairs and Inspections.—A master is likewise liable to his servant for an injury arising from a failure on his part to use reasonable care to keep buildings, machinery, tools, etc., in a safe and fit condition for use.⁶ And the question of reasonable care has

Co. v. Kraft, 31 Ohio St. 287; *Wills v. Oregon R. & N. Co.*, 11 Ore. 257; 17 Am. & Eng. R. Cas. 539; *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262; 44 Am. Rep. 573; *Wells v. Coe*, 9 Colo. 159; *Kelley v. Erie Tel. Co.*, 34 Minn. 321; *Bridges v. St. Louis etc. R. Co.*, 6 Mo. App. 389; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *St. Louis etc. R. Co. v. Harper*, 44 Ark. 524; *Hough v. Texas etc. R. Co.*, 100 U. S. 213, 218; *Wabash etc. R. Co. v. McDaniel*, 102 U. S. 456; 11 Am. & Eng. R. Cas. 58. See FELLOW SERVANTS, vol. 7, p. 825, 830.

1. A legislative act required that all slope mines should be provided with two passage ways, one to be used and set apart exclusively as a man way. A, an employee, was killed while passing through the slope, and in an action brought by his widow to recover damages for his death, there was a dispute as to whether the manway was in proper form, or in proper condition, so that A might have used it instead of the slope. The court left as a question of fact for the jury. *Held*, there was no error in this. *Cambria Iron Co. v. Shaffer* (Pa. 1887), 8 Atl. Rep. 204.

2. *Wormell v. Maine Central R. Co.*, 79 Me. 397; 31 Am. & Eng. R. Cas. 272; *Sweeney v. Berlin etc. Envelope Co.*, 101 N. Y. 520; 54 Am. Rep. 722; *Slack v. Patterson*, 6 Phila. (Pa.) 225; *Nashville etc. R. Co. v. Elliott*, 1 Cold. (Tenn.) 1012; *Dynen v. Leach*, 26 L. J. Exc. 221.

Owners of Mines—Precautions Against Fire Damp.—The owner of a mine is

not bound to employ the most expensive precautions against fire damp, but only to use reasonable efforts for ventilation. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285.

3. *Morse v. Minneapolis etc. R. Co.*, 30 Minn. 465; 11 Am. & Eng. R. Cas. 168.

4. *Columbia etc. R. Co. v. Hawthorn*, 3 Wash. Ter. 353; *Pennsylvania Tel. Co. v. Varnan* (Pa.), 1888, 15 Atl. Rep. 624; *Atchison etc. R. Co. v. McKee*, 37 Kan. 592.

5. *Louisville etc. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Little Rock etc. R. Co. v. Duffey*, 35 Ark. 602; 4 Am. & Eng. R. Cas. 637; *Wells v. Coe*, 9 Colo. 159; *Columbus etc. R. Co. v. Troesch*, 68 Ill. 545; *Chicago etc. R. Co. v. Brogonier*, 11 Ill. App. 516; *Wabash etc. R. Co. v. Fenton*, 12 Ill. App. 417; *Chicago etc. R. Co. v. Pratt*, 14 Ill. App. 346; *Smith v. Sellers*, 40 La. An. 527; *Flynn v. Beebe*, 98 Mass. 575; *Siela v. Hannibal etc. R. Co.*, 82 Mo. 420; *Batterson v. Chicago etc. R. Co.*, 49 Mich. 184; 8 Am. & Eng. R. Cas. 123; *Porter v. Hannibal etc. R. Co.*, 71 Mo. 66; 2 Am. & Eng. R. Cas. 44; *Pleasants v. Raleigh etc. R. Co.*, 95 N. Car. 96; *Painton v. North Cent. R. Co.*, 83 N. Y. 7; 5 Am. & Eng. R. Cas. 454; *Mad River etc. R. Co. v. Barber*, 5 Ohio St. 541; *Sykes v. Packer*, 99 Pa. St. 465; *Green etc. R. Co. v. Bresmer*, 97 Pa. St. 103; 4 Am. & Eng. R. Cas. 647; *Galveston etc. R. Co. v. Delahaunty*, 53 Tex. 206; 4 Am. & Eng. R. Cas. 628.

6. 2 Thompson on Neg. 984. *Holden*

relation to, and is dependent upon, the facts and circumstances of each particular case.¹ And his liability is the same when overseers are deputed to perform the duty and are negligent.²

But while an employer must frequently inspect machinery in use by his employees,³

v. Fitchburg R. Co. (Mass.), 129 Mass. 268; 2 Am. & Eng. R. Cas. 94; *Michigan etc. R. Co. v. Smithson*, 45 Mich. 210; 1 Am. & Eng. R. Cas. 101; *King v. Ohio etc. R. Co.*, 16 Fed. Rep. 277. And see *Hough v. Texas etc. R. Co.*, 100 U. S. 213, 218; *Wells v. Coe*, 9 Colo. 159; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Snow v. Housatonic R. Co.* (Mass.), 8 Allen 441; *McMilla v. U. P. Brick Works*, 6 Mo. App. 434; *Lewis v. St. Louis etc. R. Co.*, 59 Mo. 495; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Warner v. Erie etc. R. Co.*, 39 N. Y. 468; *King v. New York etc. R. Co.*, 4 Hun (N. Y.) 769; *Lanning v. New York etc. R. Co.*, 49 N. Y. 521; *Chicago etc. R. Co. v. Swett*, 45 Ill. 197; *Illinois etc. R. Co. v. Welch*, 52 Ill. 183; *Toledo etc. R. Co. v. Ingraham*, 77 Ill. 309; *Goheen v. Texas etc. R. Co.*, 3 Cent. L. J. 382; *Weems v. Matheson*, 4 McQueen (Sc.) 215.

1. *Hallower v. Henley*, 6 Cal. 200; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Fletcher v. Boston etc. R. Co.*, 1 Allen (Mass.) 9; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *R. Co. v. Moore*, 21 N. J. L. 824; *Pennsylvania etc. R. Co. v. Ogier*, 35 Pa. St. 60; *Keegan v. Western etc. R. Co.*, 8 N. Y. 175; *Ryan v. Fowler*, 24 N. Y. 410; *Byron v. Telegraph Co.*, 26 Barb. (N. Y.) 39; *Noyes v. Smith*, 28 Vt. 59; *Paterson v. Wallace*, 1 Macq. (Sc.) App. Cas. 748; *Brydon v. Stewart*, 2 Macq. (Sc.) App. Cas. 30; *Marshall v. Stewart*, 33 Eng. L. & E. 1; *Matthews v. McDonald*, 3 Macph. (Sc.) 506; *Swords v. Edgar*, 59 N. Y. 28; *Godley v. Haggerty*, 20 Pa. St. 387; *Sweeney v. Old Colony R. Co.*, 10 Allen (Mass.) 368; *Seymour v. Maddox*, 6 Q. B. 376; *Indemaur v. Dawes*, L. R., 1 C. P. 274; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

Proper Heat for Steam Boiler.—The plaintiff, while in the discharge of his duty as watchman for the railroad, in its yards at Texarkana, was injured by the explosion of the boiler of one of the company's locomotives, caused, as the plaintiff alleged, by a defect in the boiler, which the company might have discovered by the exercise of proper

diligence. The defendant denied all knowledge of defects in the exploded engine, as well as a want of care on its part. The chief point in dispute was whether the boiler had been properly tested. The evidence for the plaintiff showed that one test, usually applied, had not been applied to this boiler. On the other hand, defendant introduced the evidence of mechanics experienced in such matters, who testified that the best test for finding a defect in a boiler was applied; that care and diligence failed to disclose any imperfection in the boiler. It was held that if the company omits any test of soundness of the boiler that ought to have been made, it was guilty of negligence, and it was not for the court to take the question from the jury. *Noyes v. Smith*, 28 Vt. 59; 21 Am. & Eng. R. Cas. 60.

2. *Hough v. Texas etc. R. Co.*, 100 U. S. 213, 218; *Wabash etc. R. Co. v. McDaniels*, 107 U. S. 454; 11 Am. & Eng. R. Cas. 158. And see *Mitchell v. Robinson*, 80 Ind. 281; *Ohio etc. R. Co. v. Collarn*, 73 Ind. 261. Compare *Rice v. King Phillip Mills*, 144 Mass. 229. And see FELLOW SERVANTS, vol. 7, p. 830, where authorities are fully collected.

We find it laid down in a Massachusetts case that if a master employs a servant to work on a machine so far out of repair as to be dangerous, he is not relieved from responsibility merely by proof that he has entrusted to competent servants the duty of making ordinary repairs, and keeping it in order from day to day, if they inspected it simply to keep it in order so that it would do good work. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198. Compare *Sanborn v. Madeira Flume & Trading Co.*, 70 Cal. 261.

3. *Atchison etc. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206.

The inspection must be made by competent inspectors. *Durkin v. Sharp*, 88 N. Y. 225. And see *Braun v. Chicago etc. R. Co.*, 53 Iowa 595; 36 Am. Rep. 243; *Turney v. Minneapolis etc. R. Co.*, 33 Minn. 311; 21 Am. & Eng. R. Cas. 545.

he is not bound to pursue a system which will embarrass the operation of his business.¹

A railroad conductor must inspect brakes and other appliances in connection with his train, and if he fails to do so, and is injured, he cannot recover of the company though it was the duty of the car inspector also to make the examination and he failed to do so.² So also must brakemen.³

Allowing machinery to remain out of repair when its condition is brought to an employer's notice, or by proper inspection might be known, is culpable negligence.⁴

An employer is not chargeable with negligence merely because he delays for any length of time to repair a defective machine while it remains unused, and is not so situated as to create danger; nor, in case of a car, because it fails to move the same to

1. *Smoat v. Mobile etc. R. Co.*, 67 Ala. 13; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505; 11 Am. & Eng. R. Cas. 188; *Philadelphia etc. R. Co. v. Hughes*, 109 Pa. St. 301; 33 Am. & Eng. R. Cas. 349.

2. *Alexander v. Louisville R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

It was held in one case that even if it was the duty of the conductor to inspect the cars constituting his train, it was largely a question of fact whether the short time he had been in charge of the train (thirty-six hours) was sufficient, by ordinary diligence, to have enabled him to know of the defect through which he lost his life. *International etc. R. Co. v. Kindred*, 57 Tex. 491; 11 Am. & Eng. R. Cas. 649.

3. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

Where Inspectors Are Employed at Local Stations.—The fact that a railway company may have employed car inspectors, at certain local stations, to inspect cars, will not relieve brakemen using the same from their duty of inspecting that part of the machinery they are expected to handle, and reporting defects to the company. *Chicago etc. R. Co. v. Bragoner*, 119 Ill. 51.

Foreign Cars.—A railroad company is not liable to its brakeman for an injury caused by neglect of its competent inspector to inspect a car received from another road for transportation. *Mackin v. Boston etc. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456.

Presumption of Brakeman's Skill as Inspector.—But it was laid down in a

Georgia case that there is no presumption that a brakeman has sufficient skill to determine, from an inspection of the brakes, their fitness for use. *Central R. Co. v. Haslett*, 74 Ga. 59.

Usual Duties as to Inspection—Evidence.—In an action involving the question of a brakeman's negligence in his failure to examine the brakes on a freight car, either party has the right to prove what were the customary and usual duties of brakemen as to the inspection of brakes. *Chicago etc. R. Co. v. Bragoner*, 119 Ill. 51.

4. *North Pac. R. Co. v. Herbert*, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407; *Beeson v. Green Mt. etc. Min. Co.*, 57 Cal. 32; *Leahy v. Southern Pac. etc. R. Co.*, 65 Cal. 150; 15 Am. & Eng. R. Cas. 230.

Bridge.—Where a railroad corporation purchased the line of another company, of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, *held*, that it was negligence on the part of the corporation to continue its use without such an inspection and a correction of the defects; that it was liable to an employee upon one of its trains for injuries received by a fall of the bridge; and this although the bridge had been in use for several years before the purchase. (*Devlin v. Smith*, 89 (N. Y. 470, distinguished.) *Vosburgh v. Lake Shore R. Co.*, 94 N. Y. 374; 46 Am. Rep. 148; 15 Am. & Eng. R. Cas. 249.

its shops for repairs and does not make them at the place where the car was injured.¹

A master is also bound to know that a tool or machine will only last a given time, and it is his duty to renew the same at proper intervals.²

18. Master's Duty to Instruct Inexperienced and Minor Servants—

(a) *General Rule.*—It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience or want of capacity of the servant; and failing to do so, is liable for the damages suffered through such neglect.³ And a master who should have known, but does not, that a machine was out of repair and dangerous is likewise liable to a servant who suffers through failure of warning.⁴ His duty is not discharged by informing the servant generally that the service engaged in is dangerous, especially where he is a person who neither by experience nor education has, or would be likely to have, knowledge of such facts; he should be informed not only that the service is dangerous, and of the perils of a particular place, but where extraordi-

1. *Flannagan v. Chicago etc. R. Co.*, 50 Wis. 462; 2 Am. & Eng. R. Cas. 150. Approving 45 Wis. 98.

2. *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 24; 40 Am. Rep. 639; 8 Am. & Eng. R. Cas. 141; *Kitteringham v. Sioux City etc. R. Co.*, 62 Iowa 285; 18 Am. & Eng. R. Cas. 14.

3. *Atkins v. Merrick Thread Co.*, 142 Mass. 431; *McGowan v. La Plata M. & S. Co.*, 9 Fed. Rep. 861; *Jones v. Florence Min. Co.*, 66 Wis. 268; *Parkhurst v. Johnson*, 50 Mich. 70; *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 526; *Whitelaw v. Memphis etc. R. Co.*, 16 Lea (Tenn.) 391; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 445; *Sullivan v. India Mfg. Co.*, 113 Mass. 397; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; 2 Am. & Eng. R. Cas. 94; *Swoboda v. Ward*, 40 Mich. 420; *Michigan R. Co. v. Smithson*, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101; *Perry v. Marsh*, 25 Ala. 659; *Atlas Engine Works v. Randall*, 100 Ind. 293; 5 Am. Rep. 798; *Louisville etc. R. Co. v. Frawley*, 110 Ind. 18; 28 Am. & Eng. R. Cas. 308; *Buckley v. Gutta Percha Mfg. Co.*, 41 Hun (N. Y.) 450; *Baxter v. Robert*, 44 Cal. 187; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515.

An untruthful statement made by a

servant, when he enters upon employment, that he is accustomed to such work, relieves the master from the duty of explaining the dangers ordinarily incident, but does qualify his obligation to furnish reasonably safe appliances. *Steen v. St. Paul etc. R. Co.*, 37 Minn. 310.

A fair opportunity to acquire the knowledge and skill requisite to the performance of his duties, as they are ordinarily acquired by men in the same service must be accorded a person hired to fill a certain position. *Moore v. Chicago etc. R. Co.*, 65 Iowa 505; 22 Am. & Eng. R. Cas. 396.

4. *Rice v. King Phillip Mills*, 144 Mass. 229; *Covey v. Hannibal etc. R. Co.*, 86 Mo. 635; 28 Am. & Eng. R. Cas. 382; *Stone v. Mfg. Co.*, 4 Oreg. 52; *Michigan etc. R. Co. v. Dolan*, 32 Mich. 510; *Stark v. Patterson*, 5 Phila. (Pa.) 225; *Williams v. Clough*, 3 H. & N. 258; *Potts v. Plunkett, Jr.* Com. Law (Q. B.) 290; *McEwing v. Waterford etc. Railway Co.*, 8 Ir. Com. Law (Q. B.) 389.

Broken Track—Due Warning.—A railway company whose track is broken without any fault of its own is under no obligation to its employees to repair it within any specified time, if it duly warn them so that they shall not be injured in consequence thereof. *Henry v. Lake Shore etc. R. Co.*, 49 Mich. 495; 8 Am. & Eng. R. Cas. 110. See *Hill v. Gust*, 55 Ind. 45. Compare

nary risks are or may be encountered, if known to the master, or should be known by him.¹

(b) *Duty to Compel Obedience.*—It is not sufficient for a master to give proper instructions to his servant to avoid liability; he must also see that they are obeyed.²

(c) *Ordinary Processes.*—But an employer is not bound to warn an experienced workman that certain appliances and processes with which he is entirely familiar are dangerous.³

O'Connor v. Adams, 120 Mass. 427; *Anderson v. Morrison*, 22 Minn. 274.

1. *Smith v. Car Works*, 60 Mich. 505.

Overhead Bridge.—Thus if a railroad company maintains a bridge over its track at a height insufficient to permit a brakeman on a train to be carried under it without stooping, the company, if it fails to warn him, is liable for an injury sustained by his head coming in contact with the bridge. *Baltimore etc. R. Co. v. Rowan*, 104 Ind. 88; 23 Am. & Eng. R. Cas. 390.

Driving Under Low Hung Sign.—If a servant, who is engaged in backing while standing at his horses' heads, a loaded van, is directed by his master to mount the van and drive it under a gateway over which there is a sign, and then to back down, the master being familiar with the practice of so driving vans, and the servant, though an experienced teamster, never having driven under the gateway before, and their relative positions are such that the master has better means of observation than the servant, whose attention is devoted chiefly to the management of his horses, and of seasonably appreciating the dangers attending the act, and the servant, in following the directions of the master, is injured by coming in contact with the sign, the servant may maintain an action against the master for such injury. *Haley v. Case*, 142 Mass. 316.

Lime Kiln.—The proprietor of a lime kiln was in the habit of having the stone removed from the base of the kiln, as it was burned, and of pushing the mass, wedged into the crater above, down into the emptied space. When the mass gave way those who were upon it and crowding it down would step back to the margin of the crater to escape going down with it. The proprietor had an inexperienced laborer helping him at this work when an unusually large quantity of burned stone had been removed, and he did not warn him of the danger. When the mass

dropped the workman fell with it and was burned to death. *Held*, that his employer was liable for causing his death by negligence. *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28.

Starting of Wash Wheels in Tannery Vats Without Notice.—Deceased was employed to remove hides from vats in a tannery and put them in wash wheels. The space between the vats and the wash wheels was about four feet wide, and the wheels in the vats were eighteen inches from the sides. Deceased was accustomed to start one of the wheels in the morning, and after it had run fifteen minutes stop it and take out the hides, when the wheel in the other vat would be started by an employee from the other side and run fifteen minutes out of each hour. Deceased knew the time when the wheels would be started. *Held*, that it was not negligence to start the wheel in the vat at which the deceased was not working without notice to him. *Ball v. Detroit Leather Co.*, 73 Mich. 158.

2. *Johnson v. Central Vermont R. Co.*, 56 Vt. 707; 19 Am. & Eng. R. Cas. 169.

3. *Chicago etc. R. Co. v. Clark*, 108 Ill. 113; 15 Am. & Eng. R. Cas. 261.

Danger of Gas in Fire Room.—It was recently held in a Georgia case that it was not criminal negligence in a corporation not to give warning to the master machinist employed in their establishment that there was danger of fire in the gas room, or that there was danger that the wall or walls would fall in case fire occurred, it not being alleged that he was ignorant of the danger, or of the causes which produced it. *Allen v. Augusta Factory (Ga.)*, 8 So. Rep. 68.

Tendency of Boards to Spring Back.—The tendency of a board when warped to spring back during the operation of being sawed by a circular saw is not so obvious that an inexperienced workman must be held necessarily to take

(d) *Danger from Extraneous Causes.*—If the employer has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the employer to be, he is bound to inform him of the fact; if he fails to do so, he is liable for such damages as the employee sustains by reason of such causes.¹

(e) *Patent Dangers.*—It is the master's duty to instruct even where the danger or hazard is patent, if through youth, inexperience, or other cause, the servant is incompetent to fully understand the nature and extent of the hazard.²

17. Minor Servants.—(a) *Work More Dangerous than Agreed Upon.*—The fact that a master sets a minor servant at a more dangerous class of work than that for which such servant was originally employed, does not make him liable for injuries sustained by the minor in doing such work, unless, under all the cir-

cognizance of it without being warned. *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294.

Signal Boards in Railway Station.—But signal boards warning persons to keep off tracks at their peril, erected in station used jointly by two companies, are not to be regarded as applying to the servants of either company. *Illinois Cent. R. Co. v. Frelka*, 110 Ill. 498; 18 Am. & Eng. R. Cas. 7.

Danger from Exposed Gearings.—An employer is not bound to give notice to an employee who is an experienced machinist, that the uncovered and plainly exposed gearing of machinery with which he is working is dangerous, nor can the employee recover for injury caused by coming in contact with the gearing because it might have been made less dangerous by being covered. *Foley v. Pettie Machine Works* (Mass. 1889), 21 N. E. Rep. 304. In this connection see *Berger v. St. Paul etc. R. Co.*, 39 Minn. 78; *Hull v. Hall*, 78 Me. 114; *Robertson v. Cornelson* (S. Car.), 34 Fed. Rep. 716; *Balle v. Detroit Leather Co.*, 73 Mich. 158; *Judkins v. Maine etc. R. Co.*, 80 Me. 417; *Norfolk etc. R. Co. v. Jackson's Admr.* (Va. 1888), 8 S. E. Rep. 370; *Crowley v. Pacific Mills*, 148 Mass. 228; *Stephen-son v. Duncan*, 73 Wis. 404; *Eicheler v. St. Paul Furniture Co.*, 40 Minn. 263.

Open Holes in Sugar Bins.—See *Bohn v. Havemeyer*, 114 N. Y. 296. 402; *affirming* 46 Hun (N. Y.) 557.

1. This principle is not affected by the fact that the danger known to the employer arises from the felonious or tortious designs of third persons acting in hostility to him. The employee is

entitled to all the information the employer may possess with regard to the danger of the employment arising from extraneous causes, to enable him to determine for himself whether, at the proffered compensation, he will assume the risk and incur the hazard. *Baxter v. Roberts*, 44 Cal. 187.

2. *Grizzle v. Frost*, 3 F. & F. 622; *U. P. R. Co. v. Fort*, 17 Wall. (U. S.) 554; *Coombs v. Cordage Co.*, 102 Mass. 572. *Compare Jones v. Phillips*, 39 Ark. 17.

Inexperienced Boy of Seventeen.—An inexperienced boy of seventeen employed to work upon visibly dangerous machinery is entitled to warning of the danger from his employer. *Dowling v. Allen*, 74 Mo. 13.

Boy of Twelve—Danger from Cogs.—Plaintiff, a boy of twelve years, had worked at defendant's machine several days before he was injured. While putting a cylinder in place, which was part of his duty, his foot slipped, and, involuntarily throwing out his hand to prevent himself from falling, he thrust it into a set of cog wheels. It was not necessary for plaintiff, in discharge of his duty, to put his hands within nine inches of the cogs. *Held*, that the accident being the result of a cause over which the defendant had no control, defendant was not rendered liable by failure to instruct plaintiff as to the danger of cog wheels, it being obvious. *Buckley v. Gutta Percha etc. Mfg. Co.*, 113 N. Y. 540.

Boy of Fifteen—Falling Stones in Mine.—If a boy of fifteen is sent into a mine without warning of the danger from falling stones and he is injured by one,

cumstances, the setting him at such work was a negligent act on the part of such master.¹ Yet the master will be much more strictly held to the exercise of an intelligent discretion in this regard toward such persons than toward adults.²

(b) *Employment of Minors—Recovery by Parent.*—It is an act of negligence on the part of a railroad company to take into its employment as a brakeman a minor of such tender years as not to know the risks of the service, if the agent of the company making the contract knows that he is a minor, and that the contract is made without the consent of the parents.³ Where, therefore, a minor so employed contrary to the wish of the parent is injured in the course of his employment, the parent may recover damages.⁴ But in order that a father may recover from a railroad company, for damages resulting to him through loss of services owing to injuries sustained by his minor son while in its employ, it is necessary that he should aver and prove that the defendant knew of his son's

the employer is liable. *Jones v. Florence Mining Co.*, 66 Wis. 268; 57 Am. Rep. 269; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298.

Girl, as to Danger from Clay Mill.—Plaintiff was a girl employed by defendant in his clay mill, who was wholly inexperienced in the business, having been but nine days in the service, and unaware of the risk from the machinery. The superintendent put her to work to remove some clay while the rollers were in motion and she was injured. It was held that she could recover. *O'Byrne v. Burn*, 16 Cas. in Ct. of Sess. (2nd series) 1025. Also see *Bartonshill v. McGuire*, 3 Macq. 300; *Indermaur v. Dawes*, L. R., 2 C. P. 311.

Risk Attending Use of Laundry Machine.—A girl of fourteen, employed to feed collars to an ironing machine, was not instructed as to the obvious danger. After six weeks she caught her finger in a button hole and her hand was drawn between the rollers. *Held*, that her employer was not liable. *Hickey v. Taaffe*, 105 N. Y. 26.

Boy of Nineteen—Use of Split Saw.—Where plaintiff in an action for personal injuries done by defendant's split saw was nineteen years of age, had been in defendant's employ three years, was "put on all kinds of machinery to run," had been employed in the room where the split saw was located, and had worked at the split saw several days before he was injured in operating it, it was held that he could not hold the defendant liable on the ground that he was inexperienced and defendant

should have warned him of the danger. *Prentiss v. Kent Fur. Mfg. Co.*, 63 Mich. 478. See likewise *Lewis v. McAffe*, 32 Ga. 405; *Chicago etc. R. Co. v. Harney*, 28 Ind. 28; *Hill v. Gust*, 55 Ind. 45; *St. Louis etc. R. Co. v. Valerius*, 56 Ind. 511; *Allison v. Western etc. R. Co.*, 64 N. Car. 382; *U. P. R. Co. v. Fort*, 17 Wall. 553; *Memphis etc. R. Co. v. Jones*, 2 Head (Tenn.) 517; *Fisk v. Central Pac. R. Co.*, 72 Cal. 38.

1. *Anderson v. Morrison*, 22 Minn. 274.

2. *Lewis v. McAffe*, 32 Ga. 405; *Chicago etc. R. Co. v. Harney*, 28 Ind. 28; *Hill v. Gust*, 55 Ind. 45; *Allison v. Western etc. R. Co.*, 64 N. Car. 382; *U. P. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Memphis etc. R. Co. v. Jones*, 2 Head (Tenn.) 517.

3. *Goff v. Norfolk etc. R. Co.* (Va.), 36 Fed. Rep. 299.

4. *Grand Rapids etc. R. Co. v. Showers*, 71 Ind. 451; 2 Am. & Eng. R. Cas. 9; *Hamilton v. Galveston etc. R. Co.*, 54 Tex. 566; 4 Am. & Eng. R. Cas. 528.

Youth Twenty Years Old.—In a statutory action to recover for death caused by negligence, when the next of kin, for whose benefit the action is prosecuted, were so related to the deceased as to be entitled to his services, the law presumes some loss; and where it appeared that the deceased was a man engaged in active employment, presumably lucrative, and that he was nine months less than twenty-one years of age, it was held that a recovery might be had in behalf of the father of more than

minority when it employed him.¹ And in an action brought by a parent to recover damages for an injury that resulted in the death of his son, it is incumbent upon him to show such facts as would entitle the son to recover had he been simply injured but not killed. But to recover, the parent is not required to show that deceased was a minor, whose age could and should have been known to the company.²

The mere fact that a brakeman injured was a minor will not entitle him to recover for such injury if he was physically able to perform the duties he was employed to do, and, in the absence of evidence to the contrary, it will be presumed that he was of ordinary intelligence.³ And the fact that a minor was employed as a brakeman by a railway company without the consent of his parent will not of itself authorize a recovery for damages resulting from injuries inflicted in the course of his employment.⁴

The mere fact that a railway company employed a minor with his parent's consent in one capacity and then changes his duties is not negligence.⁵

(c) *Where Minor Is Instructed.*—A young and inexperienced brakeman has no greater right of action for an injury against the company employing him than an older and more experienced hand would have under the same circumstances, if his duties have been fully explained to him.⁶ Nor has any minor employee under like circumstances.⁷

merely nominal damages. *Robel v. C. etc. R. Co.*, 35 Minn. 84.

1. *Gulf etc. R. Co. v. Redeker*, 67 Tex. 181.

2. *Texas etc. R. Co. v. Crowder*, 61 Tex. 262; 63 Tex. 505; *Texas etc. R. Co. v. Carlton*, 60 Tex. 400; 15 Am. & Eng. R. Cas. 350.

3. *Youll v. Sioux City etc. R. Co.*, 66 Iowa 346; 21 Am. & Eng. R. Cas. 589.

4. *Texas etc. R. Co. v. Crowder*, 61 Tex. 262. And see *Texas etc. R. Co. v. Carlton*, 60 Tex. 400; 15 Am. & Eng. R. Cas. 350.

Testimony of Father as to Boy's Appearance When Employed.—In an action by a minor against a railroad company for an injury received through the alleged negligence of the company, while in its employ, the plaintiff himself having testified before the jury, it is not error to permit the boy's father to testify as to his relative appearance as to age at the time of the injury and at the time of the trial, and that he did not appear older at the time he entered the company's employment than he really was. *Louisville etc. R. Co. v. Frawley*, 110 Ind. 18; 28 Am. & Eng. R. Cas. 308.

Danger in Transferring Lumber.—Where plaintiff, a minor, hired by his father to defendant to transfer lumber

from one car to another, which work both had done for defendant before, and which was not more than ordinarily hazardous, was injured by the lumber slipping and falling, defendant was held not to be liable by reason of its failure to specially warn plaintiff of danger before putting him to work. *East & West R. Co. v. Sims*, 80 Ga. 807.

Declarations as to Skill by Minor Previous to Accident.—In an action by a widowed mother against a railroad company for damages for the death of her minor son, employed by the defendant without her consent, wherein the complaint alleged that the deceased came to his death by reason of injuries received by him while performing certain dangerous work at which he had been put by the defendant, and in which he was unskilled, declarations by the deceased, made prior to the accident, that he was skilled in such labor, are inadmissible in evidence against the plaintiff. *Pennsylvania Co. v. Long*, 94 Ind. 250.

5. *Texas etc. R. Co. v. Carlton*, 60 Tex. 397; 15 Am. & Eng. R. Cas. 350.

6. *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466.

7. *McGinnis v. Canada S. Bridge Co.*, 49 Mich. 466; *Sullivan v. India*

(d) *Permanent Injury*.—And furthermore, a minor being damaged in his person may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority.¹

(e) *Failure to Instruct—Negligence of Co-employee*.—And furthermore, an employer failing to make appropriate explanation to a minor servant is liable for an injury resulting from the danger known to the employer and unknown to the employee, although the immediate cause of the injury was the negligence of co-employees.²

But in one State at least it has been held that generally it is not the duty of the employer to instruct a servant in the rules applicable to the service unless information be asked, or the employee is known to be ignorant and inexperienced regarding dangers peculiar to the service.³

Where a master owes to his servant the duty of notifying him of a special peril to be encountered in the work to be done, such duty is not discharged by delegating the performance of it to a third person.⁴

18. Safe Place to Work.—The proprietors of manufacturing establishments are charged with the duty of providing their employees with a suitable place in which work may be performed with a reasonable degree of safety to them, and without exposure to dangers that are not within the obvious scope of the employ-

Mfg. Co., 113 Mass. 396; Gilbert v. Guild, 144 Mass. 60.

Where Minor Fails to Understand.—

Where a minor servant, without negligence, fails to understand instructions and is injured, the master is liable. Smith v. Car Works, 60 Mich. 504; Ryan v. Tarbox, 135 Mass. 207.

Employee of Eighteen Presumably Able to Understand.—An employee of eighteen years is ordinarily old enough to be capable of understanding the uses and dangers of a given employment. Gordon v. Reynolds Mfg. Co., 54 Hun (N. Y.) 278.

1. The Central R. Co. v. Brinsom, 64 Ga. 475; 8 Am. & Eng. R. Cas. 343.

2. Jones v. Florence Mining Co., 66 Wis. 268; 57 Am. Rep. 269. And see Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298.

The Complaint in Such Cases.—A complaint for damages for personal injuries which proceeds upon the theory that the plaintiff, an inexperienced minor, was put to work with machinery which his employers knew to be dangerous, but of which danger they did not inform him, is sufficiently explicit as to the character of the machinery if it avers that there was danger in op-

erating it, and that it was dangerous in the particular which caused the injury. Donley v. Scanlon, 116 Ind. 8.

3. Missouri Pac. R. Co. v. Watts, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277. Nor against an obvious danger. Costello v. Judson, 21 Hun (N. Y.) 396; Pittsburgh etc. R. Co. v. Adams, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408.

4. Wheeler v. Wason Mfg. Co., 135 Mass. 294; McKinney on Fellow Servants, §§ 39, 40.

Incompetency of Instructor.—An employer who furnishes an instructor to teach an ignorant servant as to the duties he is expected to perform is answerable for any injury to him arising from the incompetency or negligence of the instructor. In such a case the instructor does not stand to the party injured in the relation of a co-servant, but as a representative of the master. Brönnan v. Jordan, 13 Daly (N. Y.) 208; McKinney on Fellow Servants, §§ 39, 40.

If a flagman, aware of the approach of a backing engine, gives no warning, his negligence is imputable to the railroad company employing him. Finklestein v. New York etc. R. Co., 41 Hun (N. Y.) 34.

ment in the business as usually carried on.¹ Ordinary care in this regard is all that is required of the master; he does not stand in the relation of an insurer to the servant against injury, and can be held chargeable only when negligence can properly be imputed to him.²

But the obligation of a master to provide reasonably safe places and structures for his servants to work upon, does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants.³

19. Particular Customs.—A custom with reference to the adop-

1. *Smith v. Peninsular Car Works*, 60 Mich. 501; 12 Am. & Eng. Corp. Cas. 269; *Consolidated Ice Machine Co. v. Kiefer*, 26 Ill. App. 466; *Ferren v. Old Colony R. Co.*, 143 Mass. 197; *Paterson v. Wallace*, 1 McQ. 748; *Brydon v. Stewart*, 2 McQ. 30.

Construction of the Building in Use.—But although a building was negligently erected, yet if no negligence is imputable to the master, either in directing how the building should be constructed or in having knowingly committed its construction to incompetent persons, he cannot be held chargeable for injuries resulting to his servants from such defects. *Brown v. Accrington Spinning Co.*, 3 H. & C. 511; *Potts v. Port Carlisle Dock & R. Co.*, 8 W. R. 524; *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101.

Dangerous Use of Unsafe Building.—Yet if the master use an unsafe building in a dangerous manner, whereby an injury occurs, he will be liable therefor. *Caledonian R. Co. v. Greenock Sacking Co.*, 2 Ct. of Sess. (Sc.) 671 (4th series).

2. *Tinney v. Boston etc. R. Co.*, 62 Barb. (N. Y.) 218; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Columbus etc. R. Co. v. Arnold*, 31 Ind. 174; *Columbus etc. R. Co. v. Froesch*, 68 Ill. 545; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233.

3. *Armour v. Hahn*, 111 U. S. 313.

Falling Brick.—Upon the trial of this action, brought by the plaintiff to recover damages for the death of her intestate, which was alleged to have been occasioned by the negligence of the defendant, it appeared that the intestate, while working in the cellar of a build-

ing being erected by the defendant in the city of New York, in preparing mortar to be used by the bricklayers, was required to go to a tub of water in that portion of the cellar under the space left for the construction of the stairways. While near the tub deceased was struck by something, but by what was not shown by any direct evidence, although the *post mortem* examination showed that his skull had been fractured by a blow upon the top of his head, and the facts proved were such as to warrant the jury in concluding that it was by some hard substance falling upon him from the top of the building. One witness testified that he heard a noise, which he described as a kind of thud; that he looked up and saw deceased stagger over towards the wall, and that he, the witness, caught the deceased just as he struck the tub. Evidence was also given tending to show that broken portions of brick did fall from the upper part of the building where the bricklayers were at work, and that there was no safe or secure covering to protect persons who were required to resort to the tub in preparing mortar, while on the part of the defence evidence was given tending to prove that a complete and secure covering was placed and maintained in this part of the building. *Held*, that the evidence sustained a verdict against defendant. *Ford v. Lyons*, 41 Hun (N. Y.) 512. And see generally *Anderson v. Bennett*, 16 Oreg. 515; *Baldwin v. St. Paul etc. R. Co.*, 72 Iowa 45; *Missouri etc. R. Co. v. McElyea*, 71 Tex. 386; *Southwest Va. Imp. Co. v. Smith* (Va. 1888), 7 S. E. Rep. 365; *Dunlap v. Richmond etc. R. Co.*, 81 Ga. 136; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; 47 Am. Rep. 650; *Coombs v. New Bed-*

tion of certain safeguards in a given business must be so general that it is presumed that the defendant had knowledge of it, in order to make him liable for neglecting to provide the same.¹

20. Proximate and Remote Cause.—In such actions the injuries must be the actual, natural and proximate result of the wrong committed, the legitimate sequence of the thing amiss.² And what is the proximate cause of an injury is usually a question for the jury.³

21. Burden of Proof.—The servant who seeks to recover for injuries claimed to have been received through negligence for which his employer is liable, must establish that negligence by proof, and that he himself was not in fault but exercised due care. Under this rule the plaintiff is required to show the facts surrounding and leading to the injury; and if from them a jury can reasonably infer negligence in the employer contributing to the injury, and the exercise of due care upon the servant's part, then he is entitled to recover.⁴

22. Questions for Court and Jury.—(See title NEGLIGENCE).—In cases of doubt, where the facts are disputed, or where different minds may reasonably draw different conclusions from the same undisputed facts, the question of negligence *vel non* is a question of fact for the determination of the jury.⁵

ford Cordage Co., 102 Mass. 572; Snow v. Housatonic R. Co., 8 Allen (Mass.) 445; Sullivan v. India Mfg. Co., 113 Mass. 397; Holden v. Fitchburg R. Co., 129 Mass. 268; 2 Am. & Eng. R. Cas. 94; Smith v. Car Works, 60 Mich. 501; Daley v. Schaaf, 28 Hun (N. Y.) 314; Cook v. St. Paul etc. R. Co., 34 Hun (N. Y.) 45.

1. Couch v. Watson Coal Co., 5 Cent. L. J. 108.

Covering Cages in Coal Mines.—It was furthermore held in the above case an expert being admitted to testify that it was customary to use covers on the cages in one coal mine in another State, *held*, first, that the usage in one coal mine was not sufficient to establish a general custom; and second, that to make such a custom binding upon the defendant, it must be shown in mines similarly situate in its locality. Couch v. Watson Coal Co., 5 Cent. L. J. 108.

Storage of Grain.—Where a corporation believed, and was justified in believing, that a certain quantity of grain could be safely stored on a floor of their building, and the floor gave way, whereby an employee was injured, it was held that he could not recover. Dillon v. Sixth Ave. R. Co., 48 N. Y. Super. Ct. 283.

2. Clifford v. Denver etc. R. Co., 9 Colo. 333.

3. Eames v. Texas etc. R. Co., 63 Tex. 660; 22 Am. & Eng. R. Cas. 540.

A servant at work on a track jumped to get out of the way of car propelled at moderate speed. He slipped and fell on the ice. *Held*, that the rate of speed was the proximate cause of the accident. Crowley v. Burlington etc. R. Co., 65 Iowa 658; 18 Am. & Eng. R. Cas. 56.

Failure to Notify Servant of Obstructions.—If a railroad company permits unnecessary obstructions to remain near its track, it is not liable for injuries arising therefrom where due care was not exercised by the employee, and a failure to notify him of their existence was not the proximate cause of the injury. Gould v. Chicago etc. R. Co., 66 Iowa 590; 22 Am. & Eng. R. Cas. 289.

Defective Engine Stop—Unfamiliar Engineer.—Texas etc. R. Co. v. Wiesner, 66 Tex. 674.

4. Texas etc. R. Co. v. Crowder, 63 Tex. 502; Corcoran v. Boston etc. R. Co., 133 Mass. 507; 12 Am. & Eng. R. Cas. 226; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Langhoff v. Milwaukee etc. R. Co., 19 Wis. 515; Meloy v. Chicago etc. R. Co. (Iowa), 33 Am. & Eng. R. Cas. 358; Norris v. Union Pacific R. Co., 3 Colo. L. J. 25.

5. Louisville etc. R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514;

It is frequently stated that when the facts are undisputed or conclusively proved the question of negligence is to be decided by the court; but a better opinion, however, would seem to be, that in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable.¹

23. Knowledge of Master.—It must be shown that the master knew, or should have known, of the condition which caused the injury.² But it is well settled that although a master might have known by the use of ordinary care and diligence that a tool furnished his servant for use was defective, is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using.³

Colorado Cent. Co. *v.* Holmes, 5 Colo. 197; Kansas etc. Co. *v.* Twombly, 3 Colo. 125; Pleasants *v.* Railroad Co., 95 N. Car. 195; Murphy *v.* Crosson, 98 Pa. St. 495; Sioux City etc. R. Co. *v.* Stout, 17 Wall. (U. S.) 657; Fernandes *v.* S. C. R. Co. (Cal.), 4 Cent. L. J. 82; Detroit etc. R. Co. *v.* Van Steinburg, 17 Mich. 99; Case *v.* Chicago etc. R. Co., 69 Iowa 449. *Compare* Case *v.* Chicago etc. R. Co., 64 Iowa 762; 19 Am. & Eng. R. Cas. 142; Columbus etc. R. Co. *v.* Troesch, 68 Ill. 545; Fraker *v.* St. Paul etc. R. Co., 32 Minn. 54; 15 Am. & Eng. R. Cas. 256; St. Louis Iron Mountain etc. R. Co. *v.* Harper, 44 Ark. 524; Smoot *v.* Mobile etc. R. Co., 67 Ala. 13; Louisville etc. R. Co. *v.* Orr, 84 Ind. 50; 8 Am. & Eng. R. Cas. 94; Nolan *v.* Schicke, 3 Mo. App. 300; Painton *v.* North Cent. R. Co., 83 N. Y. 7; 5 Am. & Eng. R. Cas. 454; East Tenn. etc. R. Co. *v.* Stewart, 13 Lea (Tenn.) 432; 21 Am. & Eng. R. Cas. 614; Johnson *v.* Armour, 18 Fed. Rep. 490; State *v.* Railroad, 52 N. H. 529; Goynor *v.* Old Colony etc. R. Co., 100 Mass. 208; McGrath *v.* Hudson R. R. Co., 32 Barb. (N. Y.) 144; Bridges *v.* North London R. Co., L. R., 7 H. L. 213; Beers *v.* Housatonic R. Co., 19 Conn. 566; Vinton *v.* Schwab, 32 Vt. 612; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Wyatt *v.* Citizens R. Co., 55 Mo. 485; Norton *v.* Ittner, 56 Mo. 351; Stoddard *v.* St. Louis etc. R. Co., 65 Mo. 514.

Construction and Inspection of Bridge.—Where an employee of a railway company was injured by the falling of a bridge, the details of the construction and inspection of the same being before the jury, it was held that it was for it to decide whether reasonable care had

been used in the construction and inspection of the same. Bowen *v.* Chicago etc. R. Co., 95 Mo. 268.

Blocking Rail in Certain Manner.—And where, owing to a block in the space between the main and the guard rail on the track of defendant's road being worn, and a portion split off, caused by the operation of the road, plaintiffs' intestate, a brakeman, caught his foot in said space and was killed, the court submitted to the jury the question whether or not the block was so placed as to be dangerous to employees of the company. Griffith *v.* Burlington etc. R. Co., 72 Iowa 645; 31 Am. & Eng. R. Cas. 227.

Negligence of electric light company in turning on current. Question of negligence for jury. Colorado Electric Co. *v.* Lubbers, 11 Colo. 505.

1. See NEGLIGENCE.

2. Smith *v.* St. Louis etc. R. Co., 69 Mo. 32; Porter *v.* Hannibal etc. R. Co., 71 Mo. 63; State *v.* Hannibal etc. R. Co., 82 Mo. 430; Hayden *v.* Smithfield Mfg. Co., 29 Conn. 548; Atchinson etc. R. Co. *v.* Wagner, 23 Kan. 660; Morris *v.* Gleason, 1 Ill. App. 570; Lopez *v.* Central Ariz. Mining Co., 1 Ariz. 464; Corcoran *v.* Boston etc. R. Co., 133 Mass. 507; 12 Am. & Eng. R. Cas. 226. *Compare* Hoffman *v.* Dickinson, 31 W. Va. 142.

3. Little Rock etc. R. Co. *v.* Duffy, 35 Ark. 602; 4 Am. & Eng. R. Cas. 637. And see Currant *v.* Missouri Pac. etc. R. Co., 86 Mo. 62; Pantzar *v.* Tilly Foster Mining Co., 99 N. Y. 368; Hull *v.* Hall, 78 Me. 114; Texas Pac. R. Co. *v.* McAtee, 61 Tex. 695; Cook *v.* St. Paul etc. R. Co., 34 Minn. 45; Regan *v.* St. Louis etc. R. Co., 93 Mo. 348; Schmidt *v.* Block, 76 Ga. 823; Philadelphia etc. R. Co. *v.* Hughes, 119

And the rule holds good where the employer is a municipality.¹

Evidence of notoriety of the defect in the particular appliance by which the injury was caused is proper in establishing notice or knowledge on the part of the master.²

Of course, a servant cannot recover for an injury arising from his own unskilfulness, of which his master was not informed.³

24. Competency and Qualification of Servant.—Ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation involves an assertion by the person seeking employment that he is competent to discharge all its ordinary duties; and it is one of the general, implied conditions of every contract for service with an adult person that the servant is competent to discharge the duties for which he is employed.⁴

Pa. St. 301; 33 Am. & Eng. R. Cas. 349.

An allegation in a petition that the injury was caused by the negligence of the master in failing to provide safe appliances, and stating particulars of the defect, is equivalent to a specific allegation that the master knew or might have known of the defect. *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; 25 Am. & Eng. R. Cas. 440.

Plaintiff was standing upon a platform engaged in taking down a steam pipe. A section of the pipe which had been but partially screwed into the cylinder suddenly started while plaintiff was attempting to unscrew it, and separated from the cylinder, causing him to fall from the platform. The pipe had answered the purposes for which it was intended, and there was no evidence that the defendants had failed to employ competent workmen to put it in, or that they knew or ought to have known of its condition. *Held*, that the defendants were not liable for the injury to the plaintiff. *Behm v. Armour*, 58 Wis. 1, distinguished; *Hobbs v. Staner*, 62 Wis. 108.

1. *Turner v. Indianapolis*, 96 Ind. 51; 7 Am. & Eng. Corp. Cas. 94. And see *Chicago v. Robbins*, 2 Blackf. (Ind.) 418; *Griffin v. New York*, 9 N. Y. 496; *Howe v. Lowell*, 101 Mass. 99; *Manchester v. Hartford*, 30 Conn. 118; *Smith v. New York*, 66 N. Y. 295; *Furnell v. St. Paul*, 20 Minn. 117; *Nichols v. Alberis*, 66 Mo. 413; *Hubbard v. Concord*, 35 N. H. 52; *Ward v. Jefferson*, 24 Wis. 342; *Dantzeiser v. Cook*, 40 Ind. 65; *Weightman v. Washington*, 1 Blackf. (Ind.) 39; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687; *Castor v. Uxbridge*, 39 App. Cas. Q. B. 113; *Van Pelt v. Davenport*, 42

Iowa 308; *Bancher v. New Haven*, 40 Conn. 456; *Chicago v. McCarthy*, 75 Ill. 602; *Atlanta v. Perdue*, 53 Ga. 607; *Colley v. Westbrook*, 57 Me. 181; *Rice v. Des Moines*, 40 Iowa 638; *Market v. St. Louis*, 56 Mo. 89; *Allbrittin v. Huntsville*, 60 Ala. 486; *Howe v. Plainfield*, 41 N. H. 485; *Perkins v. Fayette*, 68 Mo. 152; *Farrell v. Oldtown*, 69 Me. 72; *Kenady v. Lawrence*, 128 Mass. 318; *Lafayette v. Larson*, 73 Ind. 367; *Joliet v. Walker*, 7 Ill. App. 267; *Shell v. Appleton*, 49 Wis. 125; *Atlanta v. Champe*, 66 Ga. 659; *Huntington v. Breen*, 77 Ind. 29; *Smith v. Bangor*, 72 Me. 249; *Salina v. Trasper*, 27 Kan. 544; *Logansport v. Justice*, 74 Ind. 348; *Chatsworth v. Ward*, 10 Ill. App. 75; *Benware v. Pine Valley*, 53 Wis. 527; *Centralia v. Krouse*, 64 Ill. 19; *Rappa v. Moore*, 68 Pa. St. 404; *Cleveland v. St. Paul*, 18 Minn. 255; *Doulon v. Clinton*, 33 Iowa 397; *Dewey v. Detroit*, 15 Mich. 307; *Estelle v. Lake Crystal*, 27 Minn. 243; *Sterling v. Thomas*, 67 Ill. 264; *Durant v. Palmer*, 29 N. J. L. 544; *Osgood v. Hamilton*, 29 Kan. 1; *Evansville v. Wilter*, 86 Ind. 414; *Washington v. Small*, 86 Ind. 462; *Medina v. Perkins*, 48 Mich. 67; *Chicago v. Stearns*, 105 Ill. 554; 2 Am. & Eng. Corp. Cas. 594; *Montgomery v. Wright*, 72 Ala. 411; 5 Am. & Eng. Corp. Cas. 642; *Bailey v. Spring Lake*, 61 Wis. 227; 5 Am. & Eng. Corp. Cas. 651.

2. *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; 25 Am. & Eng. R. Cas. 440.

3. *Whittaker v. Coombs*, 14 Ill. App. 498.

4. *Union Pac. R. Co. v. Estes*, 37 Kan. 715; *Squire v. Wright*, 1 Mo. App. 172; *Alexander v. Louisville etc. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

As to whether or not a servant was qualified for a certain position is a question to be determined by the jury from all the facts and circumstances of the case.¹

25. Recovery by Trespasser.—A trespasser cannot ordinarily recover for injuries suffered through the negligence of another.² Unless an injury is wilfully inflicted upon him.³

26. Obedience to Orders.⁴—A servant is bound to obey all the master's lawful and reasonable commands, even though such commands may, under the circumstances, seem harsh and severe.⁵

27. Rules and Regulations.—(a) *Duty to Promulgate.*—It is the duty of an employer to make and promulgate rules, which, if faithfully observed, will give reasonable protection to his

Undertaking of Integrity and Honesty.—Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. *Page v. Wells*, 37 Mich. 415.

Thus a locomotive engineer is not bound, at all hazards, to comprehend fully all the results of changes in the running time of trains made by a new time table, and is not necessarily guilty of negligence in running his train contrary to the rules of such time table on the first trip after it takes effect. *Nelson v. Chicago etc. R. Co.*, 60 Wis. 320; 22 Am. & Eng. R. Cas. 391.

1. *Moore v. Chicago etc. R. Co.*, 65 Iowa 505; 22 Am. & Eng. R. Cas. 396.

Confessed Want of Skill on Part of Conductor.—A conductor on a railroad train cannot recover against the company for an injury resulting from his own confessed want of experience and skill. The fact that the company employed him with knowledge of his want of experience will not enable him to recover. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 590; 25 Am. & Eng. R. Cas. 458.

2. Unnecessarily Using Dark Passage.—And a servant who gropes along a dark passage on his master's premises where he has no business, and opens a door and falls down an elevator which has a bar in front of it, has no cause of action against his master. *Pfeiffer v. Ringler*, 12 Daly (N. Y.) 437.

Or through a scuttle while moving about for curiosity. *Severy v. Nickerson*, 120 Mass. 306. Also see *Indemaur v. Dawes*, L. R., 1 C. P. 274.

3. *Collyer v. Pennsylvania R. Co.*, 49 N. J. L. 59; *Jones v. Roach*, 41 N. Y. Super. Ct. 248; *Span v. Ely*, 15 N.

Y. 255. Compare *Kielly v. Belcher etc. Mining Co.*, 3 Sawy. (U. S.) 500. And see *St. Louis etc. Iron Co. v. Burke*, 12 Ill. App. 369; *Falen v. Chicago etc. R. Co.*, 48 Mich. 622; 6 Am. & Eng. R. Cas. 161; *Baker v. Hughes*, 2 Colo. 79; *Chicago etc. R. Co. v. Donahue*, 75 Ill. 106; *Hughes v. Winona etc. R. Co.*, 27 Minn. 137; *Baker v. Hughes*, 2 Colo. 79; *Wells v. Coe*, 9 Colo. 159; *Martensen v. Chicago etc. R. Co.*, 60 Iowa 705; 11 Am. & Eng. R. Cas. 233; *Houston etc. R. Co. v. Conrad*, 62 Tex. 627; *Bunt v. Sierra Buttes Gold Mining Co.*, 24 Fed. Rep. 847; *English v. Chicago etc. R. Co.*, 24 Fed. Rep. 906; *Cook v. Bell*, 29 Sec. Ser. (Scotch Rep.) 427; *O'Neill v. Wilson*, 20 Sec. Ser. (Scotch Rep.) 137.

4. See *post*, 27, RULES AND REGULATIONS.

5. *Saunders v. Anderson*, 2 Hill (N. Y.) 486; *Mitchell v. Toale*, 25 S. Car. 238; *Union Pacific R. Co. v. Fray*, 31 Kan. 739.

Obedience Likely to Result in Injury.—But a servant is not bound to risk his life or limb in obedience to his master's orders, and if he do so, and is injured, the master is not liable. *Stephens v. R. Co.*, 86 Mo. 221; *R. Co. v. Lave*, 10 Ind. 554; *Riley v. Boxendale*, 30 L. J., Exch. 87; *Hawley v. R. Co.*, 29 N. W. Rep. 787.

Where Act Would be Unlawful.—Neither, though ordered, should he commit an act known by him to be unlawful. *Southern v. How*, Cro. Jac. 471; *Grylls v. Davies*, 2 B. & Ad. 516.

Command Accompanied by Threat.—A command accompanied by a threat is a command to which an employee is not bound to submit. *Capper v. Louisville etc. R. Co.*, 103 Ind. 305; 21 Am. & Eng. R. Cas. 525.

employees; and whether he is negligent in that respect in a given case is a question for the jury.¹

Instructions as to Rules.—It is not generally the duty of the employer to instruct the employee in the rules applicable to the service, unless information be asked, or he is known to be ignorant and inexperienced regarding dangers peculiar to the service.²

(b) *Disobedience of Rule.*—If an employee knowingly and intentionally disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear produced by sudden danger, and the act of disobedience is the proximate cause of the injury complained of, he cannot recover.³

An employee may, however, recover for injuries even when he has violated some rule of his employer, when such violation did not contribute to the injury suffered.⁴

Of course, in any case, the rules and regulations of an employer

1. *Abel v. Priest etc. of Delaware etc. Canal Co.*, 103 N. Y. 581; 28 Am. & Eng. R. Cas. 497; *Sheehan v. New York etc. R. Co.*, 91 N. Y. 332; 12 Am. & Eng. R. Cas. 235; *Lake Shore etc. R. Co. v. Lavalley*, 36 Ohio St. 221; 5 Am. & Eng. R. Cas. 549; *Vose v. Lancashire R. Co.*, 2 Hurl. & N. 728; *Chicago etc. R. Co. v. Taylor*, 69 Ill. 461; *Regan v. St. Louis etc. R. Co.*, 93 Mo. 348.

Failure to Provide Watchman According to Rule.—Where custom and rule of company is to provide watchman to protect defective car under which employees are working, and an injury is occasioned by failure to do this, the question of negligence is for the jury. *Luebke v. Chicago etc. R. Co.*, 59 Wis. 127; 15 Am. & Eng. R. Cas. 183.

2. *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277.

3. *Gulf etc. R. Co. v. Ryan*, 69 Tex. 665; 33 Am. & Eng. Cas. 289; *Gardner v. Michigan etc. R. Co.*, 58 Mich. 584; 24 Am. & Eng. R. Cas. 435; *Wolsey v. Lake Shore etc. R. Co.*, 33 Ohio St. 227.

Habitual Breach—Employer's Knowledge.—But otherwise where injury arises from a breach, which has grown to be habitual with the knowledge of the employer. *Fray v. Minneapolis etc. R. Co.*, 30 Minn. 234; *Hayes v. Bush etc. Mfg. Co.*, 41 Hun (N. Y.) 407.

Rule as to Running Switch.—An action cannot be maintained against a railroad company for injuries received by a brakeman while acting in wilful disobedience of a rule of the company prohibiting "flying switches." *Pilkinton v. Gulf etc. R. Co.*, 70 Tex. 226.

The violation by a conductor of a rule of the company forbidding a "running switch" does not preclude him from recovering against the company for an injury received in making such a switch, it appearing that this was the only practicable way of putting cars on the particular switch, and that it had been so habitually resorted to as to raise the presumption that the company was aware of and approved it. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 590; 25 Am. & Eng. R. Cas. 458.

Knowledge of Servant as to Existence of Rule.—In an action against a railroad company for negligently killing plaintiff's husband, it appeared that deceased, while defendant's brakeman, was killed while making a "flying switch." The petition alleged a rule of defendant prohibiting "flying switches," but there was no allegation or proof that deceased was ignorant of the rule. *Held*, that deceased will be presumed to have known of the existence of such rule. *Pilkinton v. Gulf etc. R. Co.*, 70 Tex. 226; *Baltimore etc. R. Co. v. Kean*, 65 Md. 394; 28 Am. & Eng. R. Cas. 580.

Evidence as to Such Flying Switch.—It was held not to be error to permit plaintiff to describe a "flying switch" when he did not state that the same was the transaction in which the accident occurred, particularly in view of the fact that the company had put in evidence a rule prohibiting servants from making a flying switch. *Pringle v. Chicago etc. R. Co.*, 64 Iowa 613; 18 Am. & Eng. R. Cas. 91.

4. *Central Railroad v. Mitchell*, 63 Ga. 173; *Ford v. Fitchburgh etc. R. Co.*, 110 Mass. 240; *Thomas v. Memphis R.*

must be known to the employee in order to bind him.¹ But it has been laid down that a railroad conductor, at least, is in duty bound to post himself as to the rules of the company employing him.²

(c) *Evidence of Rules.*—A printed rule of a master is admissible in evidence, in an action by a servant against him for negligence, to show that the servant was properly attempting to carry out his master's orders at the time of the injury.³

(d) *Agreement to Obey Rules.*—Where an employee, upon entering upon his employment, signs a contract binding himself to obey all orders, rules and regulations, but in which the general language applies equally to all classes of employees, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith, and differing therefrom.⁴

28. Contributory Negligence in Use of Appliances—Notice of Defects.—An employee cannot recover when injured by the use of a defective appliance under his own exclusive care;⁵ nor when he has knowledge of the defect and fails to notify the master and no blame is imputable to him in not discovering the same.⁶ And this duty of an employee to report defects and breakages is none the less where the company employs local inspectors, unless inspection is

Co., 51 Miss. 637; *Vose v. Lancashire R. Co.*, 2 H. & N. 728; *Haskin v. New York etc. R. Co.*, 65 Barb. (N. Y.) 129.

1. *Covey v. Hannibal etc. R. Co.*, 27 Mo. App. 170.

Evidence of Rules Not Known.—In an action against a railroad company for damages for negligently causing the death of one of its employees, it is not error for the court on the trial to exclude evidence offered by the railroad company to prove certain written or printed rules, which it claims the deceased wrongfully disregarded, when it is not shown that the deceased ever had any knowledge of such written or printed rules. *Atchison etc. R. Co. v. Plunkett*, 25 Kan. 188; 2 Am. & Eng. R. Cas. 127.

2. *Alexander v. Louisville etc. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

3. *Louisville R. Co. v. Frawley*, 110 Ind. 18; 28 Am. & Eng. R. Cas. 308.

In case of an injury from an unblocked frog, an order of the company to block all frogs may go in evidence. *Burlington etc. R. Co. v. Coates*, 62 Iowa 486; 15 Am. & Eng. R. Cas. 265.

4. *Jones v. Lake Shore etc. R. Co.*, 49 Mich. 573; 8 Am. & Eng. R. Cas. 221.

The rule requiring persons crossing a track to look in both directions for approaching trains, does not apply strictly to employees at work on the track. *Crowley v. Burlington etc. R. Co.*, 65 Iowa 658; 18 Am. & Eng. R. Cas. 56.

5. *Stroble v. Chicago etc. R. Co.*, 70 Iowa 555; 28 Am. & Eng. R. Cas. 510. A case of defective platform steps. *Wells v. Cole*, 9 Cal. 159. Defective hoisting apparatus in mine.

6. *Cowles v. Richmond etc. R. Co.*, 84 N. Car. 309; 37 Am. Rep. 620; *Critchfield's Case*, 78 N. Car. 300; *Johnson v. Richmond etc. R. Co.*, 81 N. Car. 453; *Baker v. Allegheny etc. R. Co.*, 95 Pa. St. 211; 8 Am. & Eng. R. Cas. 141; *Chicago etc. R. Co. v. Bragonier*, 119 Ill. 724; *State v. Hannibal etc. R. Co.*, 82 Mo. 430; *Baker v. Allegheny etc. R. Co.*, 95 Pa. St. 211; 40 Am. Rep. 634; 8 Am. & Eng. R. Cas. 141; *Le Clair v. First Div. St. Paul etc. R. Co.*, 20 Minn. 9; *De Berry v. Carolina Cent. R. Co.* (N. Car.), 6 So. E. Rep. 723; *Noves v. Smith*, 28 Vt. 59; *Skipp v. Eastern Counties R. Co.*, 9 Exch. 223; *Keegan v. W. R. Co.*, 4 Seld. 175; *M'Millan v. Saratoga etc. R. Co.*, 20 Barb. (N. Y.) 450; *Stroble v. Chicago etc. R. Co.*, 70 Iowa 555; 28 Am. & Eng. R. Cas. 510.

given exclusively to them.¹ But if a corporation is negligent in respect to furnishing suitable machinery, it is charged in law with notice of the unfitness of the machine, and cannot take advantage of its own wrong and set up as a defence to an action for such injury that it did not have notice of the defect in its machine.² Notice need not, in cases of this character, be given to the master in person. Notice to a vice principal is equivalent to notice to the master.³ But knowledge of a defect in a machine by servants not employed about the same is not notice to the company.⁴ And where the defect is of such a character, or occurs at such a time, that the master cannot reasonably be expected to have knowledge of it, neglect on the part of a servant to give him notice thereof relieves him of responsibility.⁵

29. Selection and Retention of Competent Servants.—See FELLOW SERVANTS, vol. 7, p. 844, *et seq.*

30. Contracts Absolving Master.—A master cannot, by a contract with a servant, in consideration of the employment, exempt himself from liability to the servant for injuries sustained through his negligence. Such a contract is void as against public policy.⁶ Though they have been sustained in *England* and in *Georgia*.⁷ If a servant has compromised his claim for damages, and afterwards uses up the amount received in liquidation of the claim, he cannot be heard to assert fraud and deceit as to the compromise, when he does not tender back the amount he has already received.⁸ Contracts between the master and servant entered into after the servant received the injury by which a servant releases the master

1. *Chicago etc. R. Co. v. Bragonier*, 11 Ill. App. 516.

And likewise under rules requiring a telegraph operator to report defects in roads and bridges, or obstructions of any kind, wherever met, to the superintendent, and if possible to the nearest section master or bridge foreman, when they come to his knowledge, whether he is requested to do so by another employee or not. *Hall v. Galveston etc. R. Co.* (Tex.), 39 Fed. Rep. 18.

2. *Warner v. Western N. Car. R. Co.*, 94 N. Car. 250; 25 Am. & Eng. R. Cas. 432.

3. *Speed v. Atlantic etc. R. Co.*, 71 Mo. 303; 2 Am. & Eng. R. Cas. 77; *Dutzi v. Geisel*, 23 Mo. App. 676; *Baltimore etc. R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; *Ohio etc. R. Co. v. Collarn*, 73 Ind. 261; 5 Am. & Eng. R. Cas. 564; *Wooden v. Humeston etc. R. Co.*, 76 Iowa 310; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389; *Baldwin v. St. Louis etc. R. Co.*, 75 Iowa 297. Compare *Covey v. Hannibal etc. R. Co.*, 86 Mo. 635; 28 Am. & Eng. R. Cas. 382. As to

who is a vice principal, notice to whom is notice to company, see FELLOW SERVANTS, vol. 7, p. 824, *et seq.* See also McKinney on Fellow Servants, ch. 3.

4. *St. Louis etc. R. Co. v. Harper*, 44 Ark. 524; *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 390.

5. *Patterson v. Pittsburgh etc. R. Co.*, 76 Pa. St. 389.

6. *Roesner v. Hermann*, 10 Biss. C. Ct. 486; *Lake Shore etc. R. Co. v. Spangler*, 44 Ohio St. 471; 58 Am. Rep. 833; 28 Am. & Eng. R. Cas. 319; *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; *Willis v. Grand Trunk R. Co.*, 62 Me. 488; *Kansas etc. R. Co. v. Pearey*, 29 Kan. 169; 44 Am. Rep. 630; 11 Am. & Eng. R. Cas. 260; *Roesner v. Hermann*, 10 Biss. (U. S.) 486; 8 Fed. Rep. 782.

7. *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *R. Co. v. Bishop*, 50 Ga. 465; *R. Co. v. Strong*, 52 Ga. 461; *Galloway v. Western etc. R. Co.*, 57 Ga. 512.

8. *Stewart v. Houston etc. R. Co.*, 62 Tex. 246.

from the damages, are upheld as valid if founded upon a valuable consideration, and not obtained from the servant by means of misrepresentation or fraud.¹

31. Injury to Which Servant Consents.—A servant cannot come into court and obtain satisfaction from a master for a supposed injury to which such servant was consenting.²

32. Liability for Negligence of Vice Principal.—See FELLOW SERVANTS, vol. 7, p. 824 *et seq.*

33. Neglect of Statutory Duty.—Where a statute or municipal ordinance imposes upon a person a duty designed for the protection of others, if he neglects to perform the duty he is liable to those for whose protection it was imposed for any damages resulting proximately from such neglect, and of the character which the statute or ordinance was designed to prevent.³ And where cer-

1. Illinois etc. R. Co. v. Welch, 52 Ill. 183; Schultz v. Chicago etc. R. Co., 44 Wis. 638; Butler v. Regents, 32 Wis. 124; Chicago etc. R. Co. v. Doyle, 18 Kan. 58.

A party who, having the capacity and opportunity to read a release of claims for damages for personal injuries, signed by him, and not being prevented by fraud practiced on him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal, and binding upon him according to its terms. Wallace v. Chicago etc. R. Co., 67 Iowa 547; Illinois etc. R. Co. v. Welch, 52 Ill. 183.

Benefit Fund—Release of Employees.—The defendant iron company had in operation an arrangement by which a benefit fund was established. This fund was subscribed by the workmen and the company, and was designed for the relief of those to whom any injury or accident should happen. Such relief could only be obtained by signing an agreement to release and discharge the company from all claims for damages on account of injury caused by negligence of the company, its officers or agents.

The scheme was printed in large posters and posted up in conspicuous places upon the premises where the men were employed. The plaintiff, an employee of the company, and entitled to share in the proceeds of such fund, was injured. He was paid the money allowed to injured employees and signed the agreement releasing the company. At the time he signed the agreement he did not read it, nor was he aware of its contents. He afterwards brought an action against the company for

damages for the injury inflicted by its negligence. *Held:* (1) That the plaintiff was not bound by such agreement unless fully informed of the terms or conditions printed and posted for his information, and of the contents or substance of the agreement he signed on receiving his monthly aid.

(2) That whether he understood the purport of the instrument he signed or whether he was misled into signing it, supposing it to be a mere receipt for the money, were questions which, under the circumstances, should have been submitted to the jury.

(3) That as the mutual aid fund, by the terms of the address to the employees, was to be held by the company as trust money and did not belong to the company in any other capacity than as trustee, and was paid out in the same capacity, there was no obligation on the plaintiff's part to repay the benefit fund before bringing action against the company. O'Neil v. Lake Superior Iron Co., 63 Mich. 690; 16 Am. & Eng. Corp. Cas. 107.

2. Consenting to Sexual Intercourse.

—As where an employer persuaded his female servant to consent to sexual intercourse with his minor son, to whom she was affianced, but who subsequently refused to marry her. Jordan v. Hovey, 72 Mo. 574; 37 Am. Rep. 447. And see Roper v. Clay, 18 Mo. 384; Paul v. Frazier, 3 Mass. 71; Sherman v. Rawson, 102 Mass. 400; Kelly v. Riley, 106 Mass. 339; Burks v. Shain, 3 Bibb (Ky.) 341; Whalen v. Layman, 2 Blackf. (Ind.) 194; Wells v. Padgett, 8 Barb. (N. Y.) 323.

3. Osborne v. McMasters, 40 Minn. 103, following Bott v. Pratt, 53 Minn. 323; Coe v. Platt, 6 Exch. 727; Caswell

tain duties are imposed on the master by legislative act, it is negligence *per se* on his part to abstain from carrying them out. And he is liable for injuries arising from such failure, unless it can be clearly shown that the servant assumed the risk.¹

34. Requisites of Petition.—Whatever is the real ground of complaint ought to be distinctly stated in the petition.² In an action by an employee against his employer, to recover for an injury received from the dangerous condition of the premises where he was required to work, it has been held that the employee must aver want of knowledge on his part, of the defect;³ in other words, that the defect was known to the master, or was such as with reason-

v. Worth, 5 E. & B. 849; *Dale v. Sheppard*, 5 E. & B. 846; *Schofield v. Schunk*, 5 E. & B. 858; *Holmes v. Clark*, 30 L. J.; Exch. 135; *Britton v. Great Western Cotton Co.*, 41 L. J. Exch. 99.

Thickness of Walls.—If a city ordinance regulates the thickness of the walls of buildings, a violation of such ordinance in the construction of a building is *prima facie* evidence of negligence. *Giles v. Diamond State etc. Co.* (Del.), 1889; 7 Atl. Rep. 368.

1. *Cayzer v. Taylor*, 10 Gray (Mass.) 410; *Gibbs v. Crombie*, 2 Ct. of Sess. Cas. 4th ed. (S. Car.) 210; *Clarke v. Holmes*, 7 H. & N. 942; *St. Louis etc. R. Co. v. Mathias*, 50 Ind. 65.

2. *Edens v. Hannibal etc. R. Co.*, 72 Mo. 212; 5 Am. & Eng. R. Cas. 459.

It was furthermore held in this case that as the company's negligence consisted in having a defective sand box on the engine and in keeping a defective frog in the track, a recovery could not be had for negligent running of the cars. And see *Waldhier v. Hannibal etc. R. Co.*, 71 Mo. 514; 2 Am. & Eng. R. Cas. 146; *Buffington v. Atlantic etc. R. Co.*, 64 Mo. 246.

Aggravation of Pre-existing Infirmities.—Under a declaration alleging infirmities caused directly and altogether by the accident, plaintiff cannot recover for the aggravation of pre-existing infirmities. *Wilkinson v. Detroit Steel Spring Works*, 73 Mich. 403.

Defective Construction or Want of Repair.—In a suit brought to recover damages for the death of a brakeman, caused by the breaking of a defective hand hold, it was held unnecessary to state in the pleading whether the alleged defect which caused the death was in construction or arose from want of repair, such defect being pointed out with particularity. *Guttridge v. Missouri Pac. R. Co.*, 94 Mo. 468

Sickness Resulting from Exposure of the Servant.—In an action by a laborer engaged in the construction of a road, against his employer, a railroad company, for damages for breach of contract and negligence, in that defendant failed to supply him with good and suitable board and lodging, a complaint alleging that plaintiff "was compelled to sleep on the cold, wet and frozen ground, without anything under him except damp branches of pine and spruce trees, and without sufficient blankets or bed clothes to cover him and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure," is good upon demurrer, as the sickness referred to is not too remote, to support an action. *Clifford v. Denver etc. R. Co.*, 9 Colo. 333.

Lack of Information as to Projecting Beam.—In an action for personal injuries received by a railroad employee, the complaint alleging that the injury was caused by the negligent construction of the road by defendant's agent placing and leaving standing a beam in dangerous proximity to the track, by which plaintiff, who had been ordered to sit on the edge of a flat car by such agent, was injured, that plaintiff had no knowledge, or means of knowledge, of the beam having been so placed and left standing, which the agent knew, and that plaintiff was guilty of no negligence, is sufficient though it shows that plaintiff took his seat on the edge of the car voluntarily and without protest, "as was the universal custom," as the danger, being unknown to him, was not assumed as a risk of his employment, especially where it does not appear that the beam was used in the operation of the railroad. *Arabello v. San Antonio etc. R. Co.* (Tex.), 1889, 11 S. W. Rep. 913.

3. *Bogenschutz v. Smith*, 84 Ky. 330.

able diligence he ought to have known, and that the plaintiff did not know and could not reasonably be held to know of it.¹ But this cannot be said to be the general rule, for it has been held in other States that it is not incumbent upon the plaintiff to aver such ignorance in his complaint, but rather it is for defendant to aver and prove knowledge on part of plaintiff.²

35. Evidence.³—(a) *Declarations; Res Gestæ*.—The declarations of the party injured as to the cause of the injury, made at the time of the accident, are part of the *res gestæ* and admissible.⁴ And such declarations can bind the principal only when made with reference to a transaction within the scope of the employment of the declarant.⁵ But they should be voluntary and spontaneous, and made so shortly after the principal trans-

1. *Wason v. West* (Me.), 1886, 3 Atl. Rep. 911; *Hull v. Hall*, 78 Me. 114; *Indiana etc. R. Co. v. Dailey*, 110 Ind. 75; *Lake Shore etc. R. Co. v. Stupak*, 108 Ind. 1; *Pittsburgh etc. R. Co. v. Adams*, 105 Ind. 151.

2. *Cole v. Chicago etc. R. Co.*, 67 Wis. 272; 30 N. W. Rep. 600; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; 25 Am. & Eng. R. Cas. 440; *Thompson v. North Missouri R. Co.*, 51 Mo. 191. And see *Griffiths v. London etc. Dock Co.*, 13 L. R., Q. B. Div. 259; 53 L. J., Q. B. Div. 504; 51 L. T., N. S. 533; 33 W. R. 35; 49 J. P. 100.

3. See *post*, 36, DAMAGES.

4. *Brownell v. P. R.*, 47 Mo. 240; *Perigo v. Chicago etc. R. Co.*, 55 Iowa 326; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; *Texas etc. R. Co. v. Crowder* (Tex.), 7 S. W. Rep. 711; *McKinnon v. Norcross et al.*, 20 N. E. Rep. 182; *Adams v. Hannibal etc. R. Co.*, 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; *Union Pacific R. Co. v. Fray*, 35 Kan. 700; 29 Am. & Eng. R. Cas. 309; *Waldele v. New York etc. R. Co.*, 95 N. Y. 275; 19 Am. & Eng. R. Cas. 400; *Pennsylvania Co. v. Rudell*, 100 Ill. 603; 6 Am. & Eng. R. Cas. 30; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Terry v. Burlington etc. R. Co.*, 47 Iowa 549; *Casey v. New York etc. R. Co.*, 78 N. Y. 518; *Pittsburgh etc. R. Co. v. Wright*, 80 Ind. 182; 5 Am. & Eng. R. Cas. 628; *Moore v. Chicago etc. R. Co.*, 59 Miss. 243; 9 Am. & Eng. R. Cas. 401; *Dietrich v. Baltimore etc. R. Co.*, 58 Md. 347; 11 Am. & Eng. R. Cas. 115; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; *Hawks v. Baltimore etc. R. Co.*, 15 W. Va. 628; *Chicago etc. R. Co. v. Fillmore*, 57 Ill. 265; *Packet Co. v. Clough*, 14 C. of L.—58

20 Wall. (U. S.) 528; *Ladd v. Couzins*, 35 Mo. 516; *McDermott v. Hannibal etc. R. Co.*, 73 Mo. 516; 2 Am. & Eng. R. Cas. 85.

Anything in the nature of narrative is to be carefully excluded. *Bacon v. Inhabitants of Charlton*, 7 Cush. (Mass.) 586; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 42.

5. *McDermott v. Hannibal etc. R. Co.*, 73 Mo. 516; 2 Am. & Eng. R. Cas. 85; *Toledo etc. R. Co. v. Goddard*, 25 Ind. 185; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130.

Statement by Agent Not Authorized to Bind.—The statements made by a clerk or agent, not authorized to bind the company, as to the date of the arrival of a train at a certain point, are not admissible in evidence. *Hewett v. Chicago etc. R. Co.*, 63 Iowa 611; 18 Am. & Eng. R. Cas. 569.

By Station Agent as to Cars for Through Freight.—Declarations of a station agent as to the use of freight cars by company for through freights are not admissible, he not being connected with through freight business. *Branch v. Wilmington etc. R. Co.*, 88 N. Car. 573; 18 Am. & Eng. R. Cas. 692.

Bellefontaine R. Co. v. Hunter, 23 Ind. 335; *Hynds v. Hays*, 25 Ind. 31; *Pittsburgh etc. R. Co. v. Theobald*, 51 Ind. 246; *Dickinson v. Colter*, 45 Ind. 445; *Rathel v. Brady*, 44 Ind. 412; *Bennett v. Holmes*, 32 Ind. 108; *Lafayette etc. R. Co. v. Ehman*, 30 Ind. 83; *Toledo etc. R. Co. v. Fisher*, 13 Ind. 258; *Wayne Co. T. Co. v. Berry*, 5 Ind. 286; *Tomlinson v. Collett*, 3 Blackf. (Ind.) 436; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91.

action as to preclude the idea of deliberate design.¹ Exclamations of pain made by the injured person are admissible in evidence as part of the *res gestæ*, even if made after the accident.² But while it is essential that the declarations should be contemporaneous with, or at least so connected with, the main fact in issue as to constitute a part of the transaction, and thus derive

1. *Pilkinton v. Gulf etc. R. Co.*, 70 Tex. 226.

Declarations Made Upon the Spot.—The declarations of the engineer made upon the spot, at the time of the accident, and in view of the effects of his conduct, are evidence against the company as part of the *res gestæ*. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *McLeod v. Ginther*, 80 Ky. 399; 15 Am. & Eng. R. Cas. 291.

Where plaintiff was injured by the sudden starting of a horse car from which she was alighting, a remark made to her by the conductor immediately after she fell, to the effect that he was very sorry and that it was his fault, is inadmissible as a part of the *res gestæ*. *Williamson v. Cambridge R. Co.*, 144 Mass. 148. Compare *Baltimore etc. R. Co. v. State of Md.*, 62 Md. 479; 19 Am. & Eng. R. Cas. 83.

Twenty Minutes After Accident.—In another case the time which had elapsed after an alleged injury was twenty or twenty-five minutes, and a witness was permitted to testify that the party told him he got hit; that there was a long train and he stood waiting for it to go and the engine followed and struck him. *Waldele v. N. Y. etc. R. Co.*, 29 Hun (N. Y.) 35.

Thirty Minutes After Accident.—But such declaration is not admissible if made thirty minutes after accident. *Armil v. Chicago etc. R. Co.*, 70 Iowa 130.

While Person Is Being Removed.—Nor while the person injured is being removed. *Martin v. New York etc. R. Co.*, 103 N. Y. 626.

Or After Removal Twenty or Thirty Rods.—Nor after he has been removed twenty or thirty rods. *Merkle v. Bennington*, 58 Mich. 156.

Within from Three to Five Minutes.—But to the contrary, where made within from three to five minutes of the occurrence of the accident, *Durkee v. Central etc. R. Co.*, 69 Cal. 533; and see *Waldele v. New York etc. R. Co.*, 95 N. Y. 274; 19 Am. & Eng. R. Cas. 400; *People v. Murphy*, 101 N. Y. 126; *Bigley v. Williams*, 80 Pa. St. 107; *Tilson*

v. Terwilliger, 56 N. Y. 273; *Casey v. New York etc. R. Co.*, 78 N. Y. 518; *Com. v. Hackett*, 2 Allen (Mass.) 136; *Travellers' Ins. Co. v. Mosly*, 8 Wall. (U. S.) 397.

On the Night After.—In an action against a railroad company by a passenger for damages caused by an assault of the conductor, the latter testified that he did not tell one W, on the night after the difficulty, holding his ticket punch in his hand, "this is the thing I did him (plaintiff) up with." Thereupon W was permitted to state that the conductor, at the time and place mentioned, did make such a statement to him. Held, that though the conductor's declaration, made subsequently to the occurrence, was not admissible against the company, yet as there was other competent evidence sufficient to prove that the assault was made in the manner indicated, the error in admitting the testimony was cured by withdrawing it and instructing the jury not to consider it. *Dillingham v. Anthony*, 73 Tex. 47.

Admissions Made the Next Morning.—But the admissions made by the railway servants the next morning after a passenger's baggage is lost are inadmissible. *Morse v. Conn. R. Co.*, 6 Gray (Mass.) 450.

Subsequent Declarations of Brakeman.—So also the subsequent declarations of a brakeman as to the cause of an accident. *Michigan etc. R. Co. v. Carrow*, 73 Ill. 348.

Declarations of Defendant Thirty Minutes After Accident.—And likewise evidence as to the declarations of defendant by means of signs, thirty minutes after accident. *Waldele v. R. Co.*, 95 N. Y. 274; 19 Am. & Eng. R. Cas. 400; *Pittsburgh etc. R. Co. v. Wright*, 80 Ind. 182; 5 Am. & Eng. R. Cas. 628; *Dietrich v. Baltimore etc. R. Co.*, 58 Md. 347; 11 Am. & Eng. R. Cas. 115; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130.

2. *Nourton etc. R. v. Shafer*, 54 Tex. 641; 6 Am. & Eng. R. Cas. 421; *Perkins v. Concord R. Co.*, 44 N. H. 223;

credit from the main fact or act itself, to explain or characterize which it is offered in evidence, still it is not necessary that a declaration, to be a part of the *res gestæ*, should be precisely and astronomically contemporaneous and concurrent in point of time with the principal transaction, but rather that it be made voluntarily, unpremeditatedly and spontaneously, and under the immediate and unconscious influence of the principal transaction and be made at such a time, whether contemporaneous and concurrent or not, and also under such circumstances and conditions, as to exclude the idea of deliberate intent or design.¹

(b) *Submission of Person to Inspection*.—Where it is necessary to further the interests of justice a party suing an employer for personal injuries may be compelled to submit his person to the examination of competent medical experts.² But where it does not appear that such an order is necessary for purposes of justice, it will not be made.³

36. Damages for Personal Injuries⁴—(a) *Measure and Elements Generally*.—In assessing damages to a person injured, the jury may consider the character of the injuries received by the plaintiff, how far they disabled him from pursuing his ordinary occupation, and also the physical and mental suffering to which he was subjected by reason of such injuries; and they may allow such damages as in their judgment would be a fair and just compensation.⁵ Likewise evi-

Matteson v. New York Cent. R., 35 N. Y. 487.

1. Conlan v. Grace, 36 Minn. 276; Williamson v. Cambridge R. Co., 144 Mass. 148.

2. Walsh v. Sayre, 52 How. (N. Y.) Pr. 334; Schroeder v. Chicago etc. R. Co., 47 Iowa 375; Atchison etc. R. Co. v. Thul, 29 Kan. 466; 10 Am. & Eng. R. Cas. 783.

3. Lloyd v. Hannibal etc. R. Co., 53 Mo. 509; Sioux City etc. R. Co. v. Finlayson, 16 Neb. 578; 18 Am. & Eng. R. Cas. 68.

Exhibition of Injured Limb to Jury.—In *Malahado v. Brooklyn City R. Co.*, 30 N. Y. 370, it was decided that a party might exhibit an injured limb to the jury so that a surgeon could demonstrate the nature and character of the injury.

Torn Clothing.—In an action by a servant against his master for negligence resulting in personal injuries to servant, it is discretionary with the trial court to admit in evidence the torn clothing worn by plaintiff at the time he was injured. *Tudor Iron Works v. Weber*, 129 Ill. 535.

4. See DAMAGES, vol. 5, p. 40; DEATH, vol. 5, p. 125.

5. B. & O. R. Co. v. Kean (Md.), 28

Am. & Eng. R. Cas. 580; *Brown v. Chicago etc. R. Co.*, 64 Iowa 652; *Indianapolis v. Gaston*, 58 Ind. 224; *Wright v. Compton*, 53 Ind. 337; *Cox v. Vanderkleed*, 21 Ind. 164; *Taber v. Hutson*, 5 Ind. 322; *Fisher v. Hamilton*, 49 Ind. 341; *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229; *Beems v. Chicago etc. R. Co.*, 67 Iowa 435; *Pennsylvania Tel. Co. v. Jarnan* (Pa., 1888), 15 Atl. Rep. 625; *Hogue v. Chicago etc. R. Co.*, 32 Fed. Rep. 365; *Cleary v. City R. Co.*, 76 Cal. 240; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

Railroad Operation—Carrying—Responsibility for Negligence.—The transfer of freight by a railroad company from a vessel to its cars is a railroad operation within the meaning of Pub. St. Mass., ch. 112, § 212, and St. 1883, ch. 243, providing for damages for death from the negligence of a corporation operating a railroad. *Dailey v. Boston etc. R. Co.*, 147 Mass. 101; 33 Am. & Eng. R. Cas. 298.

Offering to Settle for Certain Sum Previous to Suit.—A letter to the superintendent of a railroad company containing a brief statement of the injuries of a party, alleging that he was damaged \$500, but rather than go to law

dence as to the business education and habits of sobriety and economy is admissible in such cases.¹ In suits instituted by a father for the negligent killing of his son, the father is not entitled to recover anything for physical suffering, or mental pain and anguish, endured on account of the son's death; nor can he recover damages because of the loss of the son's society.² In case a servant is killed in the course of his employment, it is proper, in case of suit, to show the number of children the deceased left, for the purpose of fixing damages.³ But it would be error to admit evidence showing that there was a line of promotion in the business in which plaintiff was engaged, together with the salaries of the different grades, though plaintiff was shown to have been so injured as to be unfit for service, there being no evidence to show that plaintiff had any reason to expect promotion.⁴ Where a personal injury occasioned by negligence is subsequently increased or aggravated through the fault of the person injured, the party causing the original injury is not liable for the increase or aggravation.⁵

would settle for \$200 if the matter was closed up at once, written before the commencement of an action against the company by an attorney who afterwards appears in the cause of the plaintiff, is not evidence of the facts admitted therein, unless it be proved that the plaintiff authorized the letter to be written. *Solomon R. Co. v. Jones*, 34 Kan. 443.

1. *Taylor v. Western Pacific R. Co.*, 45 Cal. 324.

Recovery by Parent for Killing of Son.

—In an action by a father for damages for the negligent killing of his son, under a legislative act limiting the damages in such cases to pecuniary loss only, the jury may consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety, and economy, his annual earnings, and his probable duration of life at the time of the accident; also the amount of property, age, health, and probable duration of plaintiff's life, and the amount of assistance he had a reasonable expectation of receiving from the son. *Hall v. Galveston etc. R. Co.* (Tex.), 39 Fed. Rep. 18; 11 Am. & Eng. R. Cas. 649. See *International etc. R. Co. v. Kindred*, 57 Tex. 491, 498; *Houston etc. R. Co. v. Cowser*, 57 Tex. 293, 304.

2. *Hall v. Galveston etc. R. Co.* (Tex.), 39 Fed. Rep. 21; *Illinois etc. R. Co. v. Barron*, 5 Wall. (U. S.) 105; *March v. Walker*, 48 Tex. 375.

3. *Mulcairns v. Janesville*, 67 Wis. 24; 15 Am. & Eng. Corp. Cas. 268; *Stoher*

v. St. Louis etc. R. Co., 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

Funeral Expenses.—*Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Murphy v. New York etc. R. Co.*, 88 N. Y. 445; 8 Am. & Eng. R. Cas. 490; *Atchison etc. R. Co. v. Weber*, 33 Kan. 543; 21 Am. & Eng. R. Cas. 418. Compare *Dalton v. South Eastern R. Co.*, 4 C. B., N. S. 306.

4. *Chase v. Burlington etc. R. Co.*, 76 Iowa 675.

Probable Effect of Injury.—In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, the evidence of experts as to future consequences which are expected to follow the injury is competent. *New York etc. R. Co. v. Strohm*, 96 N. Y. 305; 19 Am. & Eng. R. Cas. 167.

Reduction of Wages.—Reduction of wages growing out of infirmities consequent upon servant's injury may also be shown. *Central R. Co. v. Coggin*, 73 Ga. 689.

5. *Atlanta etc. R. Co. v. Ayers*, 53 Ga. 12; *Bardwell v. Jamaica*, 15 Vt. 488.

Employment of Physician.—Thus, such person cannot recover for injuries occasioned by his failing altogether to send for a physician. *Allender v. C. R. I. & P. R. Co.*, 37 Iowa 264. For although the best professional assistance need not be employed, the person injured is in duty bound to exercise reasonable care and skill in the selec-

(b) *Life Tables*.—Where the injury to plaintiff is shown to be permanent, the Carlisle tables are admissible in evidence to show plaintiffs' expectancy of life.¹

(c) *Exemplary Damages*.—An injured party is entitled to exemplary, punitive or vindictive damages only where the defendant has been guilty of gross negligence.²

(d) *Amount of Damages; Question for Jury*.—In actions for personal injuries the amount of damages must be left largely to the reasonable discretion of the jury. It, however, is not at liberty to give any sum it pleases.³ And the trial court ought not to interfere and grant a new trial unless there has been a manifest abuse of the trust, such as to indicate passion, prejudice, partiality, or unaccountable caprice or corruption.⁴ Where a judgment is reversed on the sole ground that the damages awarded are excessive, the court may indicate the excess, and allow it to be remitted and judgment entered for the remainder.⁵ It is error to charge the jury that they may give such damages as they may deem a fair and just compensation for the pecuniary loss resulting from

tion of a physician. *Collins v. Council Bluffs*, 32 Iowa 324; *Rice v. Des Moines*, 40 Iowa 638. But where the person injured has exercised reasonable skill and care in selecting a physician, the party causing the original injury is liable for any increased damages occasioned by unskilful treatment, or even for death which ensues from such cause. *Storer v. Inhabitants of Bluehill*, 51 Me. 439; *Eastman v. Sanborn*, 3 Allen (Mass.) 504; *Lyon v. Erie R. Co.*, 57 N. Y. 489; *Santer v. New York etc. R. Co.*, 66 N. Y. 50.

1. *Chase v. Burlington etc. R. Co.*, 76 Iowa 65.

Evidence of Actuary as to Probable Duration of Life.—In an action to recover for personal injuries an actuary testified, under objection, as to the probable duration of the life of a healthy man of a certain age, and the value of an annuity at that age for such a life, based upon the assumption that he would earn a certain sum per annum. *Held*, error, as tending to confuse the jury, where the evidence showed that the disability incurred was only partial. *Texas Mex. R. Co. v. Douglass*, 69 Tex. 694.

2. *Louisville etc. R. Co. v. M'Coy* (Ky.), 1883, 15 Am. & Eng. R. Cas. 278.

Under a Statute providing that if the life of any person is lost by the wilful neglect of any other person or corporation, or of their agents or servants, punitive damages may be recovered therefor, it was held, that where a serv-

ant was killed in working on dangerous premises, furnished by the master, and he knew the condition of the premises, and continued to use them without objection, the master is not liable, as he is not guilty of wilful neglect. *Needham v. Louisville etc. R. Co.* (Ky.), 1887, 11 S. W. Rep. 306.

3. *Waldhier v. Hannibal etc. R. Co.*, 87 Mo. 37; *Coleman v. Southwick*, 9 Johns. Ch. (N. Y.) 45.

4. *Tennessee etc. R. Co. v. Roddy*, 1 Pickle (Tenn.) 400; 31 Am. & Eng. R. Cas. 340; *Shumacher v. St. Louis etc. R. Co.* (Ark.), 39 Fed. Rep. 174.

It was held in one case that a verdict of \$8,000 against a railroad company for negligently causing the death of a young and healthy engineer, whose expectation of life was thirty-one years, is not excessive to a point indicating either partiality, passion, prejudice, caprice or corruption. *Tenn. etc. R. Co. v. Roddy*, 1 Pick. (Tenn.) 400; 31 Am. & Eng. R. Cas. 340.

5. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 59.

Fifteen hundred dollars has been held to be a reasonable verdict where an employee's injuries were of a very severe character. *Gulf etc. R. Co. v. Dorsey*, 66 Tex. 148; 25 Am. & Eng. R. Cas. 446. As to other instances of excessive damages see *Texas etc. R. Co. v. Douglass*, 73 Tex. 325; *Columbia etc. R. Co. v. Hawthorn*, 3 Wash. Ter. 353; *Atchison etc. R. Co. v. Brown*, 26 Kan. 443; 6 Am. & Eng. R. Cas. 228;

the person's death, without making reference to any proof of the amount of damages sustained.¹

37. Food, Lodging and Medical Attention.—It is the duty of a master to provide his domestic servants with wholesome and sufficient food and suitable lodging. Failure to do so was at common law an indictable offence.² But a physician's bill is not an implication or incident to a contract for service. It requires an express contract to create that obligation.³ But if the master does send for a physician he is not only liable himself, but has no right to deduct the charge from the wages of the servant without an express agreement to that effect.⁴ There is no general liability on the part of a railroad company to provide surgical aid for sick or wounded servants, nor has the conductor any general authority to employ a surgeon; but an emergency may arise vesting such authority in the conductor.⁵

Missouri Pac. R. Co. v. Dwyer, 36 Kan. 58; *Whalen v. Chicago etc. R. Co.*, 75 Iowa 563; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183.

1. *North Chicago Rolling Mills Co. v. Morrissey*, 111 Ill. 646; 18 Am. & Eng. R. Cas. 47; *Chicago etc. R. Co. v. Sykes*, 96 Ill. 162; 2 Am. & Eng. R. Cas. 254; *Burlington etc. R. Co. v. Coates*, 62 Iowa 486; 15 Am. & Eng. R. Cas. 265. See *Gulf etc. R. Co. v. Silliphant*, 70 Tex. 623.

2. *R. v. Gould*, 1 Salk. 381; *R. v. Friend, Russ. & R.* 22; *R. v. Ridley*, 2 Camp. 650. And see 14 and 15 Vict., ch. 11; 24 and 25 Vict., ch. 95; 38 and 39 Vict., ch. 86.

3. *Sweetwater Mfg. Co. v. Glover*, 29 Ga. 399. And this is so even if the accident occurs while the servant was in the discharge of his duty. *Sellen v. Norman*, 4 C. & P. 80; *Cooper v. Phillips*, 4 C. & P. 581.

4. *Emmons v. Lord*, 18 Me. 351.

5. *Terre Haute etc. R. Co. v. McMurray*, 98 Ind. 358; 49 Am. Rep. 752; 22 Am. & Eng. R. Cas. 371.

Conductor's Authority When Accident Occurs at Point Remote.—As where, as in above case, a servant of a railroad company, while in the line of his duty, is injured at a point distant from the chief offices of the company, and there is an urgent necessity for the employment of a surgeon to render professional services to the injured brakeman, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render professional services required by the emergency. *Union Pacific R. Co. v.*

Beatty, 35 Kan. 265; 26 Am. & Eng. R. Cas. 84.

Promise of Employer to Pay Physician.

—The fact that an employee has been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure. *Toledo etc. R. Co. v. Rodrigues*, 47 Ill. 188.

Legislative Act Requiring the Calling of Physician.

—And where a statute provides that a railroad company, when an accident occurs on its line whereby anyone is injured, shall give immediate notice to the nearest physician, and report to the state commissioner, etc., under penalty of fine, it was held—a brakeman having been thrown from a train and left to freeze to death—that the fact that the brakeman was known to have been on the train at a certain point, and was missed at a point many miles distant, was not sufficient to affect the company with knowledge of the fact that the brakeman had been either killed or injured by an accident between those points, especially when there was no evidence whatever that any accident had there occurred to the train, and, on the contrary, the evidence showing that the train ran as usual between the points, with nothing exceptional or peculiar to attract the attention of those charged with its management. *Adkins v. Atlanta etc. R. Co.*, 27 S. Car. 71; 31 Am. & Eng. R. Cas. 281.

But a railway road master, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the

38. Joint Liability of Masters.—Where two corporations are co-operating in the erection of a structure, and their successive concurrent negligence caused the death or injury of an employee of one of them, they are jointly liable.¹

39. Indemnification of Servant for Loss or Damage.—A master is bound to indemnify his servant for all expenses or loss incurred or sustained in obeying his lawful orders. No express contract of indemnity is required; the law will presume from the relation of master and servant an obligation to hold the latter harmless from the consequences of obedience to the lawful orders of the former.² But a promise to indemnify a servant against the consequences of violation of a statute, or a felony or misdemeanor, or a manifest civil wrong, is of no effect; as a promise to indemnify a printer against the consequences of publishing a libel.³

MASTER IN EQUITY.

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I. DEFINITION.—An officer of a court of equity who acts as an assistant to the chancellor.⁴

The close analogy which exists between masters in equity and certain other officers with similar powers and duties, such as arbitrators, auditors and referees, should be observed. The functions

line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach, but the corporation will be bound by the ratification of such contract by the general manager. *Louisville etc. R. Co. v. McVay*, 98 Ind. 391; 22 Am. & Eng. R. Cas. 382. See Agency, 1 Am. & Eng. Encyc. of Law 365.

1. *Consolidated Ice Machine Co. v. Kiefer*, 26 Ill. App. 466; *Shearman and*

Redf. on Negligence, § 58; 5 *Wharton on Negligence*, § 788.

2. *Macdonnell's Master and Servant*, 76; *Story on Agency*, § 339.

3. *Shackel v. Rosier*, 2 Bing. N. C. 634.

Allowing Prisoner to Escape.—Or to indemnify a police constable for suffering a prisoner to escape. *Featherstone v. Hutchinson*, Cro. Eliz. 199.

4. *Bouv. Law Dict.*

of these officers, generally speaking, are to relieve the court of the investigation of complicated questions of fact, especially accounts, or to furnish the aid of the judgment, in matters of business, of men trained in such pursuits; and such preliminary hearings before competent officers, who can take time to examine the case well and report upon it intelligently and accurately, serves to develop the true points of contest for the court's consideration. Their jurisdiction is merely ancillary and proceedings before them do not finally determine the rights and liabilities of the parties to the cause, unless their reports, containing not only facts directly proved but deductions of fact and conclusions of law, are approved by the court after examination. Proceedings before arbitrators are often by consent of the parties, but those before auditors, masters in equity and referees are commonly regulated by statute and rules of court, which sometimes, however, provide for a reference by consent. It is evident that in such proceedings, whether at law or in equity, the principles of law applicable to these several officials are practically the same, and it will be found both useful and instructive to contrast with each other the several titles referred to in the notes.¹

1. Origin and History.—After establishing the system of proceeding by writs, which were authenticated by the great seal, the chancellor, who had charge of the seal, appointed certain assistants to himself, originally called clerks, *clerici* or *præceptores*, and afterwards *masters*. They were to assist the chancellor, both in issuing writs under the great seal and in preserving due regularity in the form of the writs. Before they issued any writ they were required to hear and examine the complaints of the suitors. The masters were generally required to be doctors of the civil law, and proficient in the common law of England. They were generally ecclesiastics, and among them was Martin de Pateshull, Dean of St. Paul's, afterwards chief justice of the king's bench. Another was the Abbott of Reading. From the reign of Henry VI, down to the commonwealth the court of chancery consisted of the chancellor, the master of the rolls, and the college of clerks. The clerks lived in the king's palace, or in some special place assigned to them. The judicial authority of the master of the rolls is to be traced from the reign of Edward I. It is probable that in the times of Richard II, the master of the rolls was one of the twelve *clerici de primâ formâ*, who were the council of the lord chancellor, and of whom the present *masters* are an historical survival. These clerks first obtained the title of *masters* in the reign of Edward III. In early times the masters were appointed by the king, but in the reign of Edward IV their appointment was entrusted to the chancellor. The office was conferred by a ceremony in

A master's office is a branch of the court. Stewart v. Turner, 3 Edw. (N. Y.) Ch. 458.

1. ARBITRATION AND AWARD, vol. I, p. 646; AUDITORS, vol. I, p. 1009; REFEREE.

which the chancellor in open court placed a cap upon the master's head. The masters appear to have been looked upon like the *pedanci judices*, or assistants of the Roman practors. In the time of Henry V, one of the eleven masters present in court, might on the petition of counsel, in the absence of the chancellor, dispose of applications relating to procedure, as for fixing the time of answering, or for publications of depositions, though they were not permitted to make any definitive order. In the time of Elizabeth it became customary to refer causes to such masters as the master of the rolls should call in. They sometimes sat on the bench with the chancellors, with covered heads, and advised him if called upon. Occasionally the great seal was committed to two or three masters by the chancellor during his absence, and on these occasions they sat to hear motions. When a suit depended on a matter of account it was usually, and in Lord Bacon's time always, referred to one of the masters, "matters account," according to one of Bacon's orders, not being "fit for the court." This machinery was infinitely preferable to that of the jury, and consequently *account* became an important head of equity jurisprudence. The masters also went into the country to examine witnesses under special commissions. A time was usually fixed for the masters to report, and when made the report was confirmed by an order, if no objection was made.¹

2. **Masters in the United States.**—In the *United States*; officers of this name exist in many of the States, with similar powers to those exercised by the English masters, but variously modified, restricted and enlarged by statute and rules of court, and in certain of the States similar officers are called commissioners, or by other titles.

II. APPOINTMENT.—A master is appointed by order of court on motion,² and he must of course follow the directions contained in the order of his appointment.

1. Spence Eq. Juris. of Court of Chan., vol. 1, p. 355.

2. Phillips' Appeal, 68 Pa. St. 137.

The circuit courts of the *United States* may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment, and they may also appoint a master *pro hac vice* in any particular case. *United States Equity rule* 82; *State v. McIntyre*, 53 Me. 214.

Who May be Master.—It is improper for a master to perform any official act as master in a cause in which he is solicitor, or partner of the solicitor. *Brown v. Byrne*, Walk. Ch. 403.

Where the statute prohibits the clerk of court acting as master, except in special matters, the parties may waive the right to object to his so acting.

Fisher v. Hayes, 22 Blatchf. (U. S.) 505.

Consent Will Not Authorize Him to Act as a Referee at Law.—Consent will not authorize a master to whom a question has been sent for the information of the court, to act as a referee at law, and to hear and determine the whole case. *Farmers' Loan etc. Co. v. Central R.*, 1 McCrary (U. S.) 332.

A notice was to appear before A, a master, and the return was by B, a master; it was held to be irregular. *Whipple v. Brown, Harr.* (Mich.) Ch. 436.

Master Should Complete Proceedings.—Where proceedings under an order of reference have been begun by one master they should be completed by him and the party obtaining the order cannot transfer the proceedings to another

III. POWERS AND DUTIES OF MASTER.—The province of a master is to examine a case in detail, and the effect of a preliminary hearing before a competent master is to eliminate what is undisputed and to develop the true points of the contest for the court's consideration;¹ hence he is given certain powers to facilitate his en-

master to be completed. *Bishop v. Williams*, Walk. Ch. 423; *Larkins v. Murphy*, 68 N. Car. 381.

May be Transferred in Case of Death or Inability.—The proceedings may of course be transferred to another master in extreme cases. 9 Ves. 341; *Prac. Reg.* 165; 2 *Daniell's Ch. Pr.* 1168.

A court cannot appoint a commissioner out of the State, to settle an account, without the consent of the parties. *Anderson v. Gest*, 2 Hen. & M. (Va.) 26.

1. *Phillips' Appeal*, 68 Pa. St. 447; *Clark's Appeal*, 62 Pa. St. 137; *Backus' Appeal*, 58 Pa. St. 186, 192; *Tilghman v. Proctor*, 125 U. S. 136, 149.

Duties of Master.—In *Simmons v. Jacob*, 52 Me. 147. *CUTTING, J.*, observes: "In this state (Maine) we have no *regula generalis* in relation to the duties of a master in chancery; but, in each case where a master is appointed, the rule for his guidance is the decretal order. He is not usually appointed to act merely as a commissioner to take testimony, which any ordinary magistrate might do, but as an officer to receive and adjudicate upon the force and effect of evidence produced before him and thus to ascertain facts and form an opinion as to the law arising thereon, both of which constitute his findings and are the only subject matter to be inserted in his report to the court—so that if his legal conclusions are not sustained by the facts found, the court may interpose and correct the error." See also *Howe v. Russell*, 36 Me. 115; *Mason v. York etc. R. Co.*, 52 Me. 82; *Cary v. Herrin*, 62 Me. 16, 18; *Emerson v. Atwater*, 12 Mich. 314.

Master in South Carolina.—A commissioner in equity is not a judge within the meaning of the constitution of South Carolina, so as to entitle him to hold his office "during good behavior." *Ex parte Gray*, 1 Bailey (S. Car.) Ch. 77.

A master in chancery appointed under the constitution of South Carolina of 1778, was not displaced by the act of 1799, and a new appointment under that act. *In re Gibbs*, 1 Dessaus. (S. Car.) 587.

Master in Ohio.—Referees and master commissioners, under the Ohio code, possess judicial functions. 1871, *Williams v. Stevens*, 1 Cinc. (Ohio) 176.

Master in Indiana.—A master commissioner referred to "for finding" is a general referee. *Lee v. State*, 88 Ind. 256.

A reference to a master "to hear the evidence, find the facts and report the same together with the evidence," held not to authorize conclusions of law. *McNaught v. McAllister*, 93 Ind. 114.

In Tennessee.—By the Tennessee chancery practice, orders for taking bills *pro confesso*, and setting down causes for hearing, properly appertain to the duties and functions of the clerk and master, and not of the chancellor; and should be made at rules, and not in court. And when the chancellor assumes to make such orders he is exercising the appropriate function of the master, and must conform to the rules prescribed for the government of the clerk and master. *Lanum v. Steel*, 10 Humph. (Tenn.) 280.

Jurisdiction in Rhode Island.—A master appointed under Rhode Island Rev. St., ch. 164, § 17, to settle the accounts of a removed assignee, has jurisdiction over every question which goes to the charge and discharge of the assignee, as an accounting party, though involving fraud in the performance of his trust; the act relating to jury trials in equity causes having no application to summary proceedings in equity, upon petition. *Lowitz v. Alden*, 6 R. I. 512.

One of the most important duties of the master is to make computations and take accounts in complicated pecuniary transactions referred to him by the court, and which the court will generally refuse to look into without his aid.

Master's Powers and Duties.—For a summary of the duties and powers of masters in the federal courts, see *Equity Rules United States Supreme Court*, 73-81. See *AUDITORS*, vol. 1, p. 1009.

In *Ransom v. Winn*, 18 How. (U. S.) 295, *McLEAN, J.*, said: "Where a chancery suit involves matters of account, the action of a master should be had in

quiries, among others, compelling the attendance of parties and witnesses,¹

the inferior court, and the items admitted or rejected should be stated so that exception may be taken to the particular items or class of items, and such a case should be brought before this court on the rulings of the exceptions by the circuit court."

On the reference of an account to a master for statement he should admit the oath of a party to prove only such items as from their nature are not susceptible of full proof. *Harding v. Handy*, 11 Wheat. (U. S.) 103.

1. **Master's Warrant.**—The 78th Equity Rule of the United States courts provides that the commissioner, master, or examiner shall certify to the clerk's office in case a witness refuses to appear or to give evidence, whereupon the court or any judge thereof may order attachment. See also 1 Daniell's Ch. Pr. 908; Braithwaite's Pr. 144. To bring the parties before the court the master issues a "warrant" which is a memorandum, entitled in the cause, and signed by him, appointing a day and hour for all parties or their solicitors concerned to attend a meeting before him on the matter of reference. This notice should be given at the earliest reasonable time. If either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it is the duty of the master to proceed with all reasonable diligence, in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay. United States Equity rule 75. See also Chancery Rules of *New Jersey*, 2 McCart. (N. J.) 515, 531.

In *State v. McIntyre*, 53 Me. 214, the court held that a master's report could not be successfully objected to as an *ex parte* report where he had proceeded in the absence of defendant, after giving him due notice.

Notice to Parties.—Parties are entitled to notice of the hearing before the master, though only records are to be ex-

amined. *Wardlaw v. Erskine*, 21 S. Car. 359. See also *DeWalt v. Kinard*, 19 S. Car. 286.

A commissioner appointed to take an account gave the defendant three days' notice of the date fixed for proving claims against him. *Held*, that while the notice was too short, the judgment would not be reversed, as it did not appear that defendant was prejudiced thereby. *Moore v. Bruce* (Va.), S. E. Rep. 195.

In cases in chancery where a default has been taken and a reference is made to a master to ascertain and report the amount due, no notice is required to the defendant to appear before the master on the reference. *Moore v. Titman*, 33 Ill. 353, 358.

On a reference to a master to state an account, reasonable notice of the hearing must be given to the opposite party. A notice to his attorney sent by letter, mailed three days prior to the time fixed, was held insufficient when the attorney could no more than have reached the master's office if there had been no delay in the mail or otherwise, and if he had been at home and left at once to attend. *Strang v. Allen* 44 Ill. 428.

On a bill against an administrator to account, the matter was referred to a master, and the defendant was to give notice to the complainant of the time and place of the hearing before the master. The defendant took no steps in the case during the succeeding vacation, and, at the next term, the court rendered a final decree for the complainant. *Held*, that there was no error in the proceeding. *Murdock v. Holland*, 3 Blackt. (Ind.) 114.

In *New Jersey* the time for notice is fixed by rule at four days at least, exclusive before the day assigned for the hearing. Rule 43. Chancery Rules of *New Jersey*. See 2 Daniell's Ch. Pr. 1171; *Massachusetts* Equity rule 31, and *Tennessee* Rule of Ch. Pr., rule 4. Every warrant for attendance before the master is peremptory. 59th Order, 1828; United States Equity rule 75. And he may proceed to an *ex parte* hearing upon the nonattendance. (75th Equity rule United States.) If he report that he "gave reasonable notice to each and all of said defendants" of the time and place appointed, for the hearing, it is sufficient in the absence of evi-

the production of documents,¹

dence to the contrary. *State v. McIntyre*, 53 Me. 214; *Simmons v. Jacobs*, 52 Me. 147.

Time to Prepare for a Hearing.—The time to prepare for a hearing after notice given to the parties by a master in chancery unless fixed by some rule or order, is left in the discretion of the master; but it should be a reasonable notice. *Bernie v. Vandever*, 16 Ark. 616.

A notice to appear on the day the case was referred, in a few hours, between 8 and 12 P. M. was held to be unreasonable and the report was set aside. *Bernie v. Vandever*, 16 Ark. 616.

Master's Summons.—Pending a reference, it is proper for the master to issue a summons, at the request of the defendant, to proceed in the examination of witnesses. *Fream v. Dickinson*, 3 Edw. (N. Y.) Ch. 300.

A summons to proceed upon a reference issued by the master before the actual entry of the decree, or order of reference, is irregular. *Quackenbush v. Leonard*, 10 Paige (N. Y.) 131.

The time fixed by the master for the service of a summons should be stated in the summons itself, or form a part of the underwriting, where the latter is necessary to inform the party of the object of the hearing; and the underwriting, as well as the summons, should be signed by the master. *Whipple v. Stewart*, Walk. (Mich.) Ch. 357.

Where a defendant appeared before the master at the return of a summons, and objected to his proceeding, on the ground that no time had been fixed for the service of the summons, *held*, that such appearance was no waiver of his right to make such objection. *Whipple v. Stewart*, Walk. (Mich.) Ch. 357.

Where proceedings are to be had under an order of reference to a master, it is not necessary to serve a copy of such order on the defendant with the master's summons, but he is bound to take notice of it without service. *Whipple v. Stewart*, Walk. (Mich.) Ch. 357.

Parties Entitled to Attend—The general rule appears to be that all parties beneficially interested are entitled to attend before the master on all those proceedings which may affect their interests. The rule is subject to some limitations, as in the case of executors or administrators, trustees, etc.; and these restric-

tions are adopted for the purpose of protecting the party upon whom, or the funds upon which, the costs of the suit will eventually devolve, from being put to expense by unnecessary attendance of parties before the master and the application of them is generally regulated by the master to whose discretion it is left. 2 Daniell's Ch. Pr. 1174.

1. Production of Documents.—Under the United States Equity rule 77, the master may require the production of all books, papers, writings, vouchers, and other documents applicable to the matter referred.

In an order of reference to a master, the defendant may be directed to produce before the master "all books, papers and writings in his custody or power," and may be examined on oath upon such interrogatories as the master may direct, relative to the subject matters of the reference. *Hart v. Ten Eyck*, 2 Johns. (N. Y.) Ch. 513.

Where, upon an order to deliver over books, papers, etc., the court intends to permit it to be done upon his own *ex parte* affidavit merely, he is directed generally "to produce and deliver the same on oath;" but when the party is directed to produce and deliver them on oath "before a master," or "under the direction of a master," it is held that all parties interested may examine as to the full and fair compliance with the order. *Hallett v. Hallett*, 2 Paige (N. Y.) 432.

Where a master was ordered to take testimony, where no interrogatories had been filed, the testimony consisting principally of books of account alleged to be in the custody of the respondent, *held*, that it was a proper departure from the rule requiring interrogatories to be filed, and that courts may depart from their general rules in cases where it would prevent a failure or delay of justice, and the respondent having filed an affidavit in answer to the motion, that he had no books called for in his control, that the affidavit to that effect would reply to the order. The same affidavit was made in answer to the order, and the master reported that he considered the respondent no longer amenable to his process. This report was adopted by the court, the complainant being left to a *subpoena duces tecum* to bring the books into court. *Russell v. McLellan*, 3 Woodb. & M. (U. S.) 157.

examination of parties and witnesses,¹

When any decree directs books or papers to be produced before the master, it is in the discretion of the master to determine *what* documents are to be produced. He may also require such documents to be left with him for examination. The master has power to fix a time within which they must be produced, and disobedience of his orders is contempt. *Daniell's Ch. Pr.* 1177, 1178.

In *South Carolina*, a master has no power conferred upon him to compel a party to produce a deed to be used in evidence, either by § 791 of the General Statutes or by §§ 294 and 389 of the code. *Cartee v. Spence*, 24 S. Car. 550.

In a bill for an account between partners, it is the duty of the master, upon a reference to him, to take and state an account between the parties, to state the accounts, and include that statement in his report. The parties and witnesses should be examined under oath, and their statements reduced to writing. If a witness refuses to appear before the master, or to answer, the court, upon information thereof, will punish him for contempt. The master should require all books and other evidences to be presented, which will enable him to present a full statement, and strike a correct balance. *Brockman v. Aulger*, 12 Ill. 277.

In an equity proceeding, the examiner to take testimony had filed his report, and a master had been appointed, when application was made to the court to reopen the evidence, on the ground that two of the witnesses had made a mistake in their testimony before the examiner. *Held*, that the application, in the discretion of the court, might be granted, but that such discretion should be exercised with great care. *Burton's Appeal*, 93 Pa. St. 214.

1. Examination of Parties.—The master is at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination must be taken down by the master, or by some other person by his order, and in his presence, if either party requires it, in order that the same may be used by the court, if necessary. *United States Equity rule* 81. See also *Gilmore v. Gilmore*, 40 Me. 50, 53;

Hart v. Ten Eyck, 2 Johns. (N. Y.) Ch. 513; *Hollister v. Barkley*, 11 N. H. 501; *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 499; *Story v. Livingston*, 13 Pet. (U. S.) 359.

A *viva voce* examination does not alter the rights of the parties, and therefore there can be no cross-examination by the party's own counsel. His answers are testimony, when responsive, and he may accompany them with an explanation fairly responsive to the interrogatory. *Benson v. LeRoy*, 1 Paige (N. Y.) 122.

See also *Jackson v. Jackson*, 3 N. J. Eq. 96, 102; *Winter v. Wheeler*, 7 B. Mon. (Ky.) 25.

The master has no power to examine parties other than that given by the decree, but this is usually ample, and should be rectified when it is not sufficient. The examination is usually by written interrogatories, and it is in the discretion of the master what parties shall be examined and what interrogatories shall be admitted. *Daniell's Ch. Pr.* 1181; *McCracken v. Valentine*, 9 N. Y. 42; *Copeland v. Crane*, 9 Pick. (Mass.) 93.

No witness in chief, examined before publication, nor the parties, ought to be examined before the master on a reference without an order, for that purpose, which order usually specifies the subject and extent of the examination. *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495.

When an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed to its conclusion with as little delay and intermission as the nature of the case will admit of; and where it is once concluded, it ought not to be opened for further proof without special and very satisfactory cause. *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495.

The rule of the chancery court of *New York*, which directs to the master or other officer, who is to approve sureties in any case, to require such sureties to justify, means that he shall not only examine them on oath as to the extent of their pecuniary responsibility, but also as to their residences, and other qualifications to become such sureties according to law and the practice of the court; or he should require an affidavit of such qualifications. *Ten Eck v. Simpson*, 11 Paige (N. Y.) 177.

The return of a master, charged with the execution of an order of court, showing the failure of a person to appear and submit to an examination as required by the order, is sufficient foundation for a rule to show cause why an attachment should not issue for contempt. *Whipple v. Brown, Harr.* (Mich.) Ch. 436.

Suspending Examination.—It is bad practice to suspend an examination before a master until the court shall have passed upon the relevancy of the testimony offered. *Rusling v. Bray*, 37 N. J. Eq. 174.

Oral Examination.—"The practice of oral examination is universal in the State of *New Jersey*, as well in relation to parties as witnesses, and the practice of cross examination by counsel is also universal, but must be confined to matters or facts which were the subject of enquiry on the original examination and which were authorized to be examined into by the decretal order." *Jackson v. Jackson*, 3 N. J. Eq. 96, 103. See also in this connection *Marlatt v. Warwick*, 18 N. J. Eq. 108.

Shepherd v. McClain, 18 N. J. Eq. 128; *Doody v. Pierce*, 9 Allen (Mass.) 141; *French v. Hayward*, 16 Gray (Mass.) 512; *Brady v. Brady*, 8 Allen (Mass.) 101; *Bailey v. Myrick*, 52 Me. 132.

By the United States Equity rule 77, the master has full authority to examine the parties in the causes upon oath, touching all matters contained in the reference. See also *Pingree v. Coffin*, 12 Gray (Mass.) 288.

If a master declines to examine any party when required, exception should be taken to his report on this ground. *Chenwell v. Martin*, 4 Sim. 340; *Simmons v. Gulleridge*, 13 Ves. 265; *Edwards v. Goodwin*, 10 Sim. 123.

A reference to a master, to examine the defendant on interrogatories touching an alleged contempt, and to take and report proofs, does not authorize the master to receive *ex parte* affidavits, without a special clause in the order of reference to that effect; and as a general rule, no new affidavits will be received by the court at the hearing. *Cumming v. Waggoner*, 7 Paige (N. Y.) 603.

Upon an order for the appointment of a receiver, the master may examine the defendant under oath, as well as witnesses, for the ascertaining whether all the property of the defendant has been

delivered to the receiver; but the defendant cannot be required to deliver up property of which he has denied, under oath, all possession or control by him. *Fitzburgh v. Everingham*, 6 Paige (N. Y.) 29.

Where the master certifies that an examination is insufficient, the complainant may file new interrogatories; and the defendant will be ordered to answer such interrogatories and the exceptions together, but if it is certified to be sufficient, the defendant cannot be re-examined to the same point on new interrogatories, without the permission of the court, on cause shown, and notice of the application to the defendant. *Case v. Abeel*, 1 Paige (N. Y.) 630.

Written Interrogatories and Cross Examination.—The answers to interrogatories are put in writing on advisement of counsel; and under this mode of proceeding there can be no cross examination. *Jackson v. Jackson*, 3 N. J. Eq. 96, 102.

A party interrogated before a master in chancery has a right to demand that the questions be propounded to him in writing. Otherwise, as to witnesses. *Winter v. Wheeler*, 7 B. Mon. (Ky.) 25.

Upon a reference to a master in chancery to take proofs, in a suit by a husband for a separation, where the defendant wife admits the charges in the bill to be true, either by answer or by suffering the bill to be taken as confessed for want of an answer, such defendant may appear and cross examine the witnesses of the complainant, and may produce witnesses to disprove the charges in the bill; but such cross examination must be at her own expense, and not at the expense of her husband; and the master is not bound to take testimony for her without compensation. *Perry v. Perry*, 2 Barb. (N. Y.) Ch. 285.

Exceptions.—Any objection to the form of the interrogatories as settled by the master, or to his other rulings should be taken in the form of an exception, and brought thus before the court. 1 *Daniell's Ch. Pr.* 1182. See generally INTERROGATORIES, vol. 11, p. 526.

Sufficiency or Insufficiency of Examination.—In considering the sufficiency or insufficiency of an examination upon exceptions to the master's certificate the court will look at it, to see whether there is any substantial defect. An insufficient examination is considered a

and the admission or rejection of evidence.¹

nullity; when, therefore, the examination is found insufficient, either upon the master's certificate or by order of the court, made upon exceptions to it, the same proceedings may be adopted as if no examination had been put in at all. 2 Daniell's Ch. Pr. 1186, *citing* Purcell v. McNamara, 12 Ves. 170; Jackson v. Jackson, 2 Green Ch. (N. J.) 102; 1 Hoff. Ch. Pr. 529-533; Allfrey v. Allfrey, 12 Beav. 620.

Credibility of Witness.—An objection to the credibility of a witness may be ordinarily made after publication and before hearing; but the interrogatories must be so shaped as to prevent the party, under color of an examination to credit, from procuring testimony to overcome that already taken and published in the cause. Gass v. Stinson, 2 Sumn. (U. S.) 605.

Competency of Witness.—An objection to the competency of witness cannot be made after publication, if the incompetency was known before the commission to take his deposition issued. Gass v. Stinson, 2 Sumn. (U. S.) 605.

May Receive Testimony Without Order.—The master, when directed to ascertain the facts of a case, may receive the testimony of witnesses pertinent to such facts without an order expressly directing him to that effect. Goodwin v. McGehee, 15 Ala. 232.

The fact, that the signature to an instrument, which has not been acted on as evidence by the chancellor, and on which the equity of the bill was in no way dependent, was proved before him at the hearing, does not preclude the master, when such instrument is offered in evidence upon a reference to him, from enquiring into its genuineness, for reasons apparent on the face of the instrument, irrespective of the signature. Aday v. Echols, 18 Ala. 353.

In a reference to a master the order need not particularly empower him to take testimony, if the subject matter is only to be ascertained by evidence. In taking evidence, although the better plan is to take the answers in writing, upon written interrogatories, he may examine the witnesses *viva voce*, the parties to the suit being present, personally, or by counsel, and not objecting to such a course. Story v. Livingston, 13 Pet. (U. S.) 359.

By an agreement of the parties,

which was made an order of court, two cases were referred to three masters, "to take testimony and report the facts, with the form of a decree, under and in pursuance of the agreement herewith filed." The agreement also stipulated that the awards of the masters should be final, "without exception or appeal." Held, that the awards of the masters were conclusive, and that appeals therefrom must be quashed. Hostetter's Appeal, 92 Pa. St. 132.

A witness who has given his deposition, which has been read at the hearing, cannot be examined anew before the master, without a special order of the court. Gass v. Stinson, 2 Sumn. (U. S.) 605.

If any great right or public policy has been violated by the master, relief will be afforded; otherwise not. McDougald v. Dougherty, 11 Ga. 570.

Masters are empowered to examine witnesses and even parties to the cause. Interrogatories to a party before the master are in the nature of interrogatories in a bill of chancery. And the answers are evidence to the same extent. McDougald v. Dougherty, 11 Ga. 570.

As to the general principles on which examinations before a master are to be conducted regulating the practice, as to the mode of taking testimony, on an order of reference to a master, see Remsen v. Remsen, 2 Johns. (N. Y.) Ch. 495; Gass v. Stinson, 2 Sumn. (U. S.) 605; Jenkins v. Eldridge, 3 Story (U. S.) 292, 299; Hollister v. Barkley, 11 N. H. 501; Benson v. Le Roy, 1 Paige (N. Y.) 122; McDougald v. Dougherty, 11 Ga. 570; Dougherty v. Jones, 11 Ga. 432; Gilmore v. Gilmore, 40 Me. 50.

1. Admissibility of Evidence.—Under the 77th rule of the United States supreme court, the admission of evidence rests entirely in the sound discretion of the master. Wooster v. Gumbirner, 20 Fed. Rep. 167. But this rule is not everywhere upheld. In equity proceedings, where the claims set up by one of the parties against the other are resisted on the ground of fraud, and that question is presented to the court, and judicially determined in favor of such claims, and the case is sent to a master to find the amount due, he is not authorized to re-examine the question of fraud or receive any testimony bearing thereon,

The statutes of various States and the rules of court and local customs often regulate and sometimes extend these powers and impose other duties upon the masters; such as the settlement of deeds, the appointment of new trustees, and matters relating to the management of estates of insolvent debtors.¹ Certain ministerial acts, like the sale of property decreed by the court to be sold are also entrusted to masters.²

1. Clerks, Commissioners and Referees.—Many matters formerly entrusted to masters are now performed by officers of the court called clerks, commissioners or referees. Their chief duties are to make enquiries, take accounts, sell estates and adjust other matters, before there can be a final disposition of the cause.³

IV. REFERENCE.—The delegation by the court of any matter to a master is technically called a reference.

What shall be referred to a master, general or specific, is a mat-

but all the legal evidence had at the hearing, bearing upon the question to be determined by the master, may by him be considered. *Gilmore v. Gilmore*, 40 Me. 50.

By United States Equity rule 80, all affidavits, depositions and documents which have been previously made, read, or used in the court, upon any proceedings in any cause or matter may be used before the master.

There is no error in the admission in evidence, at the hearing before a master to whom a cause has been referred by this court, of a deposition taken out of the commonwealth on commission, although it does not appear that all the formalities required in depositions taken within the State were observed. *Tyng v. Thayer*, 8 Allen (Mass.) 391. See also *Stiles v. Allen*, 5 Allen (Mass.) 320; *Bacon v. Rogers*, 8 Allen (Mass.) 146.

If the defendant wishes to controvert any allegations in the bill, he should put them in issue by plea or answer; and neglecting this, he is precluded from introducing evidence for that purpose before the master on a reference. *Ward v. Jewett*, Walk. (Mich.) Ch. 45.

Where the master erroneously refuses to receive testimony, the proper way to correct it is by motion to the court for an order compelling him to receive the evidence, and not by excepting to his report. *Ward v. Jewett*, Walk. (Mich.) Ch. 45.

1. 1 Barb. Chan. Pr., 468.

2. *Morton v. Sloan*, 11 Humph. (Tenn.) 278; *Ryan v. Dox*, 25 Barb. (N. Y.) 440.

It is proper to order a reference to

decide whether a sale to enforce a vendor's lien should be made in gross or in parcels. *Clark v. Carlton*, 4 Lea (Tenn.) 452.

Sales made in *South Carolina* under order of court, in counties where there is no master, may be ordered made by the sheriff. *Childs v. Alexander*, 22 S. Car. 169.

A creditor coming in under a decree, to prove a claim not mentioned in the pleadings, must present the particulars of his claim to the master, accompanied by his affidavit, either positive, or to the best of his knowledge and belief, that the sum claimed is justly due, and that neither he, nor any person by his order, or on his account, has received satisfaction or security for any part of the claim. *Morris v. Mowatt*, 4 Paige (N. Y.) 142.

Upon a rule against a master, to show cause why he has not paid over money belonging to suitors, he cannot discharge himself upon his own affidavit that the money has been stolen without negligence on his part. *In re Bostick*, 2 Ired. (N. Car.) Eq. 327.

Where, pending a bill, the parties settled their accounts between them, and reported the same into court, but a new order of reference was made by mutual consent, the commissioner is not precluded from examining the accounts generally, and correcting any mistakes therein; especially where the party benefited by the errors had torn the signatures of the parties from their settlement. *Todd v. Bowyer*, 1 Munf. (Va.) 447.

3. *Beebe v. Russell*, 19 How. (U. S.) 283, 285.

ter in the discretion of the court.¹ Where the evidence in a cause is all written and a decree thereon can be rendered without diffi-

1. Phillips' Appeal, 68 Pa. St. 137; Clark's Appeal, 62 Pa. St. 447, 451; Martin v. Foley, 82 Ga. 352.

Reference of an Equity Cause Discretionary with the Court.—In a suit to set aside a deed alleged to have been procured by fraud and undue influence, and to have an accounting in case the deed is set aside, where it is apparent to the trial judge that the controlling issue is as to the validity of the deed, it is not error to refuse to refer the cause to an auditor before the trial by a jury of that issue, as the reference of an equity cause is discretionary with the court, under Code *Georgia*, sections 3097, 4202. Martin v. Foley, 82 Ga. 552.

Reference—When Ordered.—See Emery v. Mason, 75 Cal. 222; Moore v. Bruce (Va.), 7 S. E. Rep. 195.

As a general rule, the party obtaining a reference is entitled to the prosecution thereof in the first instance; and where a reference is directed at a hearing in which both parties have an interest, it is to be prosecuted by the solicitor of the plaintiff; and in either case, the adverse party has no right to carry the decree to the master's office until the prosecution of the reference has been committed to him, either upon default of the party originally entitled to the prosecution or by a provision in the decree directing the reference. Quackenbush v. Leonard, 10 Paige (N. Y.) 131.

Where a cause is referred to a commissioner, the court ought to settle the principles on which he is to make up his account. Kay v. Fowler, 7 T. B. Mon. (Ky.) 593.

Orders of reference to a master should specify the principles on which the accounts are to be taken, or the enquiry proceeds, so far as the court shall have decided thereon; and the examinations before the master should be limited to such matters within the order as the principles of the decree or order may render necessary. Remsen v. Remsen, 2 Johns. (N. Y.) Ch. 495.

In What Cases a Reference Should be Ordered.—Where enquiries as to compensation or damages do not involve much complexity of facts or amounts, an issue of *quantum damnificatus* is not necessary, but the usual course is to refer the matter to the register and master. Springle v. Shields, 17 Ala. 295.

A reference to a master may be

ordered to ascertain what are "usual covenants" according to local usages.

The "usual covenants" of a deed, held to be covenants of seizin; of right to convey, against encumbrances; of quiet enjoyment, and of warranty. Wilson v. Wood, 17 N. J. Eq. 216.

Where the plaintiff, in a bill for specific performance, shows his right to a conveyance, but the defendant has, by sale or otherwise, put it out of his power to convey, it may be referred to a master, to ascertain the damages. Woodcock v. Bennet, 1 Cow. (N. Y.) 711.

In a suit in chancery to restrain further detention of land, damages for injury already received may be determined by reference to the master. Busby v. Mitchell, 29 S. Car. 447.

Under Acts *Virginia*, 1883, p. 150, as amended by Acts 1884, p. 57, authorizing a judge in vacation to order an account by a commissioner, where the judge has the bill and exhibits before him, which make out a *prima facie* case, it is not error to order an account. Moore v. Bruce (Va.), 7 S. E. Rep. 195.

An action of contract, praying for relief in equity, under the Acts of 1853, ch. 371, and 1855, ch. 194, is to be treated as a suit in equity, and as such may be referred to a master in chancery to state an account between the parties.

A remark by a master in chancery in his report on a suit in equity between partners, that "no sane man, with a knowledge of the true state of the firm's affairs, could intelligently have assumed the obligations which the defendant claims to have been fixed on the plaintiff," is no ground of exception. Topliff v. Jackson, 12 Gray (Mass.) 565.

It is a matter of discretion with the chancellor whether he will order a reference to the clerk and master with regard to matter of title; and it is highly expedient in most cases that he should investigate the matters for himself. Buchanan v. Alwell, 8 Humph. (Tenn.) 516.

It is not error for a court of equity to direct a commissioner, instead of a jury, to state and report the profits of land. Roberts v. Stanton, 2 Munf. (Va.) 129.

A court of chancery may direct the reference of a case to a master, with authority to examine the defendants on oath; and such examination will have

culty a reference is unnecessary.¹ But the court will generally refer such matters as complicated accounts, infringement of copy-

the effect of an answer. *Templeman v. Fauntleroy*, 3 Rand. (Va.) 434.

Where the defendant in a bill to foreclose fails to answer, after service of a *subpoena* on him for several terms, the matter may be referred to a master, his report taken, and a final decree rendered at the same time. *Mussina v. Bartlett*, 8 Port. (Ala.) 277.

Where a bill by a creditor, for the benefit of an assignment by his debtor, set forth a schedule of his claims entitled to preference, a claim not included in the schedule was refused a preference in payment, but the creditor was allowed to go before the master for a further investigation of the claim of preference. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

Where there are infant defendants to a bill to foreclose a mortgage, it should be referred to a master to report whether it will be for their interest to sell the whole mortgaged premises, together or in parcels; and if in parcels, what parcels, and which it will be for their interest to sell first. And, in such case, he should report the evidence so far as to enable the court to judge of the correctness of the master's conclusions. *Walker v. Bank of Mobile*, 6 Ala. 452; *Fry v. Merchants Ins. Co.*, 15 Ala. 810.

The usual and best method of proceeding, in cases of foreclosure, is to appoint a master to find and report the amount due, and then exceptions may be filed to the report, upon which the judgment of the chancellor is given; and this may afterwards be assigned as error. *Guy v. Franklin*, 5 Cal. 416.

A final decree cannot be passed on a bill to foreclose a mortgage, without a reference to the clerk or master to compute and report the amount due. *Beville v. McIntosh*, 41 Miss. 516.

In an action to recover money on a bond in which the genuineness of an alleged receipt is in issue, such issue may be referred to a master commissioner for his decision. *Hansberger v. Cochran*, 82 Va. 727.

Where the pleadings show that an accounting of partnership affairs extending over a series of years will be required, and there is nothing to indicate that difficult questions of law will be involved, it is discretionary with the court, under Code *South Carolina*, section 293, to direct a reference. *Bouland v. Carpin*, 27 S. Car. 235.

In a suit in chancery to restrain further detention of land, damages for injury already received may be determined by reference to the master. *Busby v. Mitchell*, 29 S. Car. 447.

Truth of Pleas.—Where judgments are pleaded in bar, the court on motion may refer the plea to a master to ascertain its truth. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 17 Blatchf. (U. S.) 389.

1. *Lever v. Redwood*, 9 Port. (Ala.) 79.

When Reference Should Not be Ordered.

—Where a master is not considered necessary by the court to settle a long account between parties to a bill, the court having facts enough before it to strike the true balance, the matter will not be referred to a master, unless both parties agree to or ask for the reference. *Jewett v. Cunard*, 3 Woodb. & M. (U. S.) 277.

A reference will not be ordered to enquire relative to a fact, constituting the gist of the controversy, and put in issue by the pleadings. *Lunsford v. Boston*, 1 Dev. (N. Car.) Eq. 487.

A reference to a master is not necessary to ascertain the amount due on a promissory note. *Savage v. Berry*, 3 Ill. 545.

Under *Minnesota* statute the chancellor may hear and disallow exceptions to a bill without a reference. *Goodrich v. Parker*, 1 Minn. 195.

A reference will not be made upon the mere speculation of the parties that evidence may be produced before the master: the testimony in chief must be taken before the reference. *Planters' Bank v. Stockman*, 1 Freem. (Miss.) Ch. 502.

Where a question has been distinctly put forth in the pleadings, an issue raised and testimony taken, the parties must abide by the case made out, and the court will not direct a further enquiry before a master unless upon the ground of newly discovered evidence. *Morton v. Hudson*, 1 Hoffm. (N. Y.) 312.

A reference to ascertain damages after default, under the New York practice, will not be made on the affidavit of the plaintiff that the enquiry involves the examination of a long account; but a copy of the account itself must be shown. *Brown v. Miller*, 1 Barb. (N. Y.) 24.

In a proceeding in chancery, to charge the heirs with a debt of their father, the complainant, after submitting the cause for final hearing and decree, moved the court to refer the matter to the master. The court *held* that it was their business to decide whether the heirs had received assets, etc., and rejected the motion. *Byrd v. Belding*, 18 Ark. 118.

Where an accounting is prayed, the court may itself take or state the account; and after ascertaining and declaring on the evidence that there is no profit, return money or property acquired by the party whose estate was sought to be charged, under a contract set forth in the complaint, it is not error to refuse to refer the cause for the taking of an account. *Emery v. Mason*, 75 Cal. 222.

On a bill which asks only for the construction of a will, it is error to order a reference to state an account of advancements chargeable to one of the beneficiaries. *Marquise de Portes v. Hurlbut*, 44 N. J. Eq. 517.

Where on a bill to foreclose a mortgage the debt has been paid into court, and the counsel for the mortgagee claims a lien thereon for a general balance due from his client, the court has no power to order the reference of such claim to a master or the payment of any balance found due; neither client nor counsel are for this purpose before the court or amenable to its jurisdiction. *Wolfe v. Lewis*, 19 How. (U. S.) 280.

Where, in a foreclosure suit, a junior encumbrancer has filed an answer, neither denying the amount claimed nor the order of priority, except by consent, an order of reference cannot be made, without setting the cause down for hearing. *Wright v. McKean*, 13 N. J. Eq. 259.

On a bill for foreclosure against infants and others, where any of the defendants have answered, the complainant cannot enter a rule of course to refer the cause to a master, except by consent of such defendants as have answered, or their solicitor. *Faitoute v. Haycock*, 2 N. J. Eq. 105.

A reference to a master need not be ordered as to a nonresident defendant brought in by publication, where the proofs upon the only question involved in the case are taken in open court. *Bussey v. Bussey*, 71 Mich. 504.

The court in an equity suit has no power under the practice act, without the consent of parties, to order a refer-

ence for the trial of any issue of fact except one which requires the examination of an account. *Williams v. Benton*, 24 Cal. 424. See also *McLin v. McNamara*, 1 Dev. & B. (N. Car.) 407.

Upon a motion in a cause before the circuit court for reference to a master, with directions to look into the cause and also into a case then pending in a State court, and to see whether or not the two cases were upon the same matter and between the same parties, it was held that inasmuch as upon an examination of the pleadings the court could see that different questions arose in the two causes, the motion must be denied. *Loring v. Marsh*, 2 Cliff. (U. S.) 311.

In a suit in chancery by a receiver to enforce the lien of a judgment against the lands of the debtor, where it does not appear from the record in any way that there are others who have liens on the land, the court may properly ascertain the amounts of the liens of plaintiff without referring the cause to a commissioner. *Howard v. Stevenson*, 33 W. Va. 116. See also *Emery v. Mason*, 75 Cal. 222; *Busby v. Mitchell*, 29 S. Car. 447.

Scope of Reference.—See *Perrin v. Lepper*, 72 Mich. 454; *McCormack v. James*, 36 Fed. Rep. 14.

Master May Refuse to Pass Upon Matters Not Included in the Reference.—The supreme court ordered a reference to a master and remanded the cause to the district court, which confirmed his report. On appeal, *held* that, though there were matters which should have been included in the reference, yet it was right for the master to refuse to pass upon them, as they were not included therein, and therefore that the decree of the district court should be affirmed. *Pim v. Nicholson*, 10 Ohio St. 623.

Jurisdictional Questions.—Jurisdictional questions are not, or the master. *Smith v. Rock*, 59 Vt. 232.

Insufficiency of Answer.—Under the 63rd equity rule of the Supreme Court of the United States, exceptions to an answer for insufficiency must be set down on a rule day for hearing before a judge of the court. A reference of such exceptions on a day not a rule day, and to a master and not a judge, is, unless cured by some subsequent action of the court, a nullity, and an abandonment of the exceptions. *LaVega v. Lapsley*, 1 Woods (U. S.) 428.

Special Master.—The court may ap-

right,¹ title,² divorce and any other matter in which a master can assist the court in arriving directly at the points of contest in the cause.

1. Accounts.—By comparison with a prior title the nature of equitable proceedings in matters of account, and the duty and authority of masters in equity to whom accounts are referred will more clearly appear.³ In certain States the common law action of account has been abolished.⁴ And in most of the States, legislation has made alterations in common law methods of procedure or has substituted a new practice.⁵ With what is here said in reference to the duties and responsibilities of masters in equity in matters of account should be compared, principles classified under other titles showing the analogy which exists between them and arbitrators, auditors, referees and similar officials commonly appointed for the same purpose in proceedings at law.⁶

point a special master in chancery to take testimony in a case. *Davis v. Davis*, 30 Ill. 180.

Where the mortgage and certified copies of the notes were, without objection, referred to a special master to state an account in a suit for foreclosure, the court refused to set aside a decree based upon the master's report. *Pogue v. Clark*, 25 Ill. 351.

1. Infringement of Copyright.—Before granting an injunction on a charge of infringement of copyright, the court will generally refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act in the case. *Story v. Derby*, 4 McLean (U. S.) 160.

The costs of a reference to a master, to ascertain the damages resulting from an infringement of a patent, will be put upon complainant when damages are refused, if complainant knew, or could have known, all that was brought out by the reference, and respondent has done nothing that would deceive complainant, nor concealed facts. *Hill v. Smith*, 32 Fed. Rep. 753.

2. Title.—Where a purchaser at a partition sale shows that the title is defective as cause for not complying with the terms of sale, and when the title depends upon questions of fact, the title should be referred to the master for testimony and report. *Rehkapf v. Kuhland*, 30 S. Car. 234.

Where, upon a bill to compel the specific performance of a contract for the purchase of land, the court is satisfied, at the hearing, that there can be no fuller investigation of the title, and all the facts are before the court, and the court

is satisfied that the principal objections to the title still exist, and from their nature cannot be removed, it will not direct a reference to a master to enquire if a good title can then be made. *Dominick v. Michael*, 4 Sandf. (N. Y.) 374.

Where a bill for a specific performance of a contract for the sale of land is set for hearing by consent, the question being one of law as to whether the vendor's title was defective or not, and neither party asking a reference to a commissioner, the court ought not to refer the title to a commissioner; nor, if the title is found defective, to give time to the vendor to perfect it, but to decree at once. *Jackson v. Ligon*, 3 Leigh (Va.) 161.

In a suit for a specific performance of a contract for the sale of land, where the only question is whether the vendor can make title, the court will direct a reference to a master, to ascertain the title, without the consent of the other party. *Gentry v. Hamilton*, 3 Ired. (N. Car.) Eq. 376; *Beverley v. Lawson*, 3 Munf. (Va.) 317.

3. See ACCOUNT RENDER, vol. 1, p. 128.

4. See ACCOUNT RENDER, vol. 1, p. 128.

5. See ACCOUNT RENDER, vol. 1, p. 128.

6. See ARBITRATION AND AWARD, vol. 1, p. 646; AUDITORS, vol. 1, p. 1009; REFEREES.

Accounts.—In cases of complicated accounts the orders of reference to a master should specify the principles on which the accounts are to be taken, so far as the court shall have decided thereon, and the examination before the

master should be limited to such matters within the order as the principles of the decree or order may render necessary. *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495; *Kay v. Fowler*, 7 T. B. Mon. (Ky.) 593; *Stonington Savings Bank v. Davis*, 15 N. J. Eq. 30; *Gordon v. Hobart*, 2 Story (U. S.) 243, 260; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Torrey v. Shaw*, 3 Edw. (N. Y.) Ch. 356; *Simmons v. Jacobs*, 52 Me. 147; *Updike v. Doyle*, 7 R. I. 446; *Duborg v. U. S.*, 7 Pet. (U. S.) 625; *Hudson v. Trenton Locomotive & M. Mfg. Co.*, 16 N. J. Eq. 475; *Izard v. Bodine*, 9 N. J. Eq. 309, 311; *Moss v. McCall*, 75 Ill. 190; *Patten v. Patten*, 75 Ill. 446.

Consent of counsel cannot impose on court the burden of making up complicated accounts. It is bad practice for the chancellor to take an account himself, except in simple and obvious cases. A reference should be made in complicated cases. *Bryan v. Morgan*, 35 Ark. 113.

It is not the province of a court of equity to investigate the items of an account. They will be referred to a master. *Harding v. Handy*, 11 Wheat. (U. S.) 103; *Jewett v. Cunara*, 3 Woodb. & M. (U. S.) 277; *St. Colombe v. U. S.*, 7 Pet. (U. S.) 625; *Tiel v. Roberts*, 4 Hayw. (Tenn.) 86; *Peyton v. Smith*, 2 Dev. & B. (N. Car.) Eq. 325; *Bland v. Wyatt*, 1 Hen. & M. (Va.) 543.

To the master's report and account the parties may take exceptions, and thus bring the matter before the court. *St. Colombe v. U. S.*, 7 Pet. (U. S.) 625.

As to the mode of taking exception, and the method of presenting evidence on such an exception in matters of account, see *Prince v. Cutler*, 69 Ill. 267.

The court will not lay down in advance the principles on which an account is to be stated by a commissioner or auditor. *Vanderwick v. Summerl*, 2 Wash. 41.

On a bill for discovery, relief and account, the right of the plaintiff must be first established and decided, after which an account may be taken. *Neale v. Hagthorp*, 3 Bland (Md.) 551. See also *Franklin v. Meyer*, 36 Ark. 96; *Dunlap v. O'Dena*, 1 Rich. (S. Car.) Eq. 272.

A decree to account calls on both parties to be active in the cause. And especially after a decree, the defendant being in court and called upon to account with all the material in his pos-

session, by which an account could be taken, can take no advantage of the apparent laches of the complainant. The question of laches is to be decided upon the special circumstances of each case. *Glenn v. Hebb*, 17 Md. 260.

Account Should be Ordered for Both Parties.—In general, where a bill renders an account necessary, the account should be ordered for both parties, and both become actors; and if a balance be found due to the defendant, it ought to be decreed to him. *Payne v. Graves*, 5 Leigh (Va.) 561.

Cannot Exceed Allegations and Proofs.—An order of reference for an account before a master, cannot be more extensive than the allegations and proofs; and where the charges are specific, setting forth the items, an account will not be decreed beyond the matters charged. *Consequa v. Fanning*, 3 Johns. (N. Y.) Ch. 587. Compare *Calvert v. Carter*, 18 Md. 73.

Notice to Account.—No precise form of words is necessary in a notice to account, etc., in a suit in equity. It is enough if it be such that it cannot mislead the party, or leave him in any doubt of the object of it. *Whittier v. Vaughan*, 27 Me. 301.

Question of Fact.—When the question whether a charge in an account referred to a master should be allowed or not, is one of fact, depending upon the evidence, the conclusion of the master as to the fact is to be deemed *prima facie* correct. *Stimpson v. Green*, 13 Allen (Mass.) 326.

Full Statement of Facts Required.—In a reference in matters of account the master should set forth in his report a plain and full statement of the figures and facts found by him, and it is not sufficient to make a general reference to the depositions. *Hurdle v. Leath*, 63 N. Car. 366.

Account of Rents and Profits.—An account of rents and profits of land may be taken by a commissioner, as well as be ascertained by a jury; and the former is the more usual course. *Newman v. Chapman*, 2 Rand. (Va.) 93.

Imperfect Account.—In any proceeding where it becomes necessary to take an account, and that account has been reported by the commissioner to whom it was referred, the presiding judge, if in his opinion such account is imperfect, may recommit it to the same commissioner, in order that it be reformed or perfected. 1874, *Turner v. Houghton*, 71 N. Car. 370.

Answer of One Defendant as Evidence Against Codefendants.—The answer of one defendant cannot be used as evidence against his codefendants in stating an account before the master; but if the other answers and proof in the cause show a greater balance against them than the account, as stated on the basis furnished by the answer, it is error without injury. *Halstead v. Shepard*, 23 Ala. 558.

Master Should State Account in Detail.—The master should state the account in detail, not in the aggregate. *Gage v. Arndt*, 121 Ill. 491.

A court of equity may refer an account generally, and on the return of the report, determine such questions as may be contested by the parties. *Field v. Holland*, 6 Cranch (U. S.) 8.

Where a case for accounting is brought up on appeal without any accounting having taken place below, the court will refuse to hear it, and will remand it. *Barnebee v. Beckley*, 43 Mich. 613.

Where Testimony is Conflicting.—Accounts involving large sums, where the testimony is conflicting, will be referred to the master to state. *Beale v. Beale*, 116 Ill. 202. See also *St. Colombe v. U. S.*, 7 Pet. (U. S.) 625.

Court Should Lay Down Principles.—In referring partnership accounts to a commissioner, the court should settle the construction of the articles of partnership, and decide what kind of accounts come within the partnership, and lay down the principles by which the commissioner should be governed. *Sharp v. Morrow*, 6 T. B. Mon. (Ky.) 300.

Where Correct Will Not be Retaken.—Where the result of taking an account is correct, it will not be directed to be retaken, though there may be some errors in the mode of stating it. *McAlister v. Olmstead*, 1 Humph. (Tenn.) 210.

When New Account Should be Taken.—On a bill of injunction to stay proceedings on a judgment at law, if it appears from a commissioner's report, not excepted to by the defendant, that the complainant is entitled to a credit which the defendant failed to give, the court ought not to set aside the order for account, and dismiss the bill, on the ground that the complainant had neglected to carry into effect a previous order, referring, by consent of parties, the accounts between them to a different commissioner; but the last order having been made on the defendant's

motion, the report being excepted to for want of notice to the complainant of the time and place of taking the account, and such exception appearing well founded, a new account ought to be directed to be taken. *Roberts v. Jordans*, 3 Munf. (Va.) 488.

Collateral Matters.—By reference of a case to a master, to state an account and report the evidence, he is not required to report his conclusions or determine the liability of parties on collateral matters. *Fordyce v. Shriver*, 115 Ill. 530.

Where a case is sent to a master in chancery to take an account, it may be done either by requiring the parties to bring in debtor and creditor accounts under oath, or by examining them on interrogatories; both modes are sometimes combined. *Hollister v. Barkley*, 11 N. H. 501.

Form of the Account.—Where a chancery suit involves matters of account, the action of the master should be had in the inferior court, and the items admitted or rejected should be stated, so that exceptions may be taken to the particular items or class of items; and such a case should be brought before the supreme court on the rulings on the exceptions by the circuit court. *Ransom v. Winn*, 18 How. (U. S.) 295.

Failure of Proof.—Where the proof fails to furnish a proper basis for an accounting, the court may either dismiss the bill or refer the case to a master to take further testimony. *Ridenbaugh v. Barnes*, 14 Fed. Rep. 93.

To Expedite Proceedings.—An account may be ordered to be taken for the purpose of expediting proceedings, without first decreeing that the party is liable to account. *Carter v. Alston*, 2 Hayw. (N. Car.) 237.

Proper Equity Must be Shown.—Before an interlocutory decree to account is passed, the facts in relation to the account should be put in issue, but there must also be evidence which shows them to be probable, and the equity proper. *McLoskey v. Gordon*, 26 Miss. 260. See also *Planters' Bank v. Stockman*, 1 Freem. (Miss.) Ch. 502.

Examination of a Long Account Under New York Statutes.—The term "examination of a long account," as used in the provisions of the *New York Revised Statutes* and Code of Procedure authorizing the reference of causes, does not mean the examination of it to ascertain the result or effect of it; but the proof by testimony of the correctness of the

items composing it. *Magoun v. Sinclair*, 5 Daly (N. Y.) 63.

Under the *New York* Code of Procedure, the court cannot refer the trial of an action, where any issue raised upon the complaint is such that the objecting party has the right to its trial by jury. All the causes of action stated in the complaint must be referable. And the power to refer even actions arising on contract is restricted to cases where the court can see, from the proofs before it, that the examination of a long account will be required. 1873, *Evans v. Kalbfleisch*, 16 Abb. (N. Y.) Pr., N. S. 13.

Where Referred to Accountants Instead of Master.—Where accounts between parties were referred to accountants, in the place of a master, and two of them having thoroughly examined a certain branch of the accounts, the other concurred without examination; *held*, that the proceeding was regular. *Gibson v. Broadfoot*, 3 Dessaus. (S. Car.) 584.

In California.—When an account between parties must be taken, the court may take it, or may refer it to a commissioner. *Field v. Holland*, 6 Cranch (U. S.) 8; *Hidden v. Jordan*, 28 Cal. 301.

In Delaware.—In Delaware, the chancellor has not power to appoint a person as master in chancery, to state an account. *Reybold v. Dodd*, 1 Harr. (Del.) 401.

In Kentucky.—In Kentucky, the chancellor may adjust complex accounts without the intervention of an auditor. *Shipp v. Jameson*, 6 Litt. (Ky.) 190.

If the state of the accounts is such that the courts cannot safely render a decree, the cause should be sent to an auditor with authority to examine the parties on oath as to the doubtful items of their accounts. *Power v. Reeder*, 9 Dana (Ky.) 6.

In Maryland.—In Maryland, where there are no masters attached to the court of chancery, it is competent for an auditor to take testimony, state an account, or frame any statement which may be necessary or proper to enable the court correctly to dispose of any case in which it has the power to grant relief. *Townshend v. Duncan*, 2 Bland (Md.) 45.

In Virginia.—In Virginia, when the court of chancery orders an account to be made up without appointing a person before whom it is to be done, the order must be executed before one of

the masters of the court. *Anderson v. Gest*, 2 Hen. & M. (Va.) 26.

An order for an account must be executed within twelve months, in Virginia. *Anon.*, 4 Hen. & M. (Va.) 410.

A motion for an account is irregular; the complainant should move for a decree; on that hearing, if an account appears necessary, it will be ordered. *Hampton v. Pollard*, 4 Hen. & M. (Va.) 451.

Power of Master Under Rule of Court.—

On a reference to a master to state an account, he may, under rule 102 of court, require the parties to exhibit in writing, before him, the items of their claims, within such time as he may think reasonable, or be precluded from afterwards making such claim, unless there is some reasonable excuse for the delay. *Story v. Brown*, 4 Paige (N. Y.) 112.

And the master should regulate the manner of taking the reference, at the return of the first summons, so far as it can conveniently be done. *Story v. Brown*, 4 Paige (N. Y.) 112.

Time Given to Masters.—The time which should be given to commissioners to ascertain the amount of rents, waste, etc., is discretionary with the court. *Bullock v. Beemis*, 3 A. K. Marsh. (Ky.) 285.

Cases Depending Upon Local Rules of Law.—Proper manner of taking an account, determined, in cases depending upon peculiar facts; or upon local rule of law. *Sibert v. Kelly*, 6 T. B. Mon. (Ky.) 669; *Coit v. Tracy*, 9 Conn. 15; *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495; *Peck v. Hamlin*, 1 Paige (N. Y.) 247; *McConnico v. Curzen*, 2 Call (Va.) 358.

Miscellaneous.—Where the defendants, in their answer, pray an account from the plaintiff, they are bound to render an account of any moneys due to the plaintiff, though the bill does not pray an account. *Terry v. Hopkins*, 1 Hill (S. Car.) Ch. 1, 9.

The defendants in a suit will not be ordered to account among themselves, unless such account is necessary to a final settlement, and at least one of the parties interested requires it. *Craig v. Craig*, 1 Bailey (S. Car.) Ch. 102.

On a bill impeaching a settled account, the title of the complainant to relief depends on his success in showing errors against him in the settlement; and when the court directs an account to be taken, the commissioner, in executing the order of account,

2. Testimony.—Where matters of fact are referred, the masters take testimony and report facts to the court.¹

3. Time of Reference.—A case should not be referred to a master until the issues made by the pleadings have been settled by a decree. It is not proper to try those issues upon exceptions to the master's report.²

should confine himself to a statement of these errors, the sum of which is the proper measure of relief. *Shugart v. Thompson*, 10 Leigh (Va.) 434.

Where, on a bill filed for foreclosure, it is referred to the master to take and state an account, it is error in the chancellor to make a final order for the sale of the property before the report of the master comes in and is confirmed. *Graham v. King*, 15 Ala. 563.

A reference to a master for an account does not preclude the parties from denying their liability to account. *Smith v. Estes*, 2 Hayw. (N. Car.) 156.

When a bill sets up matters of account as a foundation for a trust, an account must be taken before a decree can be made. *St. Clair v. Smith*, 3 Ohio 355.

The report of a master on the accounts of a receiver appointed under the *New Jersey* act of 1829, to prevent frauds by corporations, requires confirmation, and may be excepted to; and on the exceptions the particular items of the account may be examined. *Richards v. Morris Canal etc. Co.*, 4 N. J. Eq. 428.

Where an injunction is granted to a judgment, and an account between the parties directed, the commissioner ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the suit. *Lipscomb v. Littlepage*, 1 Hen. & M. (Va.) 454.

An account not mentioned in the bill, but brought forward in the answer, increasing the demand of the plaintiff at law, may be allowed under the general demand for a just account. An account exhibited, and sworn to be just, in response to a bill to settle accounts, ought to be allowed as correct as to all the articles therein contained; but interest cannot be annexed thereto, without proof of an agreement or understanding that interest was to be paid. *Dozier v. Edwards*, 3 Litt. (Ky.) 71.

A party in account before a master, will not be allowed for anything under the head of general expenses, but must

specify the items. *Methodist Church v. Jaques*, 3 Johns. (N. Y.) Ch. 77.

Where a master was directed to "take an account of all the personal property which came to the hands of A and B, by virtue" of a certain contract, and a draft for money had come into their hands at the same time, and for the same purpose as other property, and they had obtained the money on it; *held*, that it was no objection to his proceedings that he charged A and B with the sum so received. *Morse v. Slason*, 16 Vt. 319.

If the decree directs the account to be stated on proper principles, errors in allowing items alleged not to be within the rules of the decree, can only be brought up by exceptions to the account. *Williamson v. Downs*, 34 Miss. 402.

After a final decree, an order for the defendant to account before the master, changing the nature of the relief, will not be granted on motion; the reference, if granted at all, must be after a rehearing. *Hendricks v. Robinson*, 2 Johns. (N. Y.) Ch. 283.

1. *Knapp v. White*, 23 Conn. 529; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Izard v. Bodine*, 9 N. J. Eq. 309; *Pilkinton v. Cotten*, 2 Jones (N. Car.) Eq. 238.

Under *Vermont* R. L., 730, the supreme court will not revise error in admission of testimony by master, unless exception is taken and filed. *Bruce v. Continental L. Ins. Co.*, 58 Vt. 253.

2. *Ward v. Paducah etc. R. Co.*, 4 Fed. Rep. 862.

Time of Ordering Reference.—An order of reference to a master to take the testimony, and report it, with his conclusions of law and fact, should not be made before the time for answering, allowed upon overruling a demurrer to the complaint, has expired. *Holliday v. Holliday*, 27 S. Car. 622.

Authority Conferred by Order.—An order of reference to a master to ascertain the sum due, made after a hearing, in a suit for foreclosure of a mortgage, with directions to the master to examine the complainant as to pay-

V. REPORT.—The document exhibiting the master's findings and conclusions is called his "report," the object of which is to present the case to the court in such a manner that intelligent action may be had; and it is this action that finally determines the rights of the parties.¹ A *general* report embraces the whole matter referred to the master by a given decree or order; while a *separate* report embraces only one distinct object of the reference, and these may be made by the master from time to time as may be convenient. They are open to exception in the same manner as general reports.²

1. Form of Report.—A master's report should recite the issue, determine the facts to be found, and the law arising from the findings, and the form of the decree.³

2. Masters Must Follow Decretal Order.—Masters have no right to review, reject or disregard the decision, order or directions of the court as contained in the decretal order under which they are appointed. They are bound to follow all such orders and directions,⁴ and if the report does not furnish the facts necessary to enable the court to make a final decree on the merits, it should be set aside notwithstanding no exceptions are taken to it.⁵

ments received, gives him no authority to examine the complainant or defendant, as to the validity of the mortgage, upon an issue of fraud raised by the pleadings. *McCrackan v. Valentine*, 9 N. Y. 42.

Evidence of Negligence.—A party applying to the master, under the rule of court, to have the prosecution of a reference committed to him, for neglect of the plaintiff's solicitor, must give notice to such solicitor of the application, papers, etc., on which the application is founded; and he must produce evidence of the negligence, though the master's certificate of the facts is sufficient, where the evidence of negligence exists in his office. *Holley v. Glover*, 9 Paige (N. Y.) 9.

Question of Priority.—Where a defendant, in a suit to foreclose, sets up a claim of priority adverse to the claim of the plaintiff, the master, on a reference to compute the amount due to the mortgagee and to prior encumbrancers, is not authorized to settle the question of priority. *Harris v. Fly*, 7 Paige (N. Y.) 421.

Counsel Fee.—On a reference to a master to compute the amount due on a bill taken *pro confesso*, the complainant's solicitor's fee was included in his assessment. *Held*, that as the fee was not claimed in the bill the decree should be reversed, even though the defendant had bound himself by an agreement

filed in the cause, to pay the fee if the complainant had to foreclose the mortgage. *Adams v. Payson*, 11 Ill. 26.

1. *North Carolina R. Co. v. Swasey*, 23 Wall. (U. S.) 405, 410.

2. *2 Daniell's Ch. Pr.* 1294; *Kennedy v. Kennedy*, 3 Ala. 434.

Oath to Master.—A report of a master in an equity cause in a United States circuit court will not be set aside because the master was not sworn, unless the order of reference expressly ordered that he should be sworn, which is not usually necessary. *Thompson v. Smith*, 2 Bond (U. S.) 320.

Failure to Report.—If a commissioner fails entirely to make any report on a matter referred to him, the court should refer this matter to him again to be reported upon, and this should be done though no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report because of such failure. *Childs v. Hurd* (W. Va.), 9 S. E. 362.

3. *Agnew v. Whitney*, 11 Phila. (Pa.) 298.

4. *Felch v. Hooper*, 4 Cliff. (U. S.) 489.

5. *Lang v. Brown*, 21 Ala. 179. *In re Hemiup*, 3 Paige (N. Y.) 305; *Mott v. Harrington*, 15 Vt. 185.

Where the master to whom a cause was referred to compute damages reported that the complainants were en-

3. The General Report.—The general report should embrace all the matters referred to the master by the decree, and should refer to any separate reports that have been made, specifying the particulars of them, so that the court may see that all the matters referred have been disposed of. But the master should be careful not to go beyond the limits of the reference.¹ If he does, the proper course is not to except to the report, but, before it is confirmed, to apply to the court to have the report referred back for review.²

The report should meet every point raised by the order or decree of reference, and should state, not the evidence but the master's conclusions from the evidence.³ Even when the evidence

titled to no damages, it was held that the report was inconsistent with the decree, which implied that the complainants were at least entitled to nominal damages, and the cause was referred back. *Lonsdale Co. v. Moies*, 2 Cliff. (U. S.) 538.

Where the master to whom a reference for an account is made, reports generally adverse to the complainant, recommending that the bill be dismissed for want of equity, such order will not be made, but the cause will be referred anew. 1869, *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Hays v. Hays*, 64 N. Car. 59.

Must Not Report Matters Not Referred.—If a master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity. *White v. Walker*, 5 Fla. 478.

Master's Findings Like a Special Verdict.—The master's finding of facts is somewhat like a special verdict and must not be omitted. Their soundness is tested on exceptions in the court below, and the decision on them comes before the supreme court. *Clark's Appeal*, 62 P. St. 447.

Where a bill in equity was brought, no waste being charged therein, and the subject matter was referred to a master for report thereon, he, with the consent of the parties, reported upon the question of waste; *held*, that all of the report relating to waste should be stricken out, and that the master, not being directly authorized thereto, could not acquire any authority to make the enquiry from the consent of the parties. *Gordon v. Hobart*, 2 Story (U. S.) 243.

As a general rule, a master should not hear further testimony after the parties have seen the draft of his re-

port. *Tyler v. Simmons*, 6 Paige (N. Y.) Ch. 127; *Burgess v. Wilkinson*, 7 R. I. 31.

A master may grant a rehearing upon the discovery of proof subsequently to the previous hearing, at any time before the final settlement of his report. *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

1. *White v. Walker*, 5 Fla. 478; *Gordon v. Hobart*, 2 Story (U. S.) 243; *Lever v. Redwood*, 9 Port. (Ala.) 79; *Harris v. Fly*, 7 Paige (N. Y.) Ch. 421.

In stating an account, a master must conform to the directions of the decree. *Uddike v. Doyle*, 7 R. I. 446, 458; *Lonsdale v. Moies*, 2 Cliff. (U. S.) 538; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Hays v. Hays*, 64 N. Car. 59.

He cannot hear evidence, which if it had been before the court, would probably have changed the complexion of the decree; nor can such evidence be noticed on appeal. *Maury v. Lewis*, 10 Yerg. (Tenn.) 115; *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495; *Kay v. Fowler*, 7 T. B. Mon. (Ky.) 593; *Simmons v. Jacobs*, 52 Me. 147.

Where accounts are involved in an equity suit, it should be referred to a master to state the accounts, and his report should so present the items that exceptions may be taken to it, and an appeal bring up the rulings of the inferior court on these exceptions. *Ransom v. Winn*, 18 How. (U. S.) 295.

A master is not authorized to make a report more extensive than the allegations and proofs warrant. *Lever v. Redwood*, 9 Port. (Ala.) 79.

2. *Daniell's Ch. Pr.* 1296; *Jenkins v. Briant*, 6 Sim. 605; *Lever v. Redwood*, 9 Port. (Ala.) 79, 80; *Gordon v. Hobart*, 2 Story (U. S.) 243.

3. *Parker v. Nickerson*, 137 Mass.

does not admit of arriving at certainty, the master is bound to find in favor of any presumption reasonably arising. He should not state inference of law arising from the facts before him.¹

The master does not usually state the special circumstances of the case in his report, but this is sometimes required by the decree, where it is apprehended that particular circumstances may come out which will influence the mind of the court.²

487; *Nims v. Nims*, 20 Fla. 204; *Herrick v. Belknap*, 27 Vt. 673, 694; *Pilkinton v. Cotten*, 2 Jones Eq. (N. Car.) 238.

Report of Particulars.—A master ordered to report as to particular facts should report his conclusions from the evidence only, and it is improper and irregular to set forth the evidence in his report unless specially directed to do so by the court. *Mott v. Harrington*, 15 Vt. 18; 5 *In re Hemiup*, 3 Paige (N. Y.) Ch. 305; *Goodman v. Jones*, 26 Conn. 264; *Malone v. Williams*, 39 Ala. 202. But see note 6, below.

May Submit a Question of Law to the Court.—But if the conclusion which he is to draw is a question of law, and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion, and without an order for that purpose, to make a special report submitting the legal question to the decision of the court.

A master should report his conclusions of fact and so much of the evidence as is necessary to an understanding thereof. *Parker v. Nickerson*, 137 Mass. 487.

A master's statement of an account is not sufficient in stating the balance merely. The statement should be so made that the court may understand on what the master's conclusions were based. *Nims v. Nims*, 20 Fla. 204.

His report should show how his conclusions were reached. *Frazier v. Swain*, 36 N. J. Eq. 156.

It has been held in two cases that arguments and processes of reasoning are out of place in a master's report. He should give only results, stated clearly, sufficiently and intelligibly, with the proofs on which they rest. All else is superfluous. *Evans v. Evans*, 2 Coldw. (Tenn.) 143; *Herrick v. Belknap*, 27 Vt. 673.

Conflicting Testimony.—Where the testimony before a master, who is also examiner, is conflicting, although the merits may appear contrary to his findings, if it has been confirmed by the

court below, the supreme court will not reverse. The report of a master approved by the court below, as a general rule, will not be set aside by the supreme court. *Sproull's Appeal*, 71 Pa. St. 137; *Tilghman v. Proctor*, 125 U. S. 136, 149.

Where a matter of fact, depending upon conflicting evidence and the credibility of witnesses has been referred to a master, his decision will not be interfered with on his mere judgment of facts unless it is a very plain case of mistake or error. *Izard v. Bodine*, 9 N. J. Eq. 309. See also *Sinnickson v. Bruere*, 9 N. J. Eq. 659. 2 *Daniell's Ch. Pr.* 1299, citing *Merriam v. Barton*, 14 Vt. 501, 514; *Adams v. Brown*, 7 Cush. (Mass.) 220, 222; *Reed v. Reed*, 10 Pick. (Mass.) 398; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Howe v. Russell*, 36 Me. 115; *McKinney v. Pierce*, 5 Ind. 422; *State v. McIntyre*, 53 Me. 214; *Pierce v. Faunce*, 53 Me. 351; *Stimpson v. Green*, 13 Allen (Mass.) 326; *Mason v. York etc. R. Co.*, 52 Me. 82-115; *Rowan v. State Bank*, 45 Vt. 160, 162; *White v. Hampton*, 10 Iowa 238.

In determining the question whether, upon the sale of a "master's interest," or one-twelfth part, in a ship, the vendor agreed to pay the expenses of extensive repairs which were then making upon her, if the direct evidence is conflicting, it is important and material for a master, to whom the case has been referred, to decide as to the progress which has then been made in the repairs; and an exception lies to his report if it states that this point was not material. *Rennell v. Kimball*, 5 Allen (Mass.) 356.

1. *Daniell's Ch. Pr.* 1299; *In re Hemiup*, 3 Paige (N. Y.) Ch. 305.

2. *Mott v. Harrington*, 15 Vt. 185; *Pingree v. Coffin*, 12 Gray (Mass.) 288, 311; *March v. Eastern R. Co.*, 43 N. H. 534.

In a master's report which read: "It would be for the interest of the defendants to sell the estate in separate lots, if the premises can be conveniently

4. Reporting Testimony.—Sometimes the master must report the testimony by order of the court or when either party requires him to do so. In such an instance the testimony should be certified by him, and annexed to, but not embodied in, the report.¹

5. Weight Given to the Report by the Court.—The weight given by the court to the findings of a master is regulated, in many of the States, by statute or by rules of court. In some States the findings of a master are *prima facie* correct,² and the court will consider only such matters of law and fact as are brought before it upon exceptions. As a rule, however, it may be stated that the findings of fact by a master are conclusive unless clear mistake or fraud are shown.³

divided," held not sufficiently definite to be the foundation of a decree for the sale of the property. *Walker v. Hallett*, 1 Ala. 379.

1. *Clapp v. Sherman* (R. I. 1888), 17 Atl. Rep. 130; *In re Hemmip*, 3 Paige N. Y. 305; *Mott v. Harrington*, 15 Vt. 185; *Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 366; *Sparhawk v. Wills*, 5 Gray (Mass.) 423.

Reporting Evidence.—Unless ordered to do so by the court, the master is not bound to report the evidence upon which his report is founded. *Howe v. Russell*, 36 Me. 115; *Herrick v. Belknap*, 27 Vt. 693; *Gilmore v. Gilmore*, 40 Me. 50; *McKinney v. Pierce*, 5 Ind. 422; *Bailey v. Myrick*, 52 Me. 132; *Simmons v. Jacobs*, 52 Me. 147.

Reporting Evidence.—When the exceptions are filed, if either party desires the evidence to be reported, they request the master to report it in whole, or in part, as the case may be. It is usual for the master to comply with this request, but if it is made by neither party, it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion. *Union Sugar Refinery v. Mathiesson*, 3 Cliff. (U. S.) 146, 149. See also *Harper v. McVeigh*, 82 Va. 751.

An auditor's report in accounting need not contain the evidence on which his conclusions are based, the foundations of items objected to being triable *de novo* by a jury. *Ritchie v. Levy*, 69 Tex. 132.

In *Jackson v. Jackson*, 3 N. J. Eq. 96, where the master reported the evidence without being ordered to do so by the court upon the argument of the exceptions to the report, the court examined the evidence reported and ordered the report to be corrected where it was found erroneous without sending it back to the master.

Where, by agreement of the parties, entered of record, a cause is referred to a master commissioner, under the *Indiana* act of March 2nd, 1853 (1 Gav. & H. 433), to report the evidence and his findings thereon at the next term of the court, if he fails to report the evidence, his report will, on motion, be set aside. *McGillis v. Slattery*, 52 Ind. 44.

Returning Testimony.—The master is not required to return the oral testimony with his report, unless directed to do so by the decree under which he acts, or requested to do so by some of the parties. *Clapp v. Sherman* (R. I. 1888), 17 Atl. Rep. 130.

Where a bill to foreclose a mortgage has been taken as confessed against absent defendants, the master, to whom a reference is ordered to take proofs of the facts stated in the bill, must report the testimony itself, and not his opinion deduced therefrom. *Anonymous*, 1 Clark (N. Y.) Ch. 423.

2. *Medsker v. Bonebrake*, 108 U. S. 66; *McGuire v. Wright*, 18 W. Va. 507; *Kutz's Appeal*, 100 Pa. St. 75; *Anderson v. Henderson*, 124 Ill. 164.

When the parties consent to a reference to a master to hear and decide all issues and report his findings both of fact and of law, and such reference is entered as a rule of court, his findings are to be taken as presumptively correct, and are reviewable only under the reservation in the consent and order of the court, when there has been manifest error. *Kimberly v. Arms*, 129 U. S. 512; *Anderson v. Henderson*, 124 Ill. 164.

3. *Missouri Pac. R. Co. v. Texas Pac. R.*, 33 Fed. Rep. 803; *Welling v. La Bau*, 34 Fed. Rep. 40; *Bugbee's Appeal*, 110 Pa. St. 331; *Magarity v. Shipman*, 82 Va. 784; *Stuart v. Hendricks*, 80 Va. 601.

6. Final Draft of Report.—When the report is prepared, an intimation to that effect is sent to the solicitors for the parties to the cause.¹ They submit such suggestions to the master as they think fit, and when the final draft is prepared, and no objections

The findings of a master will neither be reviewed nor revised, if there is evidence tending to sustain them, unless fraud or corruption is shown. *Waterman v. Buck*, 58 Vt. 519.

It is neither the policy nor the practice of the supreme court of *Pennsylvania* to revise the findings of a master on the facts, when approved by the court, except in cases where the error is flagrant. *Appeal of Coxe*, 120 Pa. St. 98. See also *Borough of Sharpsburg's Appeal* (Pa. 1887), 10 Atl. Rep. 39; *Messinger's Appeal*, 109 Pa. St. 285.

Conclusiveness of Report.—In *Vermont*, the findings of a master seems to be as conclusive as the verdict of a jury. *Howard v. Scott*, 50 Vt. 48.

Same in *Tennessee*. *Brown v. Dailley*, 85 Tenn. 218; *Turley v. Turley*, 85 Tenn. 251. See also *McKinney v. Pierce*, 5 Ind. 422.

The report of a master, like the verdict of a jury, will not be reconsidered as to facts, and set aside, unless some clear mistake or abuse of power is shown. *Mason v. Crosby*, 3 Woodb. & M. (U. S.) 258.

The report may, however, be re-examined. *Webb v. Bowers*, 2 Woodb. & M. (U. S.) 497.

The fact that a master has erred in some respects affords no ground for setting aside his report or recommitting it, if such errors do not appear to have produced results materially different from what would otherwise have happened. *Mason v. Crosby*, 3 Woodb. & M. (U. S.) 258.

In *Holmes v. Holmes*, 3 C. E. Green (N. J.) 141, it was held that, upon exceptions to a master's report on a question of fact, the court will come to a conclusion upon the evidence, irrespective of the master's opinion. The report is not entitled to the same weight as the verdict of a jury upon a motion for a new trial in a court of law. See *Stevens v. Miner*, 110 Mass. 57; *Cary v. Herrin*, 62 Me. 16; *Com. v. Mechanics' Ins. Co.*, 112 Mass. 192, 194; *Hauser v. Roth*, 37 Ind. 89.

The report of facts made by a special master is conclusive, when the reference is voluntary and no mistake or fraud is

shown. *Merrill v. Montpelier etc. R. Co.*, 54 Vt. 200.

Findings Not Conclusive.—Findings of fact by a master are not conclusive; but, on exceptions duly taken, the court will examine the evidence, and ascertain that it supports the master's conclusions. *Worrall's Appeal*, 110 Pa. St. 349.

Properly speaking, no report is conclusive. When a master reports facts directly proved by the witnesses, the court will give his report great weight, because of his superior opportunities for judging of the credibility of the witnesses and the effect of their testimony. But where the fact is a deduction merely from the facts reported by him, his conclusion is simply a result of reasoning, of which the court is as competent to judge as he. Hence, the report is neither a decision nor an infallible guide, but a serviceable instrumentality to aid the court in performing its own functions. *Phillips' Appeal*, 68 Pa. St. 130, 137; *Clark's Appeal*, 62 Pa. St. 447, 451; *Sproull's Appeal*, 71 Pa. St. 137; *Backus' Appeal*, 58 Pa. St. 186, 192; *Tilghman v. Proctor*, 125 U. S. 136, 149.

Weight of Report in New Jersey.—To determine whether a master has arrived at a correct conclusion from the evidence, it is necessary to review and weigh the evidence. For this reason the master's report is entitled to no special consideration beyond the soundness of his reasoning and the advantage of seeing the demeanor of the witnesses while examined. Rule of Chancery, 44, *New Jersey*; *Holmes v. Holmes*, 18 N. J. E. 141.

Conflicting Testimony.—A master's findings of facts upon conflicting testimony are not to be set aside without clear proof of error or mistake. *Whitney v. Leominster Savings Bank*, 141 Mass. 85; *Messinger's Appeal*, 109 Pa. St. 285; *Morgan's Appeal*, 110 Pa. St. 271.

The findings of a fact by a master, on conflicting evidence, will not be set aside, although the court may differ with him as to the weight of the evidence. *Bridges v. Sheldon*, 18 Blatchf. (U. S.) 507.

1. *Daniell's Ch. Pr.* 1301.

are filed during the time allowed by the rules, the report is signed by the master.¹

VI. OBJECTIONS.—After the examination is concluded, in cases of reference to a master to take accounts, or make enquiries, a day should be assigned for the parties to attend before the master to the settling of his report, and to make their objections, if any, in writing; and when the report is finally settled and signed, the parties should be confined to their exceptions, to be taken in court, to such objections as were overruled or disallowed by the master.²

1. **Daniell's Ch. Pr.** 1303.

Time of Reporting.—The master may report back the cause to the court at any time when he has completed his investigations; and it is the duty of the clerk to allow him to file his report at any time. *Union Sugar Refinery v. Mathiesson*, 3 Chff. (U. S.) 146, 148.

Notice to Terminate.—Under Code Civil Procedure *New York*, section 1019, stating that a notice to end a reference, when a report is not filed or delivered within sixty days, may be served before the report is filed or delivered, a notice to terminate, served after the filing of the report, is nugatory. *O'Neill v. Howe*, 9 N. Y. S. 746.

Miscellaneous.—Where the report of a clerk and master, upon which a decree was made, did not identify the land sold, but referred to the mortgage deed, which was a part of the record as containing the description, held to be sufficiently certain. *Sims v. Cross*, 10 Yerg. (Tenn.) 460.

Under a rule against a master to show cause why he had not paid over the proceeds of certain sales, the court refused to hear evidence to contradict the affidavit of the master denying that he had sold, or been ordered to sell. *Ex parte Perry*, 1 Harp. (S. Car.) Ch. 50.

Where a matter, of fact, unaccompanied by any evidence, is urged against the acceptance of the report of a master, as that the master had expressed feelings of hostility to the party objecting, the decision of the judge in accepting such report is not subject to exceptions. *State v. McIntyre*, 53 Me. 214.

In a suit in equity to foreclose a mortgage, where the obligation, to secure which the mortgage was given, is unliquidated, and there is nothing before the court to show that the amount due is less than the amount necessary to give the court jurisdiction, the court is not divested of its jurisdiction, although the master should report a less

sum to be due. *Ferguson v. Kimball*, 3 Barb. (N. Y.) Ch. 616.

A master in chancery, appointed to report the sum due on an outstanding mortgage of land, is not authorized to decide on the titles thereto. *Mowe v. Russell*, 36 Me. 115.

The report of a master, in stating the affairs of a mercantile firm, should show whether the partnership resulted in profit or loss, and to what extent, and should also dispose of the uncollected dues. *Zimmerman v. Huber*, 29 Ala. 379.

Where a cause is referred to a master "for hearing and determination on the merits," his report cannot be considered as an award by which the parties are concluded, or on which final judgment or decree can be pronounced. *Rankin v. Rankin*, 36 Ill. 293.

2. *Remsen v. Remsen*, 2 Johns. (N. Y.) Ch. 495; *Copeland v. Crane*, 9 Pick. (Mass.) 73; *Byington v. Wood*, 1 Paige (N. Y.) 45; *Keege v. Bossieux*, 15 Gratt. (Va.) 83; *Gordon v. Lewis*, 2 Sumn. (U. S.) 143; *Lewis v. Lewis*, 1 Minor (Ala.) 35; *Story v. Livingston*, 13 Pet. (U. S.) 359; *Beckwith v. Butler*, 1 Wash. (Va.) 224; *White v. Johnson*, 2 Munf. (Va.) 235; *Gaines v. New Orleans*, 1 Woods (U. S.) 104.

For practice in *Tennessee*, see *Cook v. Dews*, 2 Tenn. Ch. 406.

Objection to the execution of a reference by a particular master must be made before the hearing by the master, and cannot be made after his report has been returned. *Johnson v. Swart*, 11 Paige (N. Y.) 385. See also *Troy Iron etc. Factory v. Corning*, 6 Blatchf. (U. S.) 328.

Where an order referring exceptions to an answer was entered out of time, an objection on that account, taken by the defendant at the return of the summons under the order, was held to be in time. *Johnson v. Bloomer*, 3 Edw. (N. Y.) Ch. 328.

Must be Taken Before Confirmation in

In ordinary cases, the objections are made after the master has prepared a draft of his report; and objections may sometimes be made by a party who has not previously appeared before the master; but he cannot introduce new matters in evidence to support such objections.¹ Where the report is erroneous on its face it may be enquired into although no objection was taken to it.² The report is then filed in the proper office.

Court Below.—When no objections are made to a master's report in the court below, and it is there confirmed, such objections cannot be enquired into in the superior court, on error. *Huginin v. Starkweather*, 10 Ill. 492. See generally *APPEAL*, vol. 1, p. 616; *CERTIORARI*, vol. 3, p. 60; *ERROR*, vol. 6, p. 810.

To Admission of Evidence.—Objections to the admission of evidence should be made at the time, or the objection cannot be raised by excepting to the allowance of the item proved by that evidence. *Taylor v. Kilgore*, 33 Ala. 214.

Where no objection is made to the introduction of evidence upon a hearing before a master, no question as to its competency can be raised upon exceptions to the master's report. *Kinsey v. Kinsey*, 37 Ala. 394.

To Competency of Witness.—An objection to the competency of a witness should be made before the master who is executing the decree, under which the testimony is taken, at the time of applying for the order to examine the witness, or at least when the testimony is read before the master. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

To a Copy of an Award.—A copy of an award was annexed to the bill; the original was not called for, nor was any objection made to the use of the copy before the master; *held* that the objection could not be first made by exceptions to the master's report, but must then be taken to be waived. *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83.

In Matters of Account.—When an account has been taken and returned by a master, a party desiring to object to any item should file his exceptions to the report, specifying the item objected to and the grounds of objection. It is not the duty of the chancellor to examine items not thus excepted to, and on appeal the duty of the supreme court extends no further. *Smalley v. Corliss*, 37 Vt. 486.

When an account is ordered, the decree is interlocutory in regard to the details. The party ordered to account

may present objections to the time of its commencement or termination by exceptions to the commissioners' report. *Humphrey v. Foster*, 13 Gratt. (Va.) 653.

Change of Practice Before Report Filed.—An objection to the report of a master on the ground that he was not appointed under Maine Pub. Laws of 1862, ch. 155, is invalid when it appears that his hearing in the matter was concluded before the act took effect, although the report was filed afterwards. *Simmons v. Jacobs*, 52 Me. 147.

1. *Byington v. Wood*, 1 Paige (N. Y.) 145.

Draft of Report.—On the question of damages for infringement of patent, the master should allow both parties to introduce testimony. When he has heard the parties, and come to a conclusion, he makes a draft of his report, shows it to the parties, or files it in the clerk's office, and gives time for the parties, if they see fit, to make objections to the report. When these objections are made, it becomes his duty to consider or reconsider, as the case may be, the questions involved in those objections; and if, upon full consideration, he is still of the opinion that he was right in his conclusions stated in the report, he makes his final report and then the whole matter comes back to the circuit court for adjudication. *Union Sugar Refinery v. Mathiesson*, 3 Cliff. (U. S.) 146, 149.

Practice in preparing draft of reports before argument and submitting them to parties. *Hatch v. Indianapolis etc. R. Co.*, 9 Fed. Rep. 856; *Fisher v. Hayes*, 16 Fed. Rep. 469.

2. *Levert v. Redwood*, 9 Port. (Ala.) 79; *Gerald v. Miller*, 21 Ala. 433.

Where a master has followed the order of a judgment and enforced its directions, no objection can be taken, on appeal, to his action, when the appeal arises upon exceptions to his report, and not upon objection to the original judgment under which the reference to him was made. *New Orleans v. Gaines*, 15 Wall. (U. S.) 624.

VII. CONFIRMATION.—Wherever the discretion of the court is exercised upon the first order, and where the master is only called upon to perform some act, or make some enquiries necessary for carrying out the court's order, the report requires no confirmation.¹ Such are reports of the appointment of trustees, the settling of interrogatories, and the like. A report of sale, however, requires confirmation.²

Reports required to enable the court to make a discretionary order or decree, require confirmation.³

1. Effect of Confirmation.—A confirmed report of a master or commissioner, at best, stands in the same relation to the decree as a verdict to a judgment. The decree is almost certain to follow the report, but until the decree is entered the report cannot be enforced.⁴

VIII. EXCEPTIONS TO MASTER'S REPORT.—Strictly, in equity practice, though it is different in some of the States, no exceptions to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors, or to reconsider his opinions. A party neglecting to bring in exceptions before the master, cannot afterwards except to the report, unless the court, on motion, see reason

1. Daniell's Ch. Pr. 304; Case *v.* Abeel, 1 Paige (N. Y.) 630, however, requires confirmation.

2. Daniell's Ch. Pr. 1305.

3. Daniell's Ch. Pr. 1305.

4. Kingsbury *v.* Kingsbury, 20 Mich. 212.

The action of the chancellor in confirming a commissioner's report is only interlocutory, and the correctness of the report may be passed on at the final hearing and a final judgment rendered. Adkisson *v.* Dent (Ky. 1889), 11 S. W. Rep. 950.

Although the commissioner's notice of the time and place of taking the account states that the decree of reference will be executed on a certain day "*if fair, if not, the next fair day thereafter, Sundays excepted*," these words will not prevent its being deemed in substantial compliance with the statute (though not advisable to be inserted); and where the commissioner did take the account on the day named, and the appellant did not show that he was injured, *held* that there was not sufficient grounds to refuse confirmation of the report. 1876, White *v.* Drew, 9 W. Va. 695.

The report of a commissioner in equity showed a balance due an executor by the insolvent estate of his testator. The report was confirmed with-

out objection, and the court then immediately made an order against the objections of the creditors, and without hearing argument, that the ascertained balance should be paid to the executor, out of the assets of the estate, in preference to all other claims. *Held*, that, as the time within which the creditors were entitled, under the rules of court, to file exceptions to the report, had not expired when the order of confirmation was made, both orders should be set aside and the cause remanded, with leave to the creditors to file exceptions. Tindal *v.* Tindal, 1 S. Car. 111.

A matter may be referred to a master, and his report received and confirmed, all at the same term of the court. Taylor *v.* Roberts, 3 Ala. 83.

The usual order *nisi* to confirm a master's report, which is entered upon the filing of such report, becomes absolute at the expiration of eight days, except as to the matters embraced in the exceptions to the report; and the decretal order, made upon the exceptions, need not direct the report to be confirmed as to those parts thereof which are not directed to be altered or reconsidered by the master. Clark *v.* Willoughby, 1 Barb. (N. Y.) Ch. 68.

As to the practice in *Michigan*, as to confirmation of a master's report, under the 82nd rule of the court, see Suy-

to be dissatisfied with the report, and refer it to the master to re-examine it, with liberty to the party to make objections to it.¹

Exceptions to a master's report are proper only in those cases in which he has come to a wrong conclusion upon the matters which were referred to him to ascertain or decide. Where he proceeds irregularly or neglects to report upon the matters referred to him, the proper course for the aggrieved party is to apply to the court to set aside the report or to refer it back to the master to

dam *v. Dequindre*, Walk. (Mich.) 23.

1. *Story v. Livingston*, 13 Pet. (U. S.) 359.

Where a cause comes before the court, upon the master's report, nothing is properly before the court, except the exceptions taken at the hearing, and whatever may have been insisted on, by way of argument, is considered as waived, if not made matter of exception, unless it appears on the face of the report that the master has committed an error, which should be corrected. *Gordon v. Lewis*, 2 Sumn. (U. S.) 143.

Exceptions to a master's report should be taken before the master, and it is too late to except after application for a decree in conformity with the report. *Lewis v. Lewis*, Minor (Ala.) 35.

In *Alabama*, where the chancellor refers matters in controversy to commissioners, a party is not precluded from excepting to their report by his not having excepted to the special matter of objection before the commissioners. *Colgin v. Cummins*, 1 Port. (Ala.) 148.

In *Alabama*, matters of account must be brought before the master, and if rejected, excepted to, to enable the party to assign them as error. *Davenport v. Bartlett*, 9 Ala. 179.

If a suit is brought to recover back money paid on a decree, which was afterwards reversed on error, because the allegations and proof did not correspond, the defendant can derive no benefit from the master's report in the cause, although no exceptions were taken to it; the report falls to the ground with the decree. *Crocker v. Clement*, 23 Ala. 296.

Rule in New Jersey.—The rule that exceptions to an account stated by a master shall be made before him, and before he makes his report, has not been actually recognized in New Jersey, except in cases where a draft of the account was served, and the party omit-

ted to make any exceptions, or suggest any alterations, before the master. *Mechanics' Bank of Philadelphia v. Bank of New Brunswick*, 3 N. J. Eq. 437.

Miscellaneous.—An exception to a master's report cannot be sustained, unless the truth of it appears upon "the face of the proceedings." *Pearson v. Darrington*, 32 Ala. 227.

If exceptions are not taken to a master's report in the court below, it cannot be questioned in the appellate court. *Reigard v. McNeil*, 38 Ill. 400. See also *Kee v. Kee*, 2 Gratt. (Va.) 116.

Where exceptions are taken to the report of a commissioner to whom an executor's account is referred, and the exceptions are sustained, and an appeal taken to the supreme court, and the evidence is not set out in the record, the supreme court can only consider the exceptions to items, the character of which sufficiently appears from the face of the account itself. *Smith v. Hurd*, 16 Miss. 682.

The appeal given by section 29 of the Chancery act (Nix. Dig. 99, § 29) is taken by filing exceptions to the master's report within eight days from the service of the rule, which is the mode of bringing objections to the reports of masters before the chancellor for review. *Weber v. Weitling*, 18 N. J. Eq. 39.

It is the practice in equity courts, upon filing a report on exceptions to an answer, to take an order that the same shall be confirmed, unless cause be shown in eight days after the service of the same. The filing of exceptions to the report is a sufficient showing cause against its confirmation. *Weber v. Weitling*, 18 N. J. Eq. 39.

A commissioner's report will not be set aside unless excepted to. *Farmer v. Samuel*, 4 Litt. (Ky.) 187.

After the report of a master in chancery is prepared, it is proper for the master to hear exceptions, and correct his report, or, if he disallows them, to report them to the court with the evi-

perfect the same.¹ An exception cannot be taken to a master's report on the ground that it is uselessly expensive, when the master takes the accounts directed by the decree appointing him. If the decree is wrong, it must be reformed by the court; but so

dence relating thereto, to be heard. *Brockman v. Aulger*, 12 Ill. 277.

Upon exceptions to a master's report, the argument is confined to the exceptions taken, and does not reopen matters fully discussed and determined by the whole court before the reference to the master. *Pingree v. Coffin*, 12 Gray (Mass.) 288, 315.

It is not usual to refer accounts with instructions; but questions for the court should be brought before it by exceptions to the report. *Clements v. Pearson*, 4 Ired. (N. Car.) Eq. 257.

Where a master's report finds in favor of a plea, the report should be excepted to, in order to bring the matter before the court. *Dickinson v. Codwise*, 4 Edw. (N. Y.) Ch. 341. See also *State v. Foy*, 71 (N. Car.) 527.

Where, during the progress of a cause in equity, there was a reference of accounts to a master, who reported, and his report was excepted to, on matters of fact and of law, and before any final action on the exceptions, the judge permitted one of the parties to withdraw his account and substitute another, held that this was a mere interlocutory order, and not such a judgment as could be brought to the supreme court before final judgment. *Brunswick etc. R. Co. v. State*, 48 Ga. 415.

How Exceptions Are Regarded.—Exceptions to the report of a master in chancery are to be regarded so far only as they are supported by the special statements of the master, or by evidence brought before the court by a reference to the particular testimony on which the exceptor relies. *Jones v. Lamar*, 39 Fed. Rep. 585. See also *Singer v. Steele*, 125 Ill. 426.

Neglect to Raise Exceptions.—A master's report will be deemed conclusive when the parties, although notified of the report, have not raised objections to it before the master, nor filed exceptions to it after it has been filed in court and before its approval. *Jewett v. Rock Riv. Paper Co.*, 101 Ill. 57.

When Waived.—Exceptions to a master's reports are waived unless saved in the report and insisted on by bill. *Winship v. Waterman*, 56 Vt. 181.

Exception to a principal finding of a master based on all the evidence in his report is not waived by refraining from making the exception before the master, and subsequently making it before the court, since all that the parties could do would be to request the master to change his findings, a thing which they were under no obligation to do. *Jennings v. Dolan*, 29 Fed. Rep. 861.

If the master sustains an exception to evidence, and allows an appeal, the court must be called upon to act upon the appeal, or the exception will be regarded as waived; both new code *Tennessee*, § 4626, and the chancery rules requiring that the exception must be disposed of before the commencement of the hearing. *Carter v. McBroom*, 85 Tenn. 377.

Exceptions to Amounts.—Questions arising on a reference of accounts to a master will not be determined previous to the taking of the account. They must be brought before the court on exceptions regularly taken. *Vanderwick v. Summerl*, 2 Wash. 41.

If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court unless exceptions to it have been filed in the court below. *Brockett v. Brockett*, 3 How. (U. S.) 691; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289.

All questions contested before a master in chancery should be presented to the court by objection and exception to his report. The court will not entertain a motion to instruct the master pending the proceeding before him. *Lull v. Clark*, 20 Fed. Rep. 454.

An exception to the amount of a commissioner's fees must be taken in the trial court, and in the absence of such an exception, and on the filing of the proper affidavit by the commissioner, that court did not err in allowing his fees. *Shipman v. Fletcher*, 83 Va. 349.

Report of master upon questions not referred to him by court is erroneous, and subject to exception by party aggrieved. *Taylor v. Robertson*, 27 Fed. Rep. (Ill.) 537.

1. *Tyler v. Simmons*, 6 Paige (N.

long as it stands, it is imperative upon the master.¹ Exceptions are in the nature of special demurrers,² but are not required to be so full and specific. All that is necessary is, that the exceptions should distinctly point out the findings and conclusions of the master which they seek to reverse;³ for the part not excepted to, it seems, will be taken as admitted.⁴ They must not be general assignments of error, for that would impose the burden upon the court of examining every item in the account to detect the error. They must show specific errors⁵ and must be founded on the facts stated in the report, or in the accompanying documents and

Y.) Ch. 127; *Herrick v. Belknap*, 27 Vt. 673, 695; *Pierce v. Faunce*, 53 Me. 351.

1. *Udike v. Doyle*, 7 R. I. 446.

2. *Wilkes v. Rogers*, 6 Johns. (N. Y.) 566; *Story v. Livingston*, 13 Pet. (U. S.) 359; *O'Reilly v. Brady*, 28 Ala. 530; *Ridley v. Ridley*, 1 Coldw. (Tenn.) 323; *Goddard v. Cox*, 1 Lea (Tenn.) 112; *Stanton v. Alabama R. Co.*, 2 Woods (U. S.) 506.

Form of Exceptions.—An exception to a report of the master, like a special demurrer, must point out certainly and specifically the objections relied on. It must be positive, explicit and certain, leaving nothing to supposition or inference. *Kader v. Yeargin*, 85 Tenn. 486.

An objection before a master that evidence is "irrelevant and incompetent," is too vague to be considered on hearing before the court. *Hamilton v. Southern Nev. Gold and Sil. Min. Co.*, 33 Fed. Rep. 562.

3. *Foster v. Goddard*, 1 Black (U. S.) 506.

4. *Wilkes v. Rogers*, 6 Johns. (N. Y.) 566; *Story v. Livingston*, 13 Pet. (U. S.) 359; *O'Reilly v. Brady*, 28 Ala. 530; *Smally v. Corliss*, 37 Vt. 486, 492; *National Bank v. Sprague*, 23 N. J. Eq. 81; *Ransom v. Winn*, 18 How. (U. S.) 295; *Chapman v. Pittsburgh etc. R. Co.*, 18 W. Va. 184; *White v. Hampton*, 10 Iowa 238.

When the trial court determines the basis of a report, and sends the case to a master for an account, matters reported by him and not excepted to in that court, will be taken as acquiesced in. *Singer v. Steele*, 125 Ill. 426.

5. *Dexter v. Arnold*, 2 Sumn. (U. S.) 108; *Brantley v. Gunn*, 29 Ala. 387; *Halcomb v. Halcomb*, 11 N. J. Eq. 281.

The court will not notice any exceptions to a master's report, except those that point to the particular item or

matter objected to. *Foster v. Gressett*, 29 Ala. 393. See also *Royall v. McKenzie*, 25 Ala. 363; *Ferguson v. Collins*, 8 Ark. 241; *Ridley v. Ridley*, 1 Coldw. (Tenn.) 323; *Comr. and-in-Chief*, 1 Wall. (U. S.) 43; *Alexander v. Alexander*, 8 Ala. 796; *O'Reilly v. Brady*, 28 Ala. 530; *Bivingsville Mfg. Co. v. Bivings*, 7 Rich. Eq. (S. Car.) 455.

Where several exceptions to an answer are allowed by the master, and the defendant takes one general exception to the report, that exception will be overruled, if any of the exceptions to the answer are well taken. *Candler v. Pettit*, 1 Paige (N. Y.) 427; *Franklin v. Keeler*, 4 Paige (N. Y.) 382; *Noble v. Wilson*, 1 Paige (N. Y.) 164.

Exceptions to the report of a master appointed to state an account are to be regarded by the court only so far as they are supported by the special statements of the master, or by a distinct reference to particular portions of the testimony on which the party excepting relies. For the court does not investigate the items of an account, or review the whole mass of testimony taken by the master. *Harding v. Handy*, 11 Wheat. (U. S.) 103.

In the exceptions it is not enough to allege errors in general terms merely. Particulars should be indicated. To allege that the master has arrived at a wrong conclusion upon the evidence is not enough. Some portion of the testimony to support the allegation must be stated. *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

The party excepting should require the master to state the evidence on which the exception is founded, or the court will refuse to enter at length upon the evidence in order to ascertain the correctness of the ruling. *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

Noting Exception.—An exception to each ruling of the master which is to be

proofs;¹ for it is not the duty of the chancellor to examine items not thus excepted to.² To sustain exceptions to the report of a master, they must be supported by statements in the report, or by the production of evidence.³

1. Who May Take Exceptions.—All parties to the record who are interested in the matter in question may take exceptions to the report, and where there are several sets of parties, appearing by different solicitors, they may, if they are not disposed to join, each take exceptions, although their grounds of exception are the same.⁴

2. When Exceptions May be Taken.—Exceptions should not be taken to the master's report before it has been filed. They should be signed by counsel.⁵

contested should be noted at the time; but it need not be then put in form. The master should note on his minutes each exception when taken. *Troy Iron etc. Factory v. Corning*, 6 Blatchf. (U. S.) 328; 3 Fish. Pat. Cas. 497.

Questions arising upon objections made during a hearing before a master, and reserved by him, should be embraced in the objections filed with him to his draft report. *Troy Iron etc. Factory v. Corning*, 6 Blatchf. (U. S.) 328.

Leave to Amend.—Although it is proper to overrule a general exception to the report of a master in chancery as requiring the court to review the entire mass of testimony, yet, where a re-assignment of the hearing can be made without prejudice to the interests of the parties and the business of the court, it is discretionary to grant time and leave to amend the exceptions. *Jones v. Lamar*, 39 Fed. Rep. 585.

Omissions.—Exceptions to a master's report will be sustained, and the report recommitted, when it appears that a material question did not receive the attention which its importance warranted, and when the evidence on the question apparently can be made more specific. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 33 Fed. Rep. 359. See also *Richie v. Levy*, 69 Tex. 132.

1. *Dexter v. Arnold*, 2 Sumn. (U. S.) 108, 109; *Harding v. Handy*, 11 Wheat. (U. S.) 103; *Rennell v. Kimball*, 5 Allen (Mass.) 356; *White v. Hampton*, 10 Iowa 238; *Miller v. Howard*, 26 N. J. Eq. 166.

What Are Not.—Exceptions to a report of a master in chancery merely alleging that the finding of the master is erroneous and unsatisfactory, without attempting to specify any particulars in which the error consists, or even suggesting what correction ought to be

made, and omitting altogether to refer to any portion of the testimony to support the allegation, will not be sustained. *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

Exceptions to a report of a master in chancery, unaccompanied by any imputation of undue influence or fraud, and merely alleging that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, cannot be regarded as sufficient to put the finding of the matter in issue, or to require the court to review or revise the same in a matter of fact dependent entirely upon the weight and effect of the evidence submitted to his consideration. *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

When exceptions are taken to the report of a master in chancery, the evidence which furnishes the ground of the exception should be required, by the party excepting, to be stated by the master; and unless this is done, the court will not enter at large into the evidence in order to ascertain whether or not the master was wrong in his conclusion. *Boston Iron Co. v. King*, 2 Cush. (Mass.) 400; *Sparhawk v. Wills*, 5 Gray (Mass.) 423.

Exceptions, including distinct matters, as to a part of which the report is free from error, may be unconditionally overruled; or an exception may, in the discretion of the chancellor, be sustained in part, and overruled in part, unless it be so specially framed as to prevent such partial allowance. *Brantley v. Gunn*, 29 Ala. 387.

2. *Smalley v. Corliss*, 37 Vt. 486; *Reed v. Jones*, 15 Wis. 40.

3. *Miller v. Whittier*, 36 Me. 577.

4. 2 Daniell's Ch. Pr. 1311.

5. 2 Daniell's Ch. Pr. 1316.

Hearing on the Exceptions.—Either party may set down the case for hearing upon the exceptions to the master's report.¹ Both parties may except either to the preliminary or to the final report, or to both reports, and they are entitled to a hearing upon all the questions which have arisen before the master, provided they are embraced in the exceptions.²

3. Review of Questions of Fact.—If the master reports the evidence it becomes the duty of the court, if the exceptions are proper, to review the questions of fact embraced in the report, as well as the questions of law.³

4. Effect of Acquiescence.—An exception to a master's report will not be allowed when, by long acquiescence, it should be treated as

Under *United States* Equity rule 83, in the United States courts, the parties have one month from the time of filing the report to file exceptions thereto; and if no exceptions are filed within that period by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise. U. S. Sup. Ct., Rules in Equity, Nos. 83 and 84.

Where no exceptions have been taken to the report, it is open at the hearing to no exception except because of errors apparent on its face. *Himsly v. Rose*, 5 Cranch (U. S.) 313.

Further time to file exceptions to the master's report will not be granted after the expiration of the twenty days allowed by rule, because counsel did not know the report was filed, as he could have known it by using proper care. *Clapp v. Sherman* (R. I. 1888), 17 Atl. Rep. 130.

A report of a master returned into court, sealed up and endorsed "Fees to be paid before opening," is not filed within the meaning of a rule allowing one month for the filing of exceptions to an order extending the time. Exceptions will be denied. *Donaldson v. Johnson* (R. I. 1888), 16 Atl. Rep. 140.

Amendment.—Exceptions to a master's report are not pleadings in such sense as to give a right of amendment by adding new exceptions after certain exceptions have been filed and disallowed, and the time allowed for excepting has elapsed, and the case has proceeded to trial. The right to except to the report arises under a special rule, by which the court may allow time for

excepting. Where the time for filing exceptions is limited by the order, exceptions cannot afterwards be made, except by leave of the court, and upon good cause shown, and then it is in the discretion of the judge to allow or disallow them. *Suttles v. Smith*, 75 Ga. 830.

Exceptions to Amended Report.—It is irregular for a party, by new exceptions to a master's amended report, to raise the same questions which have been considered and decided by the court on the exceptions to the original report.

Time for Filing Exceptions on Insufficiency of Answer.—There is no precise time for filing exceptions to the report of a master on the insufficiency of the answer, as it does not require confirmation. *Myers v. Bradford*, 4 Johns. Ch. (N. Y.) 434.

1. *Union Sugar Refinery v. Mathieson*, 3 Cliff. (U. S.) 146, 149.

2. *Union Sugar Refinery v. Mathieson*, 3 Cliff. (U. S.) 146, 149.

3. **Review of Question of Fact.**—*Union Sugar Refinery Co. v. Mathieson*, 3 Cliff. (U. S.) 146, 149.

Matter of Fact.—A question of fact arose on the pleadings, which either party might have had tried and determined in the usual course. But by consent the cause went to a master, who determined that issue. The defendant excepted. *Held*, that the finding could not be reviewed by the court. *Bridges v. Sheldon*, 18 Blatchf. (U. S.) 507. See also *McCormack v. James*, 36 Fed. Rep. 14.

Exceptions to the admission or exclusion of evidence taken before a master need not be restated when the exceptions to his report are filed. They can be considered upon the record, at the argument of the motion to confirm his report. *Marks v. Fox*, 18 Fed. Rep. 713.

having been settled;¹ nor will it be allowed, notwithstanding error, if upon the entire report it is evident that the error did not affect the conclusion.²

5. Overruling Exceptions.—The overruling of exceptions to a master's report has the effect of confirming the report.³

On an application to open a master's report for the introduction of additional evidence, the party must show good reason why it was not offered before the master. *Whiteside v. Pulliam*, 25 Ill. 285.

1. *Walker v. Beal*, 9 Wall. (U. S.) 743.

2. *Gottfried v. Crescent Brewing Co.*, 22 Fed. Rep. 433.

3. *White v. Hampton*, 10 Iowa 238.

To Prevent Exceptions for Purpose of Delay.—Under United States Equity rule 84, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and, for every exception allowed, shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

Right to be Heard Before Master by Counsel.—Where a matter in chancery is referred to a master, the parties have a right to be heard before him by counsel, and if this right is refused them, or they have not been properly notified of the hearing, the cause will be again referred. *Whiteside v. Pulliam*, 25 Ill. 285.

Exception for Want of Notice.—Where exception is taken to a master's report for want of notice the affidavit filed in support of the motion should show that the solicitor was not notified. *Whiteside v. Pulliam*, 25 Ill. 285.

Where a report in a cause had been returned six years, and then heard and decided, *held*, that it was too late thereafter for the party against whom the decision was made, to except to the report for want of notice. *Miller v. Holcombe*, 9 Gratt. (Va.) 665.

Miscellaneous.—A bill in equity was brought by the administratrix of a deceased partner against the surviving members of the firm, and the cause was referred to a master to take the books and papers of the partnership, examine the same, hear the parties and the evidence, state the accounts, and report the material facts. The defendant submitted to be examined on oath, with-

out objection. *Held*, that he could not except to the master's report, on the ground that he had no authority to examine him under oath. *Copeland v. Crane*, 9 Pick. (Mass.) 73.

After a decree setting the priorities of creditors under an assignment in a suit for that purpose, one of the creditors, upon petition to the court, was allowed to except to the master's report as to the order of precedence, in order to enable him to place his debt in the first class, the delay having arisen from a mistake as to the mode of presenting his claim. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

And a creditor was allowed to go before the master to make further proof to entitle him to a preference, the neglect to make such proof having resulted from a misunderstanding of what was said by the master, upon payment of the costs of resisting the application. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

Exceptions to a master's report upon the disposal of a surplus, in a case of foreclosure, were ordered to be put on the calendar, as the matter of the exceptions could not come on as a special motion. *Eagle Fire Ins. Co. v. Flanagan*, 4 Edw. (N. Y.) 559.

When the insolvency of one of the defendants is alleged, and the other undertakes to show the contrary, an exception for impertinence is well taken where a restating of accounts has been had, before an officer of the court, by its order, and the balances adjusted, such accounting being final and conclusive. *Jones v. Roberts*, 4 Edw. (N. Y.) Ch. 611.

Where a reference is ordered to report facts under *New York Code*, § 271, subd. 3, the report has the effect of a special verdict, and may be reviewed on appeal without exceptions. But questions on the correctness of the proceedings on the trial or in the determination of the facts must be raised by exception. *Marshall v. Smith*, 20 N. Y. 251.

No exception lies, on the ground of inconsistency, to a master's report, which finds an agreement between the vendor and purchaser of a share in a

IX. REVIEW OF REPORT.—If the court is not satisfied with the master's findings, it may direct him to review his report, though no exceptions have been taken. This is done when there has been an error or omission which could not have been the subject of exception.¹ It is not error for the judge to review, or in a case of law to reverse, the findings of fact by the master. He has the right to substitute findings of his own and predicate the law on

ship, that the title should not vest in the purchaser until the completion of repairs, which were then making upon her, and an agreement by the vendor to pay the expenses of the repairs. *Rennell v. Kimball*, 5 Allen (Mass.) 356.

Where exceptions to the answer are referred to a master, the proper mode of bringing his report before the chancellor is, not by exceptions thereto, but by appeal. *Wheeler v. Redmond*, 6 N. J. Eq. 153.

Upon a hearing of exceptions to a master's report on a matter of account, before the chancellor, new facts or evidence not before the master are not admissible, much less in the court of appeals, on an appeal from the decree below on the exceptions. *Bank of the State v. Rose*, 2 Strobb. (S. Car.) Eq. 90.

When the omission to reckon interest on two certain items appears to be due to the master's oversight, the court will make the necessary corrections. *Crossman v. Card*, 143 Mass. 152.

It will not be presumed that a commissioner's report, returned nine days before commencement of the term at which it was disposed of, was acted on less than ten days before its return. *Moore v. Bruce* (Va.), 7 S. E. Rep. 195.

Where the court overrules exceptions by defendant to a master's report, but does not dispose of complainant's exceptions, omission to make a formal order sustaining them is not error, where the court decrees in favor of complainant on most, if not all, points covered by his exceptions. *Anderson v. Henderson*, 124 Ill. 164.

Exceptions to a register's report, dependent on testimony not filed in accordance with the rules of chancery practice, are properly overruled. *Kilpatrick v. Henson*, 81 Ala. 464. See also, as to exceptions to master's report, *Kelsey v. Hobby*, 16 Pet. (U. S.) 269; *Oliver v. Platt*, 3 How. (U. S.) 333; *Simpson v. Baker*, 2 Black (U. S.) 581; *Memphis v. Brown*, 20 Wall. (U. S.) 289; *Livingston v. Woodworth*, 15 How. (U. S.) 546; *Bate Refrigerating Co. v. Gillette*, 28 Fed. Rep. 673; *Scro-*

field v. Stoddard, 58 Vt. 290; *Stuart v. Hendricks*, 80 Va. 601; *Chapman v. McMillan*, 27 W. Va. 220; *Anderson v. Caraway*, 27 W. Va. 385; *Pico v. Sepulveda*, 66 Cal. 336.

1. 2 *Daniell's Ch. Pr.* 1320; *Lang v. Brown*, 21 Ala. 179; *Compare Wilkes v. Rogers*, 6 Johns. Ch. (N. Y.) 566, where it was held that a court of chancery cannot set aside a report upon exceptions not taken, and require further proof; not even in a case where infants are concerned when they have a guardian.

Setting Aside Report—Burden of Proof.—Where a master reports, his report is to be considered like the verdict of a jury, and to be set aside for the same reasons. The burden of proof is on the party excepting to the report, and if no abuse of power is shown, or clear mistakes proven, and if, though there be some errors, they do not affect the result, the report will be confirmed. *Mason v. Crosby*, 3 Woodb. & M (U. S.) 258.

Practice in Reviewing.—It is the duty of the master to obey the instructions of the chancellor; and if it is desired that the chancellor should review his directions, the party supposing himself to be aggrieved may take exceptions, and by this means bring the point again to the attention of the chancellor. If, on the argument of these exceptions, it should be made to appear that the justice of the case cannot be got at, without an alteration of the decree in conformity with which the report is made, the chancellor should direct the report to stand over, and order that portion of the decree containing the erroneous directions to be reheard.

When the report of the master is in direct opposition to the original decree, an order of the chancellor confirming it may be reviewed in the appellate court, without exceptions to the report in the court below. *Lang v. Brown*, 21 Ala. 179.

Parties asking the supreme court to review findings of fact by a master should, in the printed argument, collect

such findings,¹ but the court will not order a review unless it is clearly and satisfactorily shown that the findings of the master are not in accordance with the law and the evidence.² Or unless there

the evidence relating thereto, with a reference to the pages where it may be found. *Morgan's Appeal*, 110 Pa. St. 271.

Where the parties consent to a reference to a master in chancery to hear and decide all the issues, and report his findings both of fact and law, and such reference is entered as a rule of the court, his findings are to be taken as presumptively correct, and only reviewable under the reservation in the consent and order of the court, when there has been manifest error in the consideration given to evidence, or in the application of the law. *Kimberly v. Arms*, 129 U. S. 512. See also *Anderson v. Henderson*, 124 Ill. 164.

Errors of Computation May be Corrected by the Court.—Errors of computation by a master may be corrected by the court without a recommitment, at any time before or after the confirmation of his report. *Howe v. Russell*, 36 Me. 115, 116.

When a decree directing an account to be taken was a final decree, with no equity reserved, and when no further directions need be given consequent upon the master's report, an error made by the master can be corrected by the court, without referring the account back to him for a restatement, or setting down the cause for a further hearing. *Huston v. Cassidy*, 14 N. J. Eq. 320.

Where the master's report, in a partition suit, shows the actual interests of the several parties in the premises, it is not necessary to send the report back to the master to correct an erroneous estimate which he has made in relation to such interests; but the error may be corrected by the decree. *Carpenter v. Schermerhorn*, 2 Barb. (N. Y.) Ch. 314.

Duty of Court to Review.—In the final hearing on the exceptions, all the interlocutory orders are open for revision; and if the court on examination changes its opinion previously formed, or finds it in conflict with the decisions of a higher court, it is bound to reverse its former decree. *Fourniquet v. Perkins*, 16 How. (U. S.) 82.

Formal Errors.—Where by mistake there is a discrepancy between the opinion on a report of a master and the

decree recommitting it for certain alterations, the master must follow the decree. *Taylor v. Kilgore*, 33 Ala. 214.

Re-examination of Witnesses.—On a second reference, in equity, to a master, a party is not entitled, unless authorized by an order from the chancellor, to re-examine a witness whose deposition has been taken, or who has been examined at a former reference. *Pearson v. Darrington*, 32 Ala. 227.

Neglect of Master.—The remedy for a neglect of the master to execute a part of the order of reference is not by excepting to his report, but by a motion to refer the report back to the master, to amend it in that respect. *Stevenson v. Gregory*, 1 Barb. (N. Y.) Ch. 72.

When Review May be Had.—So long as a cause is on the docket, the court may receive exceptions to the report, if it is clearly shown that the report works injustice. *Wooding v. Bradley*, 76 Va. 614.

1. *Calvert v. Nickles*, 26 S. Car. 304.

2. *Stanton v. Alabama etc. R. Co.*, 31 Fed. Rep. 585.

Where Evidence Is Vague and Uncertain.—Where much of the evidence given before a master is of a vague and uncertain character, yet if, in his conclusion, he disregards such evidence, and bases his findings upon testimony that is certain and definite, there is no reason for reversing the decree reported by him. *Appeal of Perry* (Pa. 1887), 8 Atl. Rep. 450.

Where Evidence Is Conflicting.—Where the evidence is conflicting the findings of fact by the master will not be disturbed by the court. *Central Trust Co. v. Wabash etc. R. Co.*, 31 Fed. Rep. 246. See also *Central Trust Co. v. Texas etc. R. Co.*, 32 Fed. Rep. 448; *Welling v. La Bau*, 32 Fed. Rep. 293; *Jennings v. Dolan*, 29 Fed. Rep. 861; *Blackburn v. Clark*, 85 Tenn. 506.

A commissioner's report on matters of fact, recommitted, re-examined, and re-reported without change, and sustained by the lower court, will not be set aside by the appellate court because the evidence is doubtful and conflicting. *Handy v. Scott*, 26 W. Va. 710.

Conditions.—One of the parties asking to have the report set aside, the

has been some abuse of authority on the part of the master.¹ The report, however, may be set aside or referred back for irregularities in the proceedings, or for the failure of a master to report upon all matters submitted to him.²

X. ADDITIONAL TESTIMONY.—A master cannot reopen a cause for further testimony after the closing of the testimony and the submission of his draft report to the parties, without special order of the court; and this will be granted only upon the grounds of surprise³

other party asked, if the motion were granted, to be allowed to take further testimony. *Held*, that the confirmation be set aside on those terms. *Seigle v. Seigle*, 36 N. J. Eq. 397.

Reopening Findings.—Where a case is remanded to a master merely to complete an account, a question once settled cannot be reopened before the master and further testimony introduced, unless permission has been given by the appellate court which remanded the case. *Brown v. Brown*, 11 Lea (Tenn.) 608.

As to when a decree founded on a master's report will be opened, see *Townsend v. Low*, 4 Edw. (N. Y.) Ch. 249; *Pratt v. Lamson*, 6 Allen (Mass.) 457.

Amendment Does Not Authorize a General Review.—Where a master's report, upon the hearing of exceptions to the same, is sent back to be amended, it is not open to review generally by the master; unless the court expressly authorizes him to review it generally; or the nature and scope of the exceptions allowed necessarily embrace the whole subject matter of the account originally taken by the master. *Clark v. Wilmoughby*, 1 Barb. (N. Y.) Ch. 68. See also *Hooper v. Hooper*, 29 W. Va. 276.

Incidental Rulings.—Only in a case of extreme hardship should the court review an incidental ruling of the master in the course of an accounting. *Welling v. La Bau*, 23 Blatchf. (U. S.) 305.

Where, in proceedings to settle partnership affairs, a master was appointed to make sale of real estate of the firm, *held*, that the court had power to set aside the sale after the deed therefor had been executed, confirmed and delivered, it appearing that the confirmation had been made without notice to parties in interest, that the sale was irregular, there being a misdescription of the premises, and the price inadequate—on the ground that these facts constituted surprise and fraud. *Re Hildreth*, 41 N. J. Eq. 656.

Rehearing.—New hearings are never allowed on exceptions to a master's report. *Felch v. Hooper*, 4 Cliff. (U. S.) 489.

New Reference After Final Decree.—After a decree establishing the rights of parties to a suit and for the payment of a stated sum, a reference will not be made to take proofs and report as to rents received since the decree. *Bonner v. Illinois L. & L. Co.*, 96 Ill. 546.

1. *Howe v. Russell*, 36 Me. 115.

Burden of Proof.—In the case of authority by the master, the burden is on the excepting party to establish the mistake or misconduct alleged. See also *McDougald v. Dougherty*, 11 Ga. 570; *Dean v. Emerson*, 102 Mass. 480.

2. *White v. Hampton*, 10 Iowa 238.

Irregularity in Proceedings.—Where the proceedings before a master have been irregular, his report may be set aside for irregularity, on motion. In such case an order should be obtained enlarging the time to except, until the motion can be heard and decided. *Suydam v. Dequindre*, Walk. (Mich.) 23. See also, on review of report, *Lively v. Winton*, 30 W. Va. 554; Appeal of *Tolles* (Pa. 1888), 14 Atl. Rep. 394.

The action of a chancellor in refusing a reference will not be reviewed on appeal.

3. *Burgess v. Wilkinson*, 7 R. I. 31.

After a reference and report in an action for a partnership accounting, defendant filed a petition and affidavit to the effect that he had discovered numerous checks and receipts which, if taken into account, would show that he was improperly charged with certain sums by the master, and as to which sums he was unable to give an explanation on the hearing. *Held*, that the case would be opened to let in further testimony, although the defendant was guilty of laches in the nonproduction of such evidence, he having been the acting and controlling manager of the entire partnership business. *Dignan v. Dignan* (N. J. 1889), 17 A. 546.

or additional evidence, where good reason has been shown why it was not offered before the master.¹

1. **Motion to "Open and Recommit" Analogous to Motion for a New Trial.**—A motion to "open and recommit" a report of the master, confirmed without appeal, on the ground that since the filing of the report the mover has come into possession of material evidence that was not available before, is to be determined by the same principles as motions for a new trial, and petitions for rehearing on the ground of newly discovered evidence; and an order refusing to grant such a motion will not be set aside except for manifest abuse of discretion.²

XI. MASTER'S SALES.—Masters in equity are in some jurisdictions and in certain forms of equitable proceedings authorized to conduct judicial sales on behalf of the court. It is evident that this subject does not fall appropriately under this title for treatment; because, first, the principles of law which govern the court in authorizing such sales must depend upon the facts of the cases and the particular equitable proceeding in which they are presented; and, second, because the duty and responsibility of masters so appointed are the same as those already treated under other titles. It should also be borne in mind that this, as well as many other matters connected with the general subject, is regulated by statutes and rules of court in the several States, which cannot be set out in detail. In some States officials specially ap-

1. *Whiteside v. Pulliam*, 25 Ill. 285.
Taking Additional Testimony.—A party will not be allowed to open a case and have evidence retaken where his motion papers fail to show newly discovered evidence, or evidence of which the party could not avail himself at the first hearing, and where it appears that the party merely wishes to deny what he did not deny before, but which called for denial then as much as at the time of the application for a rehearing. *Witters v. Sowles*, 31 Fed. Rep. 5.

Defendant moved for a rehearing on the ground that his counsel had not offered evidence before the master which he was urged to put in. *Held*, that the counsel not deeming the evidence necessary to the proper conduct of the case, at best it was but an error in judgment, and no ground for a rehearing. *Paterson v. Read*, 43 N. J. Eq. 18.

2. *Hubbard v. Camperdown Mills*, 26 S. Car. 581.

No mistakes of judgment, or want of attention or capacity of counsel afford any just or proper grounds for granting a motion to open a case. *Witters v. Sowles*, 31 Fed. Rep. 5.

Where there is such an insufficiency of testimony as to preclude making a just decree, and the points are covered by the pleadings, and are such that there can be no doubt that testimony exists as to them, the cause will be remanded, with directions to take further testimony on such points. *Fuller v. Fuller*, 23 Fla. 236.

Rule 64 of the chancellor practice of *Alabama*, which provides that "After publication passed, no testimony shall be taken except by consent, or by special application to the chancellor and allowance by him," operates only on the rights of the parties, leaving unabridged the chancellor's discretion to order such additional testimony for the information of his conscience. *Dixon v. Higgins*, 82 Ala. 284. See also *Wagoner v. Wagoner*, 67 Md. XIV Mem.

Additional Proofs.—A court of equity on rejecting an account of mesne profits stated by an auditor, and returning the case to him for restatement, may properly allow additional proofs to be taken, notwithstanding a restriction as to time in the decree. *Worthington v. Hiss*, 70 Md. 172. See also *Fuller v. Fuller*, 23 Fla. 236.

pointed for this purpose are called commissioners. In the federal courts such sales are usually conducted by the marshal.¹

XII. Costs.—In the *United States* the subject of costs is regulated by statutes and rules of court. The duties appertaining to a master's office, as an item of expense in an equity cause, are included in the general costs of the suit, and the same general principles of law that govern the matter of costs in an equitable proceeding from beginning to end are of course applicable. It may be stated as a general rule that the prevailing party is entitled to costs, with the proviso, that the matter usually rests within the sound discretion of the court, and that discretion is limited by definite principles and fixed rules, regard being had to the circumstances governing each particular case.² The court, in exercising this discretion, does not impose costs as a penalty or punishment, but as a necessary consequence of a party having created a litigation in which he has failed.³ In suits under the protective and administrative jurisdiction of the court, the general rule is that the party requiring aid shall be liable for the costs;⁴ and in suits under the litigious jurisdiction of the court, the costs follow the result,⁵ though decrees are sometimes made and bills dismissed without costs on the ground that the failing party has been misled by his adversary's conduct or where the question in dispute was of a very doubtful character, or, in some cases, merely in consideration of the hardship of his case.⁶

1. See JUDICIAL SALES, vol. 12, p. 209; FORECLOSURE OF MORTGAGES, vol. 8, pp. 245-258; EXECUTIONS, vol. 7, p. 117; and see also SHERIFF'S SALES.

Setting Aside Sales.—The purchaser at a master's sale is entitled to a deed, unless there be some special circumstances to authorize the biddings to be opened; but these need not be such as are required between individuals to afford a proper ground of equitable relief. *Morton v. Sloan*, 11 *Humph. (Tenn.)* 278.

A *Tennessee* statute makes it the duty of the court, when real estate is sold under its decree, to make a reference to a master before confirmation of the sale, to find out if there were any unpaid taxes which, on the day of sale, were a lien on the land, and if so, to decree that the master pay said taxes out of the first money coming to him from the sale. Where such reference was omitted and the money paid over to creditors, *held*, that the court might, at the same term of court, order the same to be refunded for the payment of taxes. *Williams v. Whitmore*, 9 *Lea (Tenn.)* 262.

2. *Nicoll v. Town of Huntington*, 1

Johns. (N. Y.) Ch. 166; *Eastburn v. Kirk*, 2 *Johns. (N. Y.) Ch.* 317; *In re Heiniup*, 3 *Paige (N. Y.)* 305; *Woodson v. Palmer*, 1 *Bail. Eq. (S. Car.)* 95; *Lee v. Pindle*, 12 *Gill & J. (Md.)* 288; *Clark v. Reed*, 11 *Pick. (Mass.)* 446; *Tomlinson v. Ward*, 2 *Conn.* 396; *Stone v. Locke*, 48 *Me.* 425; *Brooks v. Byam*, 2 *Story (U. S.)* 525; *Gray v. Gray*, 15 *Ala.* 779; *Kaye v. Bank of Louisville*, 9 *Dana (Ky.)* 261; *Hunt v. Lewin*, 4 *Stew. & P. (Ala.)* 138; *Cowles v. Whitman*, 10 *Conn.* 121; *Saunders v. Frost*, 5 *Pick. (Mass.)* 259, 260; *Bryant v. Russell*, 23 *Pick. (Mass.)* 508.

3. 2 *Daniell's Ch. Pr.* 1377, quoting LORD CRANWORTH in *Clark v. Hart*, 6 *H. L. Cas.* 633.

4. *Adams' Eq.* 389 and cases cited.

5. *Adams' Eq.* 391.

6. *Bradley v. Chase*, 22 *Me.* 511; *Pinnock v. Clough*, 16 *Vt.* 500; *Clark v. Reed*, 11 *Pick. (Mass.)* 446; *Hammersley v. Barker*, 2 *Paige (N. Y.)* 372; *Pattison v. Hull*, 9 *Cow. (N. Y.)* 747; *Jones v. Mason*, 5 *Rand. (Va.)* 577; *Blakeney v. Ferguson*, 14 *Ark.* 641; *Tatham v. Lewis*, 65 *Pa. St.* 65. See generally COSTS, vol. 4, p. 322.

Dismissal of Suit Without Costs.—If

XIII. COMPENSATION.—The compensation of masters, whose functions are judicial, may usually be measured by the standard of judicial salaries.¹

by the complainant's own act or procurement, the object of the suit is defeated, he cannot be permitted to discontinue, without costs. The bill can be dismissed without costs only in those cases where *prima facie* the complainant would not be charged with costs on a decree dismissing the bill at the hearing, as in cases of suits brought by trustees, executors, etc. *Hammersley v. Barker*, 2 Paige (N. Y.) 372; *Beebe v. Beebe*, 3 How. Pr. (N. Y.) 170; *Pennell v. Wilson*, 5 Robt. (N. Y.) 674; *Palmer v. Van Doren*, 2 Edw. (N. Y.) Ch. 384.

If the complainant *prima facie* would be chargeable with costs if the suit was decided against him at the hearing, the court would not examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs. *Hammersley v. Barker*, 2 Paige (N. Y.) 372.

Costs are in the discretion of the court. They do not always follow the event of the cause. Where a plaintiff had probable cause for seeking the aid of the court, but failed in establishing his title; but the defendant showed no title, or no better title, to the property in dispute, the bill was dismissed without costs on either side. *Nicoll v. Town of Huntington*, 1 Johns. (N. Y.) Ch. 166.

In *Tatham v. Lewis*, 65 Pa. St. 65, the master recommended that the bill be dismissed; but, as it appeared to him that plaintiffs were warranted in prosecuting an investigation, that the decree should be without costs. Decree affirmed. Each party to pay their own costs.

Where an appellant succeeded only as to part of the matters of the appeal, neither party was allowed any costs as against the other upon the appeal. *Stafford v. Mott*, 3 Paige (N. Y.) 100.

The stockholder who comes into this court rightfully and with good faith, by a bill of interpleader, is entitled to his costs out of the fund. Those costs fall, in such cases, directly upon that defendant who had right, but eventually upon him who was in the wrong. It makes no difference in the rule that the defendant who was in the wrong is without the jurisdiction. *Canfield v.*

Morgan, Hopk. (N. Y.) 224; *Farley v. Blood*, 30 N. H. 354; *Manchester Print Works v. Stimson*, 2 R. I. 415.

Decree for Costs.—The rights of the parties are determined by the final decree. There must not only be a decree in favor of a party but there must also be an express order or decree for his costs, or they are lost. *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Travis v. Waters*, 12 Johns. (N. Y.) Ch. 500.

Partial Relief.—Partial relief usually entitles complainants to costs. *Rough v. Marshall*, 4 Bibb (Ky.) 567; *Hightower v. Smith*, 5 J. J. Marsh. (Ky.) 542; *Sapp v. Phelps*, 92 Ill. 588.

Where there has been an oppressive accumulation of costs occasioned by the errors and imperfections of the complainants' proceedings, the court will relieve the defendants from their payment. *Blakeney v. Ferguson*, 14 Ark. 641.

1. *Middleton v. Bankers' etc. Tel. Co.*, 32 Fed. Rep. 524.

Costs—United States Circuit Courts.—In the circuit courts of the United States whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance, or for whose benefit, the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made. If he omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference. United States Equity rule 74.

In *New York*, the master will in no case be allowed more than \$5 per day, including his taxable fees on the reference and for the report. And if his taxable fees amount to that sum, or nearly so, no extra allowance will be made. *Woodruff v. Straw*, 4 Paige (N. Y.) 409.

In *North Carolina*, a clerk or master is not entitled to any specific fee for issuing a *subpoena* for a witness to appear before him to give his depositions. He is to be compensated for such service as the court may think proper. *Stokes v. Brown*, 7 Ired. (N. Car.) Eq. 33.

In *South Carolina*, an officer of the

XIV. MASTER'S ESTIMATES.—In ascertaining values or profits the master should report his own judgment according to his belief of the testimony; and not a conclusion arrived at by averaging the estimates of the witnesses.¹

court of chancery cannot issue execution for his fees, for services not enumerated in the statute regulating fees, until such fees have been estimated upon a *quantum meruit*, or by the taxation of a master. *Butler v. Ryan*, 3 Dessaus. (S. Car.) 178.

A decree dismissing the plaintiff's bill, with costs, which is affirmed on appeal, includes the master's compensation, though not taxed before the appeal, and the court below has no power to order the same to be paid by the defendant. *Jones's Appeal*, 87 Pa. St. 428.

Right to Have a Clerk.—Code *Maryland*, art. 16, § 144, gives an examiner in equity the right to have a clerk to write down the testimony. *Held*, that this provision of the code is still in force, and has not been affected by any equity rule. *Canton v. McGraw*, 67 Md. 583.

1. Averaging the sums proved by the witnesses is an exceptional mode of procedure, to be resorted to only from necessity. *Pilkinton v. Cotten*, 2 Jones' Eq. (N. Car.) 238.

In *Moore v. Bruce* (Va.), 7 S. E. Rep. 195, the court held that it is error for the commissioner (master) to return the debtor's property at his own valuation; but where it is not disputed and other evidence tends to show it correct, the judgment will not be reversed.

The fact that a master, upon a reference to him to estimate damages, has made an average of the estimates of the witnesses, is not, of itself, a ground for setting aside the report. *Morison v. McLeod*, 2 Ired. (N. Car.) Eq. 108.

Interest.—In taking account of profits against an infringer of a patent, interest is not allowed before the date of the submission of the master's report, but only after that date and upon the amount shown to be due by his report and the accompanying evidence. *Tilghman v. Proctor*, 125 U. S. 136, 149.

Where a master charges interest upon an account upon a wrong principle, the court will not disturb the calculation, if no substantial damage is done to either party. *Phelan v. Hutchinson*, Phill. (N. Car.) Eq. 116. See generally *INTEREST*, vol. 11, p. 379.

Where a bill in equity prays that the judgment in a suit on a note in favor of the plaintiff in such suit be enjoined, and that the note be decreed to have been given without consideration, the court, if it refers the case to a master, should direct him to take and report testimony as to the consideration of the note, and he should receive and compute interest on only those items that are duly allowed by the court upon examination of the reported testimony. *Owens v. Rhodes*, 10 Fla. 319.

Miscellaneous—Money in Hands of Master.—A genuine bank book of a commissioner (master) in equity shows a due discharge of his duty in depositing the funds. *State v. Norris*, 15 S. Car. 241.

Death of Master.—Upon the death of the master his executor may be required to account in the proceeding in which the fund was acquired, for the fund and its earnings. *Van Doren v. Van Doren*, 45 N. J. Eq. 580.

Removal of Master.—A master in partition cannot be removed on *ex parte* hearing on petition by one of the parties, even though he had done nothing on the order of sale for five years. *Gibbons' Appeal*, 104 Pa. St. 587.

After a cause was at issue, on motion of the complainant, leave was given to take testimony before any examiner of the court. The first examiner notified to take testimony being sick, complainant took testimony before a second, and finally before a third examiner. The defendants were present and cross-examined the witnesses. The court, on motion of complainant, ordered the testimony as taken to stand, and that the third examiner should continue taking the testimony under the original order. *Held*, that the order of the court violated none of the equity rules, nor any of the general principles of equity. *Canton v. McGraw*, 67 Md. 583.

Special Master.—May be appointed where former order of master is involved, and he may be called referee. *Roberts v. Johns*, 24 S. Car. 580. See also *Verner v. Davis*, 26 S. Car. 609.

Where a master in equity borrowed

MASTER OF A VESSEL—(See also ADMIRALTY; CHARTER PARTY; DEVIATION; MARINE INSURANCE; MARITIME LIEN; SEAMEN; SHIPPING).

- I. Appointment and Dismissal, 958.
- II. Authority, 960.
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- V. Liability, 974.
 - 1. *On Contracts*, 974.
 - 2. *Misconduct*, 974.

I. Appointment and Dismissal.—A master of a vessel is appointed by the owners and his employment continues at their discretion.¹ No formalities are necessary for his appointment.² The registry acts do not affect the validity to his authority, but where a vessel is registered in the name of a particular person as master, that person must be deemed the master for every legal purpose.³

money, and, to secure the payment, hypothecated certain certificates of stock which he held as master, and in trust, the official character in which he held the stock and the trust appearing on the face of the certificates, the lender was decreed to deliver up the certificates to the parties entitled, and account for all dividends received. *Simons v. Bank*, 5 Rich. (S. Car.) Eq. 270.

Authorities.—Daniell's Ch. Pr. (5th Am. ed.); Adams' Equity (7th. Am. ed.)

1. *Ward v. Ruckman*, 34 Barb. (N. Y.) 419; *Fox v. Holt*, 4 Ben. (U. S.) 278.

2. "In this country and in *England* the law does not interfere in relation to the qualifications or mode of appointment of a master, further than as regards his national character. He is *pro hac vice* the agent of the owner; and any mode of authorization competent to give power to one man to act for and bind another is sufficient to constitute him master of a ship. The Registry act of the United States requires that the name of the master shall be inserted in the register of the vessel (Act of Dec. 31st, 1792, § 9, 1 U. S. Stat. at Large 291); that on a change of ownership, a new register shall be taken out; and that when the master is changed, the register shall be produced to the collector, and a report be made to him, by the

owner, or the new master, of such change, whereupon the collector shall endorse a memorandum of the change on the register, and subscribe his name thereto (Id. § 15; Id. 295). None of these provisions, however, whether complied with or not, affect the validity of the master's authority. They are only designed to secure the revenue against the allowance to foreign vessels, of privileges which only vessels belonging to citizens of the United States are entitled to enjoy." *The Boston*, Blatchf. & H. (U. S.) 309.

3. In the *Dubuque*, 2 Abb. (U. S.) 20, it was held that where there is a master by virtue of the registry, there cannot be in contemplation of law, another master *de facto*; that another person employed by the owners to navigate, and even discipline the ship, does not become master in either sense. In deciding this case the court followed the dissenting opinion in *Draper v. Commercial Ins. Co.*, 21 N. Y. 378.

In *L'Arina v. Manwarring*, Bee Adm. (U. S.) 199, the ship had a real master, who of his own motion, acting in his capacity as master, hired a man at Havana to lend his name to be used as nominal master to clear the vessel at that place, and to proceed to Charleston and back to Havana. The court held that the person so hired never was master; that the real master had no authority thus to divest himself of his of-

The master of a vessel registered under the laws of the United States must be a citizen of the United States.¹

In case of necessity a consul may appoint a master.² Where the master is lost, the mate may become temporary master, and persons may lawfully treat with him as such.³

When a person is once appointed master; he will be deemed to continue as such until his actual displacement by some overt act or declaration of the owner.⁴

fice, and confer it upon another; that this could be done by the owners only. See also the *Boston, Blatchf. & H.* (U. S.) 309.

1. Rev. Stat. 4131; Act 7, June 26th, 1884, ch. 121, § 1, 23 Stat. 53. In *United States v. Gillis*, Pet. C. C. (U. S.) 159, it was decided that a citizen of the United States, resident in a foreign country, may, under the act of December 31st, 1792, command a registered vessel of the United States, without her right to the payment of domestic duties being affected thereby. In ten opinions of Attorney General, it was declared that a freeman of color might be master if otherwise qualified.

2. In the case of the *Jacmel Packet*, 2 Ben. (U. S.) 107, the authority of a master appointed abroad by an American consul, in place of a master who had absconded, to give a bottomry bond and hypothecate the vessel for advances necessary to save her, was sustained.

3. In the *Favorite*, 2 C. Rob. 232, *SIR WILLIAM SCOTT* held that where a person contracts to serve as a mate, it is a part of the contract legally implied in it, that he shall likewise act as master in case of the death or removal of the actual master. See also *The Boston, Blatchf. & H.* (U. S.) 309.

In the *Ann C. Pratt*, 1 Curt. (U. S.) 340, *CURTIS, J.*, said: "When the owners appoint the mate, they are supposed to contemplate such casualties, and to agree that the mate shall exercise all the needful powers of master, in case they occur; and third persons may rightfully treat with him as master, when he has thus become such," citing the *Kennersley Castle* and *The Rubicon*, 3 Hagg. 8, 9; *The Alexandria*, 1 Dods. 280.

4. In the *Tribune*, 3 Sumn. (U. S.) 144, *STORY, J.*, said: "The next objection is that *Dennett* was not master of the vessel at the time; and if he was, that he had no authority to make the contract. I am of opinion, that he was

master. He had been master for a whole year before, and his name stood on the ship's papers as master. Being once master, he must be deemed still to continue to hold that character, until some overt act or declaration of the owners, displaced him from that station." See also *Fox v. Holt*, 36 Conn. 558; *The Swallow*, Olc. Adm. 334; *Truesdale v. Young*, Abb. Adm. (U. S.) 391; *Thomas v. Osborn*, 19 How. (U. S.) 22; *L'Arina v. Exchange*, Bee Adm. (U. S.) 198; *Stringham v. Schloener*, 4 Ben. (U. S.) 16; *Slocum v. Swift*, 2 Low. (U. S.) 212.

When one, claiming under an alleged employment as master for a foreign voyage, seeks to establish such employment, merely by inference from services rendered and acts performed by him, under authority of the owners, in making the vessel ready for sea, the court will require that the evidence shall be so strong as to exclude all reasonable doubt that an employment for the voyage was intended. *Jones v. Davis*, Abb. Adm. (U. S.) 446.

The absolute right of the owners to dismiss is well settled. Thus in *Montgomery v. The General Greene*, Bee (U. S.) 388, *JUDGE HOPKINSON* affirmed the right of the owners to dismiss, at their pleasure, a master who had been employed for a particular voyage, whose cargo was on board, for which he had signed bills of lading, and who was all ready and about to sail. In affirming the decree, the court, in 1 *Dallas* (U. S.) 51, said: "As to the other point, the dismissal of the captain, we are of the opinion that, upon a general retainer for no particular voyage, the captain may be dismissed at any time without cause assigned; but that where there is a charter party, bills of lading and a particular voyage agreed upon, though the owners may dismiss the captain, yet they would be liable in a common law court."

In *Brown v. Hicks*, 24 Fed. Rep. 811, it was held that an agreement engaging

Under the laws of the *United States*, the majority in interest of the owners of a vessel have the power to remove the master, whether he be part owner or not.¹

II. AUTHORITY—1. In General.—The master has general authority to do everything that is necessary and proper relating to the management of a vessel, in furtherance of the general purposes of the voyage.²

As between owners and underwriters, the master has an im-

a master for "a whaling voyage not exceeding three years in duration" meant that the voyage was to last three years, unless its purpose should be accomplished sooner, and that the master was entitled to damages if the owners terminated the voyage sooner, because it was not a successful one.

On the power of removal generally, see *The Camilla*, Swab. 312; *Dennis v. Marfield*, 10 Allen (Mass.) 138.

As to the termination of the contract by the destruction of the ship, see *General Interest Ins. Co. v. Ruggles*, 12 Wheat (U. S.) 408.

1. By Rev. Stat. 4250, it is enacted that the majority ownership of a vessel shall have the same power to remove a master, who is also part owner, as such majority, if owners, have to remove a master not an owner; but this does not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession. In commenting upon this section of the revised statutes, *McKENNEN, J.*, in *The Clayton v. Emory*, 4 Fed. Rep. 342, said: "This not only confers upon a majority of owners the absolute power to remove a part owner from the command and possession of a vessel, because such power is exercisable by them against one who is not an owner, but by the clearest implication it enacts that nothing but a written agreement, entitling a part owner to possession, shall be available against this right of the majority."

The co-owner of a whaling ship, who is also master, and who has contracted for a cruise of four seasons, at a certain lay, and who is wrongfully deprived of his command at the end of three seasons, has an action against his co-owners for his removal. The measure of damages in such a case is the probable value of his lay for the season for which he was displaced. *Parsons v. Terry*, 1 Low. (U. S.) 60.

In *Childs v. Gladding*, 11 Am. L. Reg., N. S. 386, it was held that the

part owner of a ship who is appointed master, is not thereby endowed with any new or additional right as a part owner, such as retaining his position of master against the express wishes of the majority of the owners.

In *Ward v. Ruckman*, 34 Barb. (N. Y.) 419, the court said: "The right of a master to continue in command of a vessel because he is a part owner, can only rest on a contract made with the owners. Even if such a contract is made with one captain, it is not an assignable right to be transferred with the share, but is personal with the captain with whom it is made."

A part owner, who is a master, is entitled to an official investigation before removal, in the course of a voyage. *Parsons v. Terry*, 1 Low. (U. S.) 60.

2. "In cases of necessity happening during the voyage, the master is by law, created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercising a sound discretion, are binding upon all parties in interest." *Miston v. Lord*, 1 Blatchf. (U. S.) 354; *The Sarah Ann*, 2 Sumn. (U. S.) 206; *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342; *Soule v. Rodocanachi*, Newb. Adm. 504; *The E. H. Fittler*, 1 Low. (U. S.) 114; *The Henry*, Blatchf. & H. (U. S.) 465; *Stone v. Ketland*, 1 Wash. (U. S.) 142; *Mervin v. Shailer*, 16 Conn. 489.

The master has authority to employ the vessel under his command in a salvage service, and to put at hazard the interests of her owner. *Waterbury v. Myrick*, Blatchf. & H. (U. S.) 34; *The Centurion*, 1 Ware (U. S.) 477.

He may regain possession of the vessel by ransom. *Phillips v. McCall*, 4 Wash. (U. S.) 141; *The Gratitude*, 3 C. Rob. 268.

He may borrow money necessary for the completion of the voyage. *The Fortitude*, 3 Sumn. (U. S.) 228; *Stearns v. Doe*, 12 Gray (Mass.) 482; *Wes-ton v. Wright*, 7 Mees. & W. 396; *Beldon v. Campbell*, 6 Exch. 886; *Des-*

plied power to do what is fit and right to be done with ship or cargo, in case of emergency.¹

2. As Agent.—Within the scope of his employment the master has full authority to bind the owners to the extent of their interest in the vessel. He is a special and not a general agent. He can enter only into such contracts as are connected with the ordinary employment of the vessel.² Thus he may employ sea-

cadillas v. Harris, 8 Greenlf. (Me.) 298.

The powers of masters employed on western steam boats is determined by maritime law. *Holcroft v. Halbert*, 16 Ind. 256.

1. Implied Authority.—The *Ann D. Richardson*, Abb. Adm. 499; *Miston v. Lord*, 1 Blatchf. (U. S.) 354. It is limited by the express or implied authority derivable from the laws of the vessel's country, or the usage of the trade, or the business of the ship, or the instructions of the owner. *The Woodland*, 7 Ben. (U. S.) 118. See also *The Pacific*, Brown & L. 243.

The master has no implied authority to borrow money for work previously done. *Beldon v. Campbell*, 6 Eng. L. & E. 473. Nor to make insurance. *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Holcroft v. Wilkes*, 16 Ind. 373; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595.

2. Master as Agent.—"The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all the lawful contracts made by him relative to the usual employment of the ship, and the repairs and other necessities furnished for her use." *The Aurora*, 1 Wheat. (U. S.) 96. See also *The Gulnare*, 24 Fed. Rep. 487 (contract for coal); *The Queen*, 28 Fed. Rep. 755 (repairs); *The Eugene Vista*, 28 Fed. Rep. 762 (employment of tug); *The Senator*, 1 Brown Adm. (U. S.) 544 (employment of tug); *The North Carolina*, 15 Pet. (U. S.) 41 (settlement of claim for salvage); *Ross v. The Active*, 2 Wash. (U. S.) 226 (sale of cargo); *The H. D. Bacon*, 1 Newb. Adm. 274 (salvage services); *Stocker v. Corbett*, 1 Const. Rep. 81; *Pope v. Nickerson*, 3 Story (U. S.) 465 (carrying money for hire); *The New World v. King*, 16 How. (U. S.) 469; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16; *Sheppard v. Taylor*, 5 Peters (U. S.) 675; *McDaniel v. Emanuel*, 2 Rich. (S. Car.) 455; *Nelson v. Belmont*, 21 N. Y. 36; *Purvis v. Tunno*, 1 Brev.

(S. Car.) 260; *The Eolian*, 1 Biss. (U. S.) 321 (pilotage); *Brown v. Lull*, 2 Sumn. (U. S.) 443; *The Grand Turk*, 1 Paine (U. S.) 73; *The Phebe*, 1 Ware (U. S.) 263 (contract on bill of lading); *The Freeman v. Buckingham*, 18 How. (U. S.) 180; *Glading v. George*, 3 Grant (Pa.) 290; *The Flash*, Abb. Adm. 67, 71; *Gen. Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 408; *Grant v. Norway*, 10 C. B. 665; *The Gen. Worth*, 30 Miss. 703; *Ward v. Green*, 6 Cow. (N. Y.) 173; *Smith v. The Creole*, 2 Wall. Jr. (U. S.) 485, 519; *Oakland etc. Mfg. Co. v. Jennings*, 46 Cal. 176, 184. As to the master being a special agent, see *The Irma*, 6 Ben. (U. S.) 1; *Webb v. Peirce*, 1 Curt. (U. S.) 104; *Mitchelson v. Oliver*, El. & B. 419; *The Thetis*, 22 L. T. Rep. 272.

In Cases of Necessity the Master Is the Agent of All Parties Concerned.—In *Miston v. Lord*, 1 Blatchf. (U. S.) 354, the court said: "In cases of necessity happening during the voyage, the master is, by law, created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest." In this case it was held that the agency of the master on behalf of the shipper at the port of distress, arising out of the necessities occasioned by the disaster, was limited to the sale of the cargo. See also *The Sarah Ann*, 13 Peters (U. S.) 387; 2 Sumn. (U. S.) 206; *Copeland v. Security Ins. Co.*, Woolw. (U. S.) 278; *The Velona*, 3 Ware (U. S.) 139; *The Gratitude*, 3 C. Rob. 240. The nature of the master's authority as agent is carefully considered by JUDGE STORY in the leading case of *Pope v. Nickerson*, 3 Story (U. S.) 465.

In *Peters v. Ballister*, 3 Pick. (Mass.) 495, the owners of the ship and cargo sent them to the West Indies, directing the master to sell the cargo, and bring or send home a return cargo, the principal object of the voyage being the freighting business among the islands, and also directing him to manage the

men,¹ receive consignments,² settle claims for demurrage,³ or

voyage in such a manner as in his opinion should be most advantageous. The master sold the outward cargo, and purchased a return cargo, but found no opportunity to send it home. A creditor of the owner threatened the master to detain the vessel and cargo by legal process unless his debt was paid. The master accordingly sold the cargo to the creditor for the payment of the debt. The court *held* that the sale, not being in the ordinary course of business, was void and could be disaffirmed by the owners.

Ratification.—If a master exceeds his authority, his acts may be ratified by the owners. Thus in *Lyman v. Redman*, 23 Me. 289, a master of a vessel bought, without authority, a cargo of plaster on credit for the benefit of the vessel and owners. The owners received the vessel and cargo from the master, and sent them under charge of another master to another port for the purpose of selling the plaster. On this voyage a part of the cargo was thrown overboard for the security of the remainder and of the vessel, and the residue was sold at the port of destination and the proceeds thereof applied to the repair of the vessel. *Held*, that the owners were liable to those who had furnished the plaster to the first master. See also *Hathorn v. Curtis*, 8 Me. 356. In *Davis v. Marshall*, 4 Harr. (Del.) 64, HARRINGTON J., in charging the jury, said: "If it be proved that it was customary for the captain of this vessel to buy wood for transportation and sale, and pay for it on the return from market, it is evidence that Mr. Wilson knew of, assented to, and authorized such contracts on the part of his captain, and he is liable accordingly for the price of the wood. But if the usual business of this vessel was to carry the wood of others for freight, and not to buy it on account of the vessel, then Wilson, the owner, would not be liable to Mr. Marshall for a contract made with the captain."

1. Hiring of Seamen.—"By the general rule of the maritime law the personal contract of the master for the wages of seamen binds the owners, and the seamen may have their remedy against either." *Baker v. Corey*, 19 Pick. (Mass.) 496. See also *Luscomb v. Osgood*, 1 Sprague (U. S.) 82; *Pickering v. Holt*, 6 Me. 160.

In *Sherwood v. Hall*, 3 Sumn. (U.

S.) 127, the owners were held liable in damages for the tort of the master in shipping a lad under age.

The master may engage seamen on a whaling voyage on shares. *Whalen v. The Silver Spring*, 32 Hunt's Mer. Mag. 711. But he cannot after hiring a crew bind the owners for increased wages. *Neilson v. Laura*, 2 Sawy. (U. S.) 242. Nor for the payment of wages for three months after the term of service. *Canizares v. The Santissima Trinidad*, Bee Adm. (U. S.) 353.

2. Authority to Receive Consignments.

In *Freeman v. Buckingham*, 18 How. (U. S.) 182, it was decided that under the admiralty law of the United States contracts of affreightment, entered into with the master in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner. See also *The Eolian*, 1 Biss. (U. S.) 321; *Poland v. The Spartan*, 1 Ware (U. S.) 134; *Jackson v. Julia Smith*, 6 McLean (U. S.) 484; *The Hendrik Hudson*, 7 L. R., U. S. 93; *Murfree v. Redding*, 1 Hayw. (N. Car.) 276; *Boucher v. Lawson*, Abb. on Ship. 119; *King v. Lenox*, 19 Johns. (N. Y.) 236; *Walter v. Brewer*, 11 Mass. 99; *Fisher v. Willing*, 8 S. & R. (Pa.) 118; *The Grand Turk*, 1 Paine (U. S.) 73; *Sheppard v. Taylor*, 5 Peters (U. S.) 675. When an owner is on board and exclusively attending to the shipment of the cargo he is not bound by the master's contract. But to relieve himself of liability, he must show the fact that he was exclusively attending to the shipment of the cargo; and he must show this, though he was on board as supercargo. *Ward v. Green*, 6 Cow. (N. Y.) 173.

The liability of the owners will not be affected by the fact that no bill of lading was signed. *Fox v. Holt*, 36 Conn. 558.

3. Demurrage.—In *Alexander v. Dowie*, 1 Hurl. & N. 152, the plaintiff, the owner of a ship, entered into a charter party with the defendant, containing stipulations as to demurrage. The ship was detained in South America beyond the time stipulated for. The captain was in possession of the ship, and was to be paid freight and demurrage by bill in South America. After

enter into contracts for repairs and supplies.¹

The master as such cannot make insurance for owners,² purchase a cargo,³ settle prior claims,⁴ make bills or notes binding the

the making of the charter party, and before the settlement hereafter mentioned, the ship with the charter was sold to F, the captain becoming a part owner. The captain settled the account for freight, demurrage and delay with the defendant by taking a bill in South America. It was held that F and the plaintiff, in whose name he was suing, were bound by the settlement. *POLLOCK, C. B.*, said that the master as captain must have had authority to make such a settlement.

1. Contracts for Repairs and Supplies.

—A master may procure all necessary repairs and supplies for the vessel in a foreign port, and may bind both the owners and the vessel for their payment. He cannot bind the owners to pay for repairs at the home port without special authority. See *Thomas v. Osborn*, 19 How. (U. S.) 22; *Phillips v. Ledley*, 1 Wash. (U. S.) 226; *Mervin v. Shailer*, 16 Conn. 489; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Provost v. Patchin*, 9 N. Y. 235; *Wainwright v. Crawford*, 4 Dall. (Pa.) 226; *The George*, 1 Sumn. (U. S.) 151; *Hussey v. Allen*, 6 Mass. 163; *Joy v. Allen*, 2 Woodb. & M. (U. S.) 303; *Webster v. Seekamp*, 4 Barn. & Adol. 352; *Dyer v. Snow*, 47 Me. 254. See *MARITIME LIENS*.

The master has no authority to bind the owners if a third person is clothed with a special ownership or authority. *Webb v. Peirce*, 1 Curt. (U. S.) 104; *Gracie v. Palmer*, 8 Wheat. (U. S.) 605; *The Joseph Cunard*, Olc. Adm. 120; *Phillips v. Ledley*, 1 Wash. (U. S.) 226; *The City of New York*, 3 Blatchf. (U. S.) 187; *The William & Emmeline*, Blatchf. & H. (U. S.) 66.

Nor can the master bind the owners if they are within easy communication. *Woodruff etc. Iron Works v. Stetson*, 31 Conn. 51.

2. Insurance.—*Holcroft v. Wilkes*, 16 Ind. 373; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595.

In case of a constructive total loss the master is agent of the underwriters. *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249. But where there is no abandonment, the underwriters have no authority over

the master. *The Senator*, 1 Brown. Adm. (U. S.) 546; *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106; *Ward v. Peck*, 18 How. (U. S.) 267; *The Henry*, 2 Blatchf. & H. (U. S.) 465.

3. Purchase of Cargo.—“The owner of a ship cannot be bound by any contract of the master concerning the purchase of cargo. To bind the owners in such a contract, the master must be clothed with powers other than those which are necessarily incident to his office as commander of the ship. He may, indeed, act in the double character of master and supercargo or consignee; but his power to sell, cases of necessity excepted, or to purchase cargo, flows not from his official character as master, but from special authority conferred for that purpose. The evidence, by which this agency is to be proved, may as in other cases, be positive or presumptive; by direct appointment contained in letters of instruction or by general and long-continued usage, under which all interested may be presumed to have contracted; or by subsequent ratification. But unless this agency be superadded by his authority as master, he has no power to bind his owners in any contracts excepting such as relate to the usual employment of the vessel committed to his charge, and the means requisite for that employment.” *Hathorn v. Curtis*, 8 Me. 356; *Davis v. Marshall*, 4 Harr. (Del.) 64; *Newhall v. Dunlap*, 14 Me. 180; *Lyman v. Redman*, 23 Me. 289; *Hewett v. Buck*, 17 Me. 147; *Naylor v. Baltzell*, Taney (U. S.) 55; *Kenzel v. Kirk*, 37 Barb. (U. S.) 113. The owners may, however, expressly authorize the master to purchase a return cargo. *Bidenlac v. Smith*, 31 N. Y. 259; *Lyman v. Redman*, 23 Me. 289.

4. Prior and Invalid Claims.—The master has no authority to settle prior claims. *Kelley v. Merrill*, 14 Me. 228. Nor invalid claims. *Merritt v. Walsh*, 32 N. Y. 685, 687. In the latter case the court said: “The defence is placed upon the ground that *Stinson*, the master who sailed the vessel in the last mentioned year, had authority to bind the owners by the allowance of the claim, notwithstanding it was not a valid one against his employers. The

owners,¹ nor enter into contracts binding the owners beyond the value of the ship.²

The owners may make a master their general agent by parol, and in such a case they are bound by any contract or agreement which he may make in their behalf.³

Persons dealing with the master of a vessel are bound to enquire into his authority to act; and in case he is without such authority, they will not be protected merely because they acted in good faith.⁴

master of a vessel is the agent of the owners; and for most purposes, the general laws of agency apply to the relation which subsists between them. But the account of 1855 accrued before Stinson became master, and when the navigation of the vessel was confided to another person as master. That account had, therefore, no connection with the agency exercised by him. Hence, he had no shadow of authority to permit the money of his employers to be applied to the payment of an alleged indebtedness arising out of a transaction which was foreign to his agency."

1. In the *Joseph Cunard, Olc. Adm.* (U. S.) 120, the master of a ship drew a bill of exchange upon the owners, in favor of the agent of the charterer, for disbursements and expenses, the drawee having notice that the master was instructed by the owners not to draw such bills, and the drawer afterwards negotiated the bill to the defendants. The court held that under the facts of the case the debt for which the bill was drawn was no lien upon the ship, and that the holders could not maintain an action *in rem* upon it.

In *Douglass v. Moody*, 9 Mass. 548, a neutral hired and loaded a ship for a voyage, in the course of which she was captured and carried into port and libelled as a prize, but before any further proceedings in admiralty, a compromise took place between the captors and hirer on which for the release of the vessel and cargo, the latter drew a bill of exchange, which the master endorsed, he having been appointed by the owners. The vessel was then released. It was held that the owners of the vessel were not liable to the hirer on account of such bill of exchange, until payment thereof, but if paid, they would be liable, as for an average on the value of the vessel and cargo at the time and place of incurring the expense.

In *May v. Kelly*, 27 Ala. 497, it was

held that the acceptance of a bill of exchange by the captain and master of a river steamboat, in his own name, as captain, does not bind the owner as acceptor.

But where a bill of exchange is drawn by the master of a ship, by authority of the owners in his own name, for cargo supplied for the owners, the latter are liable. *Wallace v. Agry*, 4 Mason (U. S.) 336. See also *Holcroft v. Halbert*, 16 Ind. 256; *Carr v. Burke*, 32 Mo. 233; *Bowen v. Stoddard*, 10 Met. (Mass.) 375.

2. "In the primitive maritime law there was in strictness no personal liability beyond that of the master. The owners would always exempt themselves from personal responsibility by abandoning their interest in the ship and freight as an appurtenance to the ship. The authority of the master extended no farther than to bind the property of the owners entrusted to his management. And such is now the law of all maritime nations on the continent of Europe." The *H. B. Foster*, 3 Ware (U. S.) 165; *The Rebecca*, 1 Ware (U. S.) 188; *Pope v. Nickerson*, 3 Story (U. S.) 465; *The Larch*, 3 Ware (U. S.) 28; *Cannan v. Meaburn*, 1 Bing. 243, 465.

3. Where the owners of a vessel employ a master for a voyage, and by parol authorize him to exercise his best judgment in the disposal of the cargo and also in the purchase of a return cargo, they constitute him their general and special agent for such purpose. *Bidenlac v. Smith*, 31 N. Y. 259. See also *Pope v. Nickerson*, 3 Story (U. S.) 465.

4. *The Eugene Vista*, 28 Fed. Rep. 762. In this case it appeared that a vessel in process of loading was driven ashore and damaged, and the owner of the cargo demanded a return of the property shipped by him, offering to pay the expense of unloading. The master refused the request and em-

3. **As Supercargo.**—The master is not ordinarily the agent of the shipper for any other purpose than that of carrying and delivering the goods; but in cases of unforeseen necessity, the law clothes him with the authority of a supercargo and he may make such disposition of the cargo as may be most to the advantage of its owners.¹

When the same person is not only master of the vessel, but also supercargo, he acts in two distinct characters. In the navigation of the vessel and the conveyance and delivery of the cargo, he acts as the agent of the owners of the vessel, but in the sale of the goods he is the agent of the consignor.²

ployed a tug to haul the vessel off and tow her to a place of safety. The court held that the owner had no power to bind the cargo, and that the owner of the tug must look to the vessel alone for his compensation. See also *Clan v. McLeod*, 38 Fed. Rep. 447.

When a master acts under instructions limiting his authority, and these instructions are known to the creditor, it will operate to prevent the claimant from recovering anything within the limit. *The Woodland*, 7 Ben. (U. S.) 110.

In *Pope v. Nickerson*, 3 Story (U. S.) 465, it was held that the master of a vessel has no power to bind the owners beyond the authority given to him by them, and the extent of that authority must be limited to their express or implied instructions, or to the law of the country, to which the ship belongs, and in which they reside. In deciding this case, STORY, J., said: "Looking at the question presented in the case at bar, as to the liability of the owner for the acts of the master, the natural enquiry first occurring to the mind, would be, what is that authority which the owners have confided to him? Is it a general authority to bind them in all cases whatsoever? Or is it a limited authority to bind them only in certain cases, and to a certain extent? There is no reason to say, that a master of a ship has any more authority to bind the owners than any other agent has to bind his principal. The authority is deducible solely from the nature of his employment, and the express or implied incidents to the trade or business in which the ship is engaged. If the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for, and to bind the owners, must be measured by the laws of that country, unless he is held

out to persons in other countries, as possessing a more enlarged authority. He is but an agent, and no person dealing with him has a right to suppose that he is clothed with any authority beyond what the laws of the country to which the ship belongs, deduces from the nature of his employment, or which, by his instructions, express or implied, he is held out to the world to possess. If any person chooses to trust him under any other circumstances, or beyond this, it is a matter of blind credulity, and at his own peril. . . . The master has no power to bind the owners, beyond the authority given to him by the owners; and that from the nature of the case, the extent of that authority must be limited to the express instructions of the owners, or the law of the country where the ship belongs and they reside; for it is there that the authority is given, and there it is to be interpreted."

See also *The Packet*, 3 Mason (U. S.) 255; *The Nelson*, 1 Hagg. Adm. 169; *Penn. St. Nav. Co. v. Shand*, 3 Moore P. C. C., N S. 272.

1. Thus where a ship in consequence of a disaster occasioned by the dangers of the sea, is obliged to put into a port for repairs, and is detained for a considerable time, the master may in the interest of the shipper, sell such part of the cargo as is of a perishable nature. *The Velona*, 3 Ware (U. S.) 139.

A master may hypothecate his cargo on freight in a foreign port, to secure repairs absolutely necessary for the prosecution of the voyage. *The Gratitude*, 3 C. Rob. 240.

2. *Hathorn v. Curtis*, 8 Me. 356, 360; *The Waldo*, Daveis' R. 161; *Stone v. Waitt*, 31 Me. 409; 2 *Livermore* 215; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Story on Agency*, § 36; *Dusar v. Perit*, 4 Bing. 361; *Courcier v. Ritter*

4. To Sell Vessel.—A master of a vessel has authority in a foreign port to sell the vessel in case of actual, urgent and extreme necessity. The measure of his discretion is whether a prudent owner would have done the same under similar circumstances. If the vessel is disabled, stranded or sunk, and the master has no funds to repair and prosecute the voyage, and is unable to raise such funds, he may sell the vessel.¹

⁴ Wash. (U. S.) 552. Where the master is himself consignee, he has authority as supercargo. *Smedly v. Yeaton*, 3 Cranch (U. S.) 181; *Biggs v. Lawrence*, 3 Term Rep. 454. Where the master becomes warehouseman, he acts as consignee, and not as master. *Wilcocks v. Phillips*, 1 Wall. Jr. (U. S.) 47; *Gove v. Moses*, 1 Wash. Ter. 7.

¹ In the case of *The Amelia*, 6 Wall. (U. S.) 18 (1867), MR. JUSTICE DAVIS carefully considered the authority of the master to sell, in the following language: "Although the power of the master to sell his ship in any case, without the express authority of the owner, was formerly denied, yet it is now the received doctrine of the courts in this country, as well as in England, that the master has the right to sell in case of actual necessity. . . . From the very nature of the case there must be this implied authority of the master to sell. The injury to the vessel may be so great and the necessity so urgent as to justify a sale, and, under such circumstances, the master becomes the agent of all concerned, and is required to act for their benefit. The sale of a ship becomes a necessity within the meaning of the commercial law when nothing better can be done for the owner or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity

is a question of fact, to be determined in each case by the circumstances in which the master is placed and the perils to which the property is exposed. The facts of this case bring it within these well settled principles of maritime law, and clearly show that the master was justified in terminating his voyage and selling his ship. When the voyage began the ship was seaworthy and well provided, but after she had been at sea a short time, she became disabled during a violent storm, and with great difficulty was taken into the harbor of Port au Prince. The master at once entered his protest before the Dutch consul general (the ship being owned in Amsterdam), who caused three surveys to be made of the condition of the vessel. No action was taken on the first survey, but the result of the second was to incur an expense of one thousand Spanish dollars in partial repairs, decided by it to be practicable, and recommended in order that the ship should be put in a proper condition to proceed on her voyage to Boston. In making these partial repairs one of the sides of the vessel was uncovered, disclosing additional damages of a serious character not previously ascertainable, which caused the consul general to order a third survey. This third and final survey was thorough and complete. The men who made it were captains of vessels, temporarily detained in port, and the agents of American and English underwriters. No persons could be more competent to advise, or, from the nature of their employment, better acquainted with the structure of vessels and the cost of repairing them. Their report is full and explicit. After the advice given in it the master, who was bound to look to the interest of all parties concerned in the adventure, had no alternative but to sell. In the face of it, had he proceeded to repair his vessel, he would have been culpable. Being in a distant port, with a disabled vessel, seeking a solution of the difficulties surrounding him; at a great distance from his own-

He cannot sell the vessel in the home port or where he is within easy reach of the owners.¹

ers, with no direct means of communicating with them, and having good reason to believe the copper of his vessel was displaced, and that worms would work her destruction, what course so proper to pursue as to obtain the advice 'of that body of men who by the usage of trade have been immemorially resorted to on such occasions?' No prudent man, under the circumstances, would have failed to follow their advice, and the state of things, as proved in this case, imposed on the master a moral necessity to sell his vessel and reship his cargo." See also *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *The Sarah Ann*, 13 Pet. (U. S.) 387; 2 Sumn. (U. S.) 206; *The Henry, Blatchf. & H.* (U. S.) 465; *The Lucinda Snow, Abb. Adm.* (U. S.) 305; *The William Carey*, 3 Ware (U. S.) 313; *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220; *Pope v. Nickerson*, 3 Story (U. S.) 465; *The Etta*, 4 Am. L. Reg., N. S. 350; *The J. F. Spencer*, 3 Ben. (U. S.) 337; *The Herald*, 8 Ben. (U. S.) 409; *Post v. Jones*, 19 How. (U. S.) 150; *The Brutus*, 2 Gall. (U. S.) 526; *Tome v. Dubois*, 6 Wall. (U. S.) 548; *The Fanny & Elmira*, Edw. Adm. 117; *The Gratitude*, 3 C. Rob. 240; *The Robert L. Lane*, 1 Low. (U. S.) 388; *Bodlam v. Tucker*, 1 Pick. (Mass.) 380; *Cannon v. Meaburn*, 1 Bing. 243; *Robertson v. Clarke*, 1 Bing. 445; *Somes v. Sugrue*, 4 Car. & P. 276; *Hayman v. Molton*, 5 Esp. 65; *Hunter v. Parker*, 7 Mees. & W. 322; *Tanner v. Bennett, Ryan & M.* 182; *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 755; *Stephenson v. Piscataqua etc. Ins. Co.*, 54 Me. 55; *Butler v. Murray*, 30 N. Y. 88; *Chambers v. Grantzon*, 7 Bos. (N. Y.) 414; *Pierce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Miston v. Lord*, 1 Blatchf. (U. S.) 354; *The William Carey*, 3 Ware (U. S.) 313; *Joy v. Allen*, 2 Wood & M. (U. S.) 303; *Scull v. Briddle*, 2 Wash. (U. S.) 150; *The Tilton*, 5 Mason (U. S.) 465; *Gordon v. The Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Read v. Bonham*, 3 Brox. & B. 147; *Tunno v. The Mary, Bec Adm.* (U. S.) 120; *Fontaine v. Phoenix Ins. Co.*, 11 Johns. (N. Y.) 293; *Storer v. Gray*, 2 Mass. 565; *Story v. Strettell*, 1 Dall. (Pa.) 10; *McMasters v. Schoolbred*, 1 Esp. 237; *Havelock v. Rockwood*, 8 Term

Rep. 268; *The Nathaniel Hooper*, 3 Suinn. (U. S.) 542; *Mills v. Fletcher*, 1 Doug. 231; *Freeman v. East Ind. Co.*, 5 Barn. & Ald. 617; *Underwood v. Robertson*, 4 Camp. 138; *Winn v. The Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *The Soglasie, Spink's Adm.* 104; *Prince v. Ocean Ins. Co.*, 40 Me. 481; *Hartman v. The Brig Will*, 4 Pa. L. J. 350; *Cambridge v. Anderton*, 2 Barn. & C. 693; *Ireland v. Thompson*, 4 Com. B. 149; *Pike v. Balch*, 38 Me. 302; *The Australia*, 1 Swabey 480; *The Margaret Mitchell*, 1 Swabey 386.

1. In *Scull v. Briddle*, 2 Wash. (U. S.) 150, an action of trover was brought to recover a vessel wrecked on the coast of Maryland and sold by the captain to the defendants. The owner lived in Philadelphia. In charging the jury, WASHINGTON, J., said: "In cases of extreme necessity the master may sell in a foreign country, rather than let the property perish; but not in the country where his owner lives; and no case of the sort can, it is believed, be shown. Mischievous would be the consequence if such doctrines were tolerated. In this case there was, in fact, no necessity for the sale; for the captain might have got these articles into a place of safety, and ought to have done so, and informed his owner, or rather the owner of the vessel, of her, he, the owner, living in Philadelphia." A verdict was rendered for the plaintiff.

In the case of the *Sarah Ann*, 13 Pet. (U. S.) 387, *Scull v. Briddle* was criticised as stating the law too broadly, and it was held that the true criterion for determining the authority of the master to sell a vessel stranded near a foreign port, or in a part of the United States, or of a different state than that to which the vessel belongs, or in which the owners may be or reside, when the necessity occurs, is the distance of the owners or insurers from the scene of stranding. If, by the ordinary means to convey intelligence of the situation of the vessel, the master can obtain directions as to what he should do, he should resort to those means. But if the peril is such that there is a probability of loss, and it is made more hazardous by every day's delay, the master may act promptly to

An examination of the vessel should be made by competent surveyors, and a sale should not be made unless the surveyors report in favor of it. Their report, however, is not conclusive.¹

The burden of proving the necessity of the sale is upon the persons who claim title under the sale.² If it has been made in good faith and for the benefit of all parties concerned, the sale is binding upon the owners, and a good title to the vessel passes to the purchasers.³

5. To Sell Cargo.—The master may sell the cargo in case of urgent necessity,⁴ for the benefit directly or indirectly of the cargo.⁵

save something for the benefit of all concerned.

1. "If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether, in their judgment, a sale is necessary. And he should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings strong evidence in justification of his conduct." *The Amelia*, 6 Wall. (U. S.) 18. See also *The Henry, Blatchf. & H.* (U. S.) 465; *Weston v. Minot*, 3 Woodb. & M. (U. S.) 436; *The Etta*, 4 Am. L. Reg., N. S. 38.

2. In *Hartman v. The Brig Will*, 4 Pa. L. J. 350, a brig was driven ashore and after survey sold by the captain for \$315. The purchaser got her off, repaired and sold her for \$2,750. She was then arrested by the original owners. The court held that both *bona fides* and necessity must be shown, and while the former might be presumed in the absence of evidence of collusion, the latter must be proved as an independent fact, saying: "It is the business of him who accepts title under a captain's sale to look carefully into the fairness of the whole dealings; . . . he must see to it not merely that the bargain will pass the ordinary inspection of the market without being condemned as tainted, but that it is without reproach or just suspicion." And though on the evidence produced the court would have sustained the sale, they refused to do so because the captain was not called, nor his absence ex-

plained by the claimants, saying, "the captain's evidence is vital to the claimants' case." See also *The Amelia* (U. S.), 6 Wall. 18 (bill of sale not required); *The Henry, Blatchf. & H.* (U. S.) 465; *Lucinda Snow*, 11 Abb. Adm. 305; 11 N. Y. Leg. Ob. 97.

3. In *The William Carey*, 3 Ware (U. S.) 313, the barque was sold the day following condemnation, and under some circumstances of concealment, but the sale was sustained. And it is sufficient if apparently justified at the time. *The Ship Fortitude*, 3 Sumn. (U. S.) 228, where the subject is carefully examined. *The Gratitude*, 3 Rob. C. Adm. 240.

4. **For Repairs.**—Where the master is driven into a foreign port for repairs necessary to continue the voyage, and has neither means nor credit, and cannot communicate with the owners, he may sell a part of the cargo. *Star of Hope*, 9 Wall. (U. S.) 203; *Ross v. The Ship Active*, 2 Wash. C. C. (U. S.) 226.

So where it endangers the safety of the ship it may be sold even though it might have been transported. *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342; *Fontaine v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 29.

So where in danger of perishing through injury or delay. *Aststrup v. Lewy*, 19 Fed. Rep. 536; *Meyers v. Baymore*, 10 Pa. St. 114; *Vlierboom v. Chapman*, 13 Mees. & Wels. 230. In *Ewbank v. Nutting*, 7 Com. B. (62 E. C. L. R.) 797, where cargoes were injured by water soon after leaving port, so that the ship might have returned but did not, and cargo was sold at port of refuge, the jury found the sale not necessary.

5. The repairs must be necessary to continue the voyage; not made to improve the ship at the cargo's expense. *The Gratitude*, 3 C. Rob. Adm. 240; *The Onward*, L. R., 4 Adm. & Eccl. 38

His authority is only that implied from the particular emergency.¹ Where possible, the owner must first be notified of the facts and instructions awaited.² The burden of proof is on the purchaser to show good faith and necessity, without which his title is invalid.³

6. To Enforce Discipline—(a) As to the Crew.—The master has sole authority over the officers and crew on board his ship,⁴ to maintain discipline⁵ and enforce obedience to his lawful orders in

(bottomry bond); *Stirling v. Nevassa Phosphate Co.*, 35 Mo. 128.

1. Where the cargo can be reshipped on reasonable terms, the master's duty is to perform the voyage. *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21; *Salters v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107; *Treadwell et al. v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Hunt v. Royal Exch. Ass. Co.*, 5 Maule & Selw. 47; *Van Omeron v. Dowick*, 2 Camp. 42. But see *Shipton v. Thornton*, 9 Adol. & El. 314.

If the voyage cannot be proceeded with, or the cargo shipped, it should be stored, unless perishable. *Smith v. Martin*, 6 Binn. (Pa.) 262.

A usage to sell without necessity is void. *Bryant v. Com. Ins. Co.*, 6 Pick. (Mass.) 131; *Palmer v. Blackburne*, 1 Bing. 61.

It is no valid reason that a creditor of the owner threatens to detain the vessel unless master would sell him cargo in part payment of his debt. *Peters v. Ballister*, 3 Pick. (Mass.) 495. Nor that the consignee refuses to receive the cargo. *Arthur v. Schooner Cassius*, 2 Story (U. S.) 81; *Moore v. Hall*, 38 Fed. Rep. 330.

A survey is no defence, if no necessity in fact existed, or if the fact therein stated or inference therefrom was unfounded. *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Meyers v. Baymore*, 10 Pa. St. 114.

2. In *Astrup v. Lewy*, 19 Fed. Rep. 536, the cargo being wet and in danger of perishing, was sold. The consul who made the survey voluntarily stated in his deposition that the shipper was "communicated with," but made no reply. It did not appear what facts were communicated to the shipper. *Held*, *prima facie* sufficient evidence of compliance with the obligation to communicate. But in *Kleinwort & Co. v. The Casa Marittima*, L. R., 2 App. Cas. 156, where the cargo was hypothecated, it was *held* that the notice must state, not the necessity for expenditure merely, but the necessity for hypothecation. See also *The Onward*, 4 Ad.

& Eccl. R. 38; *The Oriental*, 7 Moo. P. C. 393; *Elwell v. The Georgia*, 32 Fed. Rep. 843; *Pike v. Balch*, 38 Me. 302. See BOTTOMRY, vol. 2, p. 487.

3. **Presumption.**—The purchaser must show necessity, and the presumption is against it. *Morris v. Robinson*, 3 Barn. & Cress. 196; *Freeman v. East India Co.*, 5 Barn. & Ald. 616.

In *Salters v. Everett*, 20 Wend. (N. Y.) 268, where the master fraudulently transhipped goods at an intermediate port, and took a bill of lading in his own name, which he transferred to his agents, the vendors; *held*, a *bona fide* purchaser for value took no title.

In *Post et al. v. Jones et al.*, 19 How. (U. S.) 150, one who might have acted as salvor took advantage of extreme peril to drive a bargain. He was treated by the court as salvor, not as a purchaser.

4. *Butler v. McClellan*, 1 Ware (U. S.) 219, where the rule is thus stated: "By the maritime law the captain has all the authority of command on board the vessel, and the inferior officers, as well as the seamen, are bound to obey his [lawful] orders. . . . The necessities of the service require promptness of action in emergencies, and the law finding it necessary to invest the captain with a dictatorship to meet emergencies and preserve uniformity of government, very properly gives him the entire command in all cases." See also *Krauskopf v. Ames*, 7 Pa. L. J. (4 Clark 100); *The Henry, Blatchf. & H.* (U. S.) 465.

5. **Discipline.**—*The Alrena*, 22 Fed. Rep. 861, where mate was properly arrested for insubordinate language. *U. S. v. Smith*, 3 W. C. C. (U. S.) 525; *U. S. v. Freeman*, 4 Mass. (U. S.) 511; *Thorne v. White*, 1 Pet. Adm. 171; *Thompson v. Burch*, 4 W. C. C. (U. S.) 338.

Where the mate spoke of the captain as an old rascal, the court said: "The master has a right to exact from his officers and crew not only a strict observance of all his lawful orders . . . but also a respectful demeanor towards himself." But the master is not justi-

matters relating to its navigation.¹ This authority is *quasi* paternal;² while summary in character, it must be exercised with discretion, and the discretion cannot be delegated.³ Punishment should be administered moderately,⁴ with a proper instrument,⁵ and, if the circumstance admit, after consultation, and entered on the log.⁶

fied in discharging a female cook in a foreign port for mere impertinence. The Superior, 22 Fed. Rep. 927.

1. **Immorality.**—The master may not punish for general immorality, not inconsistent with duties as seamen. *Bangs v. Little*, 1 Ware (U. S.) 520.

2. *Quam admodum eam tenet pater in filios, magister in discipulos, dominus in servos vel familiares. Casaregis.* Disc. 136, n. 14, cited by Valin, on French Ad., tom. 1, p. 449; *Fuller v. Colby*, 3 Woodb. & M. (U. S.) 1, where the subject is carefully examined. Case of Agincourt, 1 Hagg. Adm. 271; *Brown v. Howard*, 14 Johns. (N. Y.) 120. But the purpose and therefore the extent of its exercise is different, being for the safety of the ship rather than for moral improvement. *Bangs v. Little*, 1 Ware (U. S.) *506; *Abbott on Shipping* (8th ed.), page 248 [177], note.

3. U. S. v. Harriman, Hughes 525, the mate was indicted and convicted for beating, etc., under Rev. Stat. U. S., § 5347. The court charged "the master cannot delegate to an inferior officer a general authority to inflict punishment, nor can the inferior officer inflict punishment at his own pleasure for any offence of the crew. The authority of any inferior officer to give blows exists only when it is at the very moment, absolutely required by the necessities of the ship's service to compel the performance of duty . . . in a moment of peril to the ship, or in self-defence." *Elwell v. Martin*, 1 Ware (U. S.) 53, 45, where the subject is carefully examined. U. S. v. Taylor, 2 Sumn. (U. S.) 584; *Murray v. White*, 9 Fed. Rep. 562.

4. **The paternal nature** of his authority authorized personal chastisement as well as confinement. *Fuller v. Colby*, 3 Woodb. & M. (U. S.) 1, where the whole subject is carefully examined.

But the punishment must be moderate; he has not an arbitrary right. In *Turner's Case*, 1 Ware (U. S.) 83, the master was held justified, while in port, in chaining to the deck a cook who had twice deserted. See *The Lothar Castle*, 1st Hagg. Adm. 384; U. S. v. Wickham, 1 W. C. C. R. (U. S.) 316;

Watson v. Cristie, 2 Bos. & Pul. 224.

It must be decently administered. *Cushman v. Lyon*, 1 Story (U. S.) 91.

Flogging is now prohibited in the navy, by Rev. Stat. U. S., § 1624, art. 49, and on board vessels of commerce by Rev. Stat. U. S., § 4611. See *Payne v. Allen*, Sprague (U. S.) 304. A whaling ship is a vessel of commerce. U. S. v. Cutler, 1 Curt. (U. S.) 501. And cruel and unusual punishments, or beating, wounding, imprisoning or starving the crew without justifiable cause, or from malice, hatred or revenge, is forbidden under penalty. Rev. Stat. U. S., § 5347. Under this, however, flogging was not forbidden. U. S. v. Collins, 2 Curt. (U. S.) 194; U. S. v. Taylor, 2 Sumn. (U. S.) 584; U. S. v. Freeman, 4 Mason (U. S.) 505. (Indictment for murder for sending aloft a sailor in a weak and sick condition, who fell overboard and was drowned.) The word crew in the statute includes an officer. U. S. v. Winn, 3 Sumn. (U. S.) 209.

Confinement of sailor in irons should not be on mere suspicion. *Joy v. Almy*, 1 Woodb. & M. (U. S.) 262; *The Nimrod*, 1 Ware (U. S.) 9; *Turner's Case*, 1 Ware (U. S.) *77, 83. **Imprisonment** on shore in foreign port, can be resorted to by the master for protection, where the presence of the offender would endanger the ship, but not as a punishment. *Magee v. The Moss*, Gilp. (U. S.) 219; *Brown v. The Maiden*, Gilp. (U. S.) 294; *Wilson v. The Mary*, Gilp. (U. S.) 31; *The David Pratt*, 1 Ware (U. S.) 495; *The William Harris*, 1 Ware (U. S.) 373; U. S. v. Ruggles, 5 Mason (U. S.) 192. And see SEAMEN. By statute, June 7th, 1872, Rev. Stat. U. S., § 4599. The master may arrest a deserter without warrant and bring him before a justice, or if there be no such court conveniences or the sailor does not so require, may convey him at once on board.

5. In *Carleton v. Davis*, 2 Ware (U. S.) 225 a belaying pin, and in *Roberts v. Sholfield*, 3 Ware (U. S.) 184, a slungshot, were held improper.

6. *Murray v. Moultrie*, 6 Car. & P.

A deadly weapon may be used to suppress mutiny, or even to compel obedience.¹

(b) *As to Passengers.*—The master may exercise such control over passengers as is necessary for the general safety and comfort. He must show a clear necessity to justify the use of force.²

III. THE DUTIES OF THE MASTER—1. *As to Owners.*—The master's duties require his general supervision of the ship and cargo,³ and the exercise of the highest skill and care for their safety.⁴ He must abide by the ship until the last, and use every human diligence and skill to save the property or its proceeds for the owners.⁵

25 (E. C. L. R.) 471; *Krauskopf v. Ames*, 7 Pa. L. J. 77 (4 Clark 100). Entry of the offence and punishment inflicted is required by Rev. Stat. U. S., § 4290.

1. *Bee Adm.* (U. S.) 248; *Relf v. The Maria*, 1 Pet. Adm. (U. S.) 186; *Thorne v. White*, 1 Pet. Adm. (U. S.) 168; *Hart v. Littlejohn*, 1 Pet. Adm. (U. S.) 115. Or where the seaman himself resorts to violence and weapons. *U. S. v. Peterson*, 1 Woodb. & M. (U. S.) 305; *The Palledo*, 3 Ware (U. S.) 321; *Brown v. Howard*, 14 Johns. (N. Y.) 120.

2. Obedience is an implied condition of the contract of carriage. *Boyce v. Bailiffe*, 1 Camp. 58. In *Prendergast v. Compton*, 8 Car. & P. (34 E. C. L. R.) 454, the passenger was held properly excluded from the cabin table for conduct unbecoming a gentleman and for threatening to beat the captain. See *Chamberlain v. Chandler*, 3 Mason (U. S.) 242. (Libel against master for ill-treating female passenger.) *Krauskopf v. Ames*, 7 Pa. L. J. 77 (4 Clark 100). Where damages were awarded against captain for beating with a cord a steerage passenger for kindling his cooking fire with tarred canvass against the regulations of the ship known to him; that the passenger was a Jew, offensive in his habits, and unable to speak English held no justification. In that case the court said: "The master has the absolute charge of his vessel, the absolute command of the crew, and a necessary control over his passengers. He may make proper regulations for their government such as may ensure their safety, promote the general comfort, and preserve decent order; and these regulations he may enforce by all temperate and needful exercise of power. But here his authority over his passengers finds its limits, and he is a trespasser if he go beyond it. He must show not only a breach of regulation

before venturing to use force toward any one of them but that there was a clear necessity for the exercise of that degree of force. . . . Courteous request, patience and renewed remonstrance or reprimand; and at last just so much restraint, and if that be unavailing, just so much active force and no more as the exigency may call for; these are the legitimate rights of a captain over his passengers. . . .

By Rev. Stat. U. S., § 4263, master of vessel transporting passengers between United States and Europe is authorized to maintain good discipline and sanitary regulations among the passengers.

3. His duties to the cargo are that of common carrier. *Elliott v. Rossell*, 10 Johns. (N. Y.) 1; *King v. Shepherd*, 3 Story (U. S.) 349. He must see to the loading and unloading. *Wilson v. The Belvidere*, 1 Pet. Adm. 258; *The R. G. Winslow*, 4 Biss. (U. S.) 13; *Joliet S. S. Co. v. Yeaton*, 29 Fed. Rep. 331; *The Keystone*, 31 Fed. Rep. 412; *Brudge v. 220 Tons of Fish Scrap*, 5 Hughes (U. S.) 141; s. c., 2 Fed. Rep. 783. And must take precautions against fire. *New Jersey Steam Navigation Company v. The Merchant's Bank*, 6 How. (U. S.) 344; *Busk v. Royal Ins. Co.*, 2 Barn. & Ald. 73; *Patapsco Ins. Co. v. Coulter*, 3 Peters (U. S.) 222.

4. For skill in navigation, see *Stone v. Ketland*, 1 W. C. C. R. (U. S.) 142; *Niagara v. Cordes*, 21 How. (U. S.) 7.

5. In *Duncan v. Reed*, 39 Me. 415, where the ship was stranded and in *Willard v. Dorr*, 3 Mason (U. S.) 161, where the ship was condemned as a prize, the master was allowed wages up to final sale his duties being held to continue till then. See also *Marshall v. The Union Ins. Co.*, 2 W. C. C. R. (U. S.) 452; *Hannay v. The Eve*, 3 Cranch (U. S.) 42; *Simms v. The Mariners*, 2 Pet. Adm. (U. S.) 393; *The Saratoga*, 2 Gall. (U. S.) 164; *Powell v. The Betsy*, 2 Brown (Pa.) 336. In the

2. As to Passengers.—The master is bound to protect passengers from personal injury and insult.¹ Towards women and minors he stands *in loco parentis*.² In case of a passenger or sailor falling overboard, he is bound both by law and contract to make every effort at rescue, consistent with safety to the ship and those on board.³

3. To the Crew.—The master is bound to see that the provisions for the crew are adequate and of good quality,⁴ and that medicine and antiscorbutics are supplied.⁵ In case of emergencies, such as accident or injury to a sailor, it is in the master's discretion to

Niagara v. Cordes, 21 How. (U. S.) 7, where the vessel was partially wrecked and left in a leaky condition by the master in care of the crew with no proper effort to save the cargo, the court said: "Where a vessel is wrecked his obligation as agent for the owner continues to take all possible care of the vessel and cargo. He must show that no human skill or care could save the property." And see the *Ocean Wave*, 3 Biss. (U. S.) 317; *The Maggie Hammond*, 9 Wall. (U. S.) 435; *Brown v. Lull*, 2 Sumn. (U. S.) 443; *The Grand Turk*, 1 Paine (U. S.) 73.

1. *Nieto v. Clark*, 1 Cliff. (U. S.) 145. Where the master was justified in discharging in a foreign port a sailor who had attempted rape on female passenger. *Flint v. The Norwich etc. Trans. Co.*, 6 Blatchf. (U. S.) 158. Where a passenger was injured by accidental discharge of a musket in the hands of a soldier who was himself being transported with his company. *Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416. Where a passenger was injured by an officer in a dispute about his fare. 3 *Mason* (U. S.) 242. *The Lord Derby*, 17 Fed. Rep. 265. Where a passenger was injured by a watch dog kept on board.

2. In *Smith v. Wilson*, 13 Pitts. L. J. 538, where a minor passenger lost money to a gambler, and the master, when informed, had not compelled a restoration, the master was held liable in damages.

3. In *U. S. v. Knowles*, 4 Sawy. (U. S.) 517, the master was indicted for manslaughter for allowing a sailor to drown who had fallen overboard. *United States v. Holmes*, 1 Wallace Jr. (U. S.) 1, was an indictment for manslaughter. The mate, eight seamen, and thirty-two passengers escaped in the long boat from a sinking ship. After twenty-four hours, the sea rising, and the overloaded boat being in danger, the prisoner and the crew during

the night threw overboard fourteen male passengers. Two women also were either thrown over, or sacrificed themselves with their brothers. There was no fighting. The defence was homicide in self defence. The court examined at length the duty of seamen to passengers, holding that in emergencies the passenger has the superior right, saying: "The captain indeed and a sufficient number of seamen to navigate the boat must be preserved . . . but if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right for their safety to sacrifice the passengers. The sailors and passengers in fact cannot be regarded as in equal positions . . . and while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if the passenger is on the plank even the law of necessity justifies not the sailor who takes it from him." Where, however, some must be sacrificed but there is time to consult (as in case of starvation), the court approves a selection by lot as in some sort an appeal to God for the selection of the victim; but the necessity must be justified before the law.

4. Rev. Stat. U. S., § 4564, fixes the lowest limit of quantity to be carried per man. See *Sundry Mariners v. The Ship Washington*, 1 Pet. Adm. (U. S.) 219; *Ferrara v. The Talent*, *Crabbe* (U. S.) 216; *The Ship Elizabeth v. Rickers*, 2 Paine (U. S.) 291; *Pratt v. Thomas*, 1 Ware (U. S.) 427; *Coleman v. The Brig Harriet*, *Bee Adm.* (U. S.) 80; *The Elizabeth Frith*, *Blatchf. & H.* (U. S.) 195; *The Mary Paulina*, *Sprague* (U. S.) 45; *Foster v. Sampson*, *Sprague* (U. S.) 182; *Collins v. Wheeler*, *Sprague* (U. S.) 188; *Baxter v. Doe*, 142 Mass. 558. See also Rev. Stat. (U. S.), §§ 4565 to 4568.

5. Rev. Stat. (U. S.), § 4569; *The Phebe*, 1 Ware (U. S.) 362; *Freeman v.*

seek the nearest port for surgical aid; there is no absolute duty to do so.¹ The master must protect the crew from abuse and prevent quarreling.²

Under the provisions of the Revised Statutes of the United States, the master sailing to a foreign port is required to give bond for the safe return of the ship's company to the United States. He is also required, at the request of the consul in a foreign port, to transport destitute seamen to the United States.³

IV. RIGHTS—1. In General.—The master's rights depend largely on the terms of his contract.⁴ He cannot trade on his own account, where his interests would conflict with those of his principals.⁵ He has no right to carry and maintain his wife and children at the ship's expense.⁶ He may secure an allowance for extra services,⁷ but not for wages of native attendant on himself while sick in foreign port.⁸ He is entitled to deduct from freight money for any liability incurred.⁹

Where the master navigates the vessel for his own exclusive benefit for a definite period, he is owner for the voyage, and as such is subject to the rights and liabilities of owner.¹⁰

Baker, Blatchf. & H. (U. S.) 372.

1. Peterson v. Chandos, 6 Sawy. (U. S.) 544; s. c., 4 Fed. Rep. 645; Brown v. Overton, Sprague (U. S.) 462; Danvir v. Morse, 139 Mass. 323. He is liable for neglect in case of sickness. Bosquall v. The City of Carlisle, 39 Fed. Rep. 807. See SEAMEN.

2. Shorey v. Rennel, 1 Sprague (U. S.) 418; Anderson v. Ross, 2 Sawy. (U. S.) 91. Duty to protect crew against assault by officers. Thorne v. White, 1 Pet. Adm. (U. S.) 168. Where the master fails to interfere to protect seamen from an assault by the mate, he is liable as a joint trespasser. Hanson v. Fowle, 1 Sawy. (U. S.) 539; Jordan v. Williams, 1 Curt. (U. S.) 69; Thomas v. Lane, 2 Sumn. (U. S.) 1.

3. See SEAMEN, where the authorities on this subject are collected.

4. Woodbury v. Brazier, 48 Me. 302; Miller v. Livingston, 1 Caines (N. Y.) 349; Brown v. Hicks, 24 Fed. Rep. 811.

5. Thompson v. Havilock, 1 Camp. 527; Mathewson v. Clark, 6 How. (U. S.) 122. But the right to carry goods for himself or others, for his own advantage depends largely upon usage. Vose v. Morton, 5 Gray (Mass.) 594; Rennell v. Kimball, 5 Allen (Mass.) 356; King v. Lenox, 19 Johns. (N. Y.) 235.

6. In Marshall v. Crawford, 4 Sawy. (U. S.) 37, it was held that the master without special contract had no

right to carry his wife and child at the ship's expense. In Winsor v. Sampson, 1 Sprague (U. S.) 548, the master was allowed the use of vacant state rooms, freight for his piano which was also used by the ship's company, and for repairs for a chronometer owned by him but also used by the ship.

7. In String v. Hill, Crabbe (U. S.) 451, he was allowed for painting the ship. In Woodbury v. Brazier, 48 Me. 302, where the master was discharged in a foreign port he was held not entitled to his expense of passage home. See also McGilvery v. Stockpole, 38 Me. 283; Kohler v. Wright, 7 Bosw. (N. Y.) 318.

8. Sunday v. Gordon, Blatchf. & H. (U. S.) 569.

9. Thus he may maintain freight to pay seamen. Goodridge v. Lord, 10 Mass. 483. See also Lewis v. Hancock, 11 Mass. 72.

10. In Lincoln v. Wright, 23 Pa. St. 76, 81, BLACK, C. J., said: That the possession, control and management of a vessel, the right to direct her destination and receive her earnings, would fix the responsibility of a person for supplies whether he had the legal title or not. The master in such a case is liable as a carrier. Tyler v. Holmes, 38 Me. 258; Nash v. Parker, 38 Me. 489; Decker v. Furniss, 3 Duer (N. Y.) 291. He is also liable for damages sustained during the voyage. For other cases on this subject see CHARTER PARTY.

2. Wages.—The master contracts with the owners on their personal credit.¹ He has no lien on the ship for his wages,² but has a lien on the freight in his hands for wages, payments made and liabilities incurred for the ship.³ Capture or shipwreck terminates the contract, but his wages continue until his duties end.⁴ When discharged in foreign port, he is entitled to three months' wages as a mariner,⁵ but not to home passage.⁶

V. LIABILITY—1. On Contracts.—In contracting for the ship's benefit, the master binds himself as well as the owners,⁷ unless it affirmatively appears that credit was given to the owners alone.⁸ If the credit is given to the master alone, he alone is liable.⁹

2. For Misconduct.—The master is civilly liable to the owners or to third persons for any injury resulting from his unskilfulness or negligence,¹⁰

1. Fisher v. Willing, 8 S. & R. (Pa.) 118.

2. Willard v. Dorr, 3 Mason (U. S.) 91; Ingersol v. Van Bokkelen, 5 Wend. (N. Y.) 314; Richardson v. Whiting, 18 Pick. (Mass.) 530. The authorities on this subject are collected under *MARITIME LIENS*.

3. Moore v. Jones, 15 Mass. 424; Ship Packet, 3 Mason (U. S.) 255; Fisher v. Willing, 8 S. & R. (Pa.) 118. See Rev. Stat. U. S., § 4526. See *MARITIME LIENS*.

4. Smith v. Gilbert, 4 Day (Conn.) 105; Durcan v. Reed, 39 Me. 415; Willard v. Dorr, 3 Mason (U. S.) 161; Hammond v. The Essex F. & M. Ins. Co., 4 Mason (U. S.) 196; Thompson v. Rowcroft, 4 East 34; Furguson v. Fitt, 1 Hayw. (N. C.) 239; Phillips v. McCall, 4 W. C. C. R. (U. S.) 141; Bergstrom v. Mills, 3 Esp. 36; Hawkins v. Turzell, 5 Ellis & B. 883; McGilveny v. Stockpole, 38 Me. 283; Strong v. Hill, Crabbe (U. S.) 454; Winsor v. Sampson, 1 Sprague (U. S.) 548.

5. Rev. Stat. U. S., § 4562, opinion Attorney General 458.

6. Woodbury v. Brazier, 48 Me. 302.

7. Jarman v. Bennet, 2 Strange R. 816; Rich v. Coe, Cowp. 636; Leonard v. Huntingdon, 15 Johns. (N. Y.) 298; Marguand v. Webb, 16 Johns. (N. Y.) 89; The Leonidas, Olc. (U. S.) 12; James v. Bixby, 11 Mass. 34; Stirling v. Loud, 10 Am. L. Reg., N. S. 542; 33 M. & R. 436. He is personally liable for wages of crew earned while he was master. Smith v. Oakes, 141 Mass. 451.

8. Snyder v. Hurd, 8 Tex. 98; Farmer v. Davis, 1 Tenn. 108; Farrel v. McClellan, 1 Dall. (Pa.) 302.

9. In James v. Bixby, 11 Mass. 35, 36,

PARKER, J., said: "It is settled that, if the master procures necessary repairs to be done without any express contract, an implied obligation arises as well against the owners as against himself, to pay for such repairs. But even this admits of the exception, that, where there is a special promise by the master, the owner is not liable; and *e converso*, where there is a special promise by the owners, the master is discharged from obligation."

In the early case of Jarman v. Bennet, 2 Strange 816, it was held that *prima facie* the repairer of a ship has his election to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.

In Hussey v. Allen, 6 Mass. 162, PARSONS, C. J., said: "When necessary supplies are to be furnished for a vessel on her voyage, and from home, the merchant may furnish them on the credit of the vessel, by taking a hypothecation, or on the credit of the master by his consent, or on the credit of all who are owners at the time the supplies are furnished."

In Thorn v. Hicks, 7 Cow. (N. Y.) 696, it was held that where an exclusive credit is given to the master, the owners are not liable.

10. In Stone v. Ketland, 1 W. C. C. R. 142, it was said: "It is not sufficient that he exercise his best judgment. It must be the judgment of a skilled and careful commander. See also Purviance v. Angus, 1 Dall. (Pa.) 180. The Gentlemen, 1 Blatchf. (U. S.) 396. Where the captain sailed with an incompetent crew, but was held not liable under the circumstances. Marshall v. Crawford, 4 Sawy. (U. S.) 37. Where the pro-

and also as to a statutory penalty.¹ He is liable as a trespasser for malicious and vindictive punishment,² and for manslaughter for causing the death of any person by negligence, misconduct or inattention to duty.³

He is also liable to numerous statutory penalties, the most important being for maliciously,⁴ and without justifiable cause,⁵ forcing⁶ any mariner or officer on shore, in a foreign port, in order to leave him behind, and refusing to bring home all who are in condition and willing to return; for refusal to pay wages and charges;⁷ for failure to keep and produce list of ship's company on foreign voyage;⁸ for refusing to give passage to destitute seamen at consul's request, when bound home.⁹

The master is also liable for the unskilfulness or lineggence of his officers or crew.¹⁰

visions were insufficient and the master was compelled to return. *Freeman v. Walker*, 6 Me. 68; *Watkinson v. Langton*, 8 Johns. (N. Y.) 213. Where the master was held liable for goods stolen. *Nisson v. Wessels*, 5 Ben. (U. S.) 483; *Van Syckel v. The Thomas Ewing*, *Crabbe* (U. S.) 405; s. c., 5 Pa. L. J. 301, where it was held the master was justified in following a pilot boat up the bay at night, having failed himself to obtain a pilot. *The Montana*, 17 Fed. Rep. 377. For running ashore in a fog. *The Packer*, 28 Fed. Rep. 156; *The Noddleburn*, 28 Fed. Rep. 855; *Withcofsky v. Wier*, 32 Fed. Rep. 301; *Knox v. Nenetta*, *Crabbe* (U. S.) 534.

1. Rev. Stat. U. S., § 4602, provides that any master who by wilful breach of duty or drunkenness does or omits any act, whereby the safety of the ship, or of any person, is endangered, is guilty of a misdemeanor.

2. *Dinsman v. Wilkes*, 7 How. (U. S.) 89, and 12 How. (U. S.) 390; *Sheridan v. Furbur*, *Blatchf. & H.* (U. S.) 423; *United States v. Taylor*, 5 McLean (U. S.) 242; *Sumn.* (U. S.) 584. Indictment under act congress for beating, etc. *Payne v. Allen*, *Sprague* (U. S.) 304; *United States v. Collins*, 2 Curt. (U. S.) 194; *Riley v. Allen*, 23 Fed. Rep. 46. Beating a roustabout. *United States v. Beyer*, 31 Fed. Rep. 35; *Sampson v. Smith*, 15 Mass. 365. Assault for refusal to wash mate's clothes after hours, unjustified. *Jarvis v. Sherwood*, *Bee Adm.* 248; *Rice v. The Polly & Kitty*, 2 Pet. Adm. 240. And see Rev. Stat. U. S., § 5347. One acting as master is liable under this statute. *United States v. Nice*, 30 Fed. Rep. 490. But in such cases the courts will not limit the master's discretion too nicely. *But-*

ler v. McLellan, 1 Ware (U. S.) 219, *220; *Elwell v. Martin*, 1 Ware (U. S.) 53; *United States v. Cutler*, 1 Curt. (U. S.) 501; *United States v. Freeman*, 4 Mason (U. S.) 505; *Thorne v. White*, 1 Pet. Adm. 168; *Morris v. Corneil*, 1 Sprague (U. S.) 62; *Thompson v. Busch*, 4 Wash. (U. S.) 338; *United States v. Taylor*, 2 Sumn. (U. S.) 584.

3. Rev. Stat. U. S., § 5344; *United States v. Farnham*, 2 Blatchf. (U. S.) 528; *United States v. Taylor*, 5 McLean (U. S.) 42; *United States v. Knowles*, 4 Sawy. (U. S.) 517; *United States v. Holmes*, 1 Wall. Jr. (U. S.) 1.

4. Rev. Stat. U. S., § 5363.

5. U. S. v. *Ruggles*, 5 Mason (U. S.) 192; *United States v. Coffin*, 1 Sumn. (U. S.) 394. As to justifiable cause. *Speyer v. The Mary Belle Roberts*, 3 Sawy. (U. S.) 1; *United States v. Netcher*, 1 Story (U. S.) 307. Imprisonment on shore for fault is forcing.

6. *United States v. Riddle*, 4 W. C. C. (U. S.) 644. Physical force not necessary.

7. Rev. Stat. U. S., § 4563.

8. Rev. Stat. U. S., 4575. See *The Atlantic*, *Abb. Adm.* 451; *Lamb v. Briard*, *Abb. Adm.* 367; *Miner v. Harbeck*, *Abb. Adm.* 546; *The Schooner Eagle*, *Olc. Adm.* 232; *The Ship Moslam*, *Olc. Adm.* 289; *Jordan v. Williams*, 1 Curt. (U. S.) 69; *Snow v. Wope*, 1 Curt. (U. S.) 301; *Campbell v. Steamer Uncle Sam*, 1 McAll. (U. S.) 77; *The Strathairly*, 124 U. S. 558.

9. Rev. Stat. U. S., § 4578; *Matthew v. Offley*, 3 Sumn. (U. S.) 115.

10. *Angus v. Parviance*, 1 Dall. (Pa.) 180. The principle of *respondet superior* applies. He is not liable for the negligence of a pilot, the pilot is master *pro hac vice*. *Suell v. Rich*, 1 Johns.

MATERIAL.—(a) Any article used in building or repairing houses, ships, etc.¹

(b) *adj.* Of the substance; essential; important.²

MATTER.—(a) Whatever is perceptible by the senses; any material.³

(b) The subject of legal action, consideration, complaint or defense.⁴

(c) Some substantial or essential thing; opposed to *form*.⁵

(N. Y.) 305. Where the master was not on board. *Bussey v. Donaldson*, 4 Dall. (Pa.) 206; *Smith v. Condry*, 1 How. (U. S.) 28. But in *Denison v. Seymour*, 9 Wend. (N. Y.) 9, where the pilot was employed by the owners, and had exclusive direction of the course of the vessel though bound to stop or proceed at the captain's order, the master was yet held liable for his negligence. See also *Nicholson v. Mounsey & Symes*, 15 East 383, where the captain of war vessel was held not responsible as a master, he not appointing his inferior officer. *Hugges v. Montgomery*, 5 Bos. & Pul. 446; *The E. M. Norton*, 15 Fed. Rep. 686.

1. *Moyer v. Pennsylvania State Co.*, 71 Pa. St. 293; *Hundhausen v. Bond*, 36 Wis. 29.

2. *Anderson's Law Dict.*

Material for a Building.—The earth excavated from a building lot, merely to prepare such lot for the erection of a building thereon, and placed in an adjoining street for removal elsewhere, cannot be regarded as "building material" within the meaning of a city ordinance. *Hundhausen v. Bond*, 39 Wis. 29.

An act incorporating a slate company (act of June 25th, 1864, § 7; Pamph. L. 947, *Pennsylvania*) provided that the stockholders should be individually liable "for debts due mechanics, workmen and laborers employed by the company, and for materials furnished." This did not include hauling, repairing wagons, lumber for erecting machinery, provender for horses used for the company, powder for blasting, tools, etc. "Materials" refers to that only which forms part of the products of the company. *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293. See **MECHANICS' LIEN** for a full collection of authorities as to what constitutes "material for a building."

"Material Defendant."—A party is a

"material defendant" whose interest is antagonistic to complainant's and against whom relief is prayed. *Waddell Admr. v. Lanier*, 54 Ala. 440.

What Is a Material Issue.—In common law actions it is one which is decisive of the cause. In equity, it is an issue upon a fact which has some bearing upon the equity sought to be established. *Wooden v. Waffle*, 6 How. Pr. (N. Y.) 145.

Material Fact.—A representation of a fact not *material*, although untrue, will not vitiate a policy of insurance. *Curry v. Commonwealth Ins. Co.*, 6 Wheel. Am. C. L. 204.

Material Allegation.—"No allegation can be deemed *material* unless an issue taken upon it, whether of law or fact, will decide the cause, so far as relates to the particular cause of action to which the allegation refers. *Newman v. Otto*, 4 Sandf. (N. Y.) 670.

A statement of claim, after alleging a promise by the defendant to marry the plaintiff, went on to allege, in paragraph 4, that, "the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease. It then alleged a breach of the said promise. An order having been made at chambers to strike out paragraph 4 of the claim, *held*, reversing the decision of the common pleas division, that the order was wrongly made, that the facts alleged in the paragraph complained of were "material facts," and as such were properly pleadable. *Millington v. Loring*, L. R., 6 Q. B. D. 190.

"Material."—As used in statutes against perjury construed in *State v. Brown*, 79 N. C. 642.

3. *Anderson's Law Dict.*

4. *Nelson v. Johnson*, 18 Ind. 332.

5. *Douglas v. Beasley*, 40 Ala. 148.

"New matter constituting a defense" is not pleaded by averments which simply deny the allegations of the com-

plaint, but only when they constitute a statement of facts, the proof of which avoids the legal conclusion otherwise to be drawn from the statement of facts in the complaint. It is in the nature of a plea of confession and avoidance. *Craig v. Cook*, 28 Minn. 234.

Matter of Law.—That which is to be ascertained by reasoning from the established rules of law, or from the enactments of the legislature. The court is to determine matters of law. *Rap. & La. Law Dict.*: *Lovinier Exr. v. Pearce*, guardian, 70 N. Car. 167.

Matter of Fact—In Pleading.—Matter the existence or truth of which is determined by the senses or by reasoning based upon their evidence. The decision of such matters is referred to the jury. *Hob. 127*; *1 Greenl. Ev.* 49.

Matter in Pais (literally, matter in the country.)—Matter of fact, as distinguished from matter of law or matter of record. *Bouv. Law Dict.*

Matter in Deed.—Such matter as may be proved or established by a deed or specialty; matter of fact, in contradistinction to matter of law. *Co. Litt.* 320; *Steph. Pl.* 197.

Matter of Record.—Some judicial matter or proceeding entered upon one of the records of the court, and of which the court takes peculiar cognizance. Thus the judgments in actions in the courts of record, being matter which is entered upon the records of the court and filed with its officer, are thence termed *matters of record*. *Rap. & La. Law Dict.*

"Material New Matter."—In *Nelson v. Johnson*, 18 Ind. 332, *PERKINS, J.*, observes: "Section 586 of the code (Ind.) authorizes a review of a judgment upon a complaint filed within three years after the rendition of the judgment. The review may be had for errors appearing on the face of the record, and for 'material new matter' discovered after its rendition. New matter is a different thing from new evidence. 'Matter,' as the word is used in law, means a fact or facts constituting the whole or a part of a ground of action or defence. Evidence is that which tends to prove or disprove the existence of such fact or facts. A new trial could not be granted, even at the term, for new matter discovered after the trial, because the new matter would have to go into the pleadings before proof of it would be allowed.

"New Matter" in Pleading.—See *Gould's Pl.* 156; *Story's Eq. Pl.*, § 404; *3 Bla. Com.* 309, 313.

"Matters and Proceedings in Bankruptcy."—See *Kidder v. Horrobin*, 72 N. Y. 159-167.

"Matter in Controversy."—Where, in an action of *tort* in this court, the plaintiff lays his damages at \$500 or upwards and the jury find a less sum, he is entitled to costs. In cases of *tort* the sum demanded in the narr. is the "*matter in controversy*." *Hancock v. Barton*, 1 S. & R. (Pa.) 269.

The damages allowed by law, upon affirmance of a county court judgment by a superior court of law, are not to be reckoned as part of the "*matter in controversy*" for the purpose of giving the court of appeals jurisdiction. If therefore the judgment be for less than \$100 but would amount to more, by adding the damages, upon affirmance, an appeal does not lie to the court of appeals. *Melson v. Melson's Admr.*, 2 Munf. (Va.) 542.

Under the existing acts of assembly, in all cases where this court has jurisdiction, costs are of course. Therefore a plaintiff is entitled to costs although he recover less than fifty pounds, provided the "*matter in controversy*" be \$500 or upwards. If a declaration on a policy of insurance contain a count for a total loss, and a count for money had and received, etc., for a return of premium, and the jury find a verdict for the defendant on the first count, and on the count for money had and received, etc., a verdict for the plaintiff, for a less sum than \$500, the plaintiff is entitled to costs; all disputes arising out of the same policy being "*the matter in controversy between the parties*." *Wurts v. McFaddon*, 4 S. & R. (Pa.) 78.

The "Matter in Demand."—As used with reference to suits in equity, does not necessarily mean a money demand, but the pecuniary value of the matter in controversy. *Blakeslee v. Murphy*, 44 Conn. 188.

"Matter in Dispute."—See *Mason v. Oglesby*, 2 La. An. 793; *Pugoe v. Corregolles*, 5 Rob. (La.) 90; *Frellsen v. Copley*, 2 La. An. 911; *Owen v. Boyd*, 7 La. An. 109; *City of New Orleans v. Imley*, 12 La. An. 87; *Wilson v. Daniel*, 3 Dall. (U. S.) 404; *Rush v. Cobbet*, 3 Yeates (Pa.) 275; *Dumphy and Hildrith v. Guindon*, 13 Cal. 28; *Thrasher v. Haynes*, 1 Wheel. Am. C. L. 427; *Malcolm v. Fullarton*, 2 T. R. 645; *Ravee v. Farmer*, 4 T. R. 146; *Ingram*

MATURE—MATURITY.—The time when a bill of exchange or promissory note becomes due.¹

v. Milnes, 8 East 445; *Fisher v. Pimbley*, 11 East 193.

"For Matter of Form."—The plaintiff's assignee in bankruptcy commenced an action in his own name, to enforce this claim and failed, because it was brought in the name of the wrong party, the present plaintiff then and now being the owner, having purchased it of the assignee. *Held*, that the failure was "for matter of form" within section 973 R. L. (Vermont), whereby a claim is saved from the operation of the statute of limitations; and that this claim was not barred, the second action having been commenced within one year from the determination of the original action. *Premo v. Lee*, 56 Vt. 60; *Goff v. Robinson*, 60 Vt. 633; *Spear v. Braintree*, 47 Vt. 729.

"A Matter Depending in the Court."—The act 3 Geo. IV, ch. 102, giving increased jurisdiction to the court, is to be construed liberally for the dispatch of business; and an affidavit sworn during term is sufficient to bring the subject matter before the court, as "*a matter depending in the court*" within the terms of the act and the king's warrant founded thereon. *Ex parte Smith*, 7 Dowl. & Ry. 382.

"Matters of subsistence for man" comprehend all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer or are only consumed after undergoing a process of preparation, which is greater or less according to the character of the article. *Slodd v. Commonwealth*, 19 Gratt. (Va.) 813.

¹ See Bills & Notes, vol. 2, p. 396.

"To be Mature" Equivalent to "To be Suable."—In *Taylor v. Mayor etc.*, City of New York, 82 N. Y. 18, FOLGER, C. J., observes: "The phrases 'cause of action' and 'right of action' are used, because ordinarily, and in the absence of some especial circumstance, when a debt is *mature* it may be demanded and sued upon, and payment of right and by its terms be then exacted; because, in general, the

phrases "*to be mature*" and "*to be suable*" both express the same fact as to the debt. It is the condition or state of the demand at the time that is looked at. See also *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Martin v. Kunz Muller*, 37 N. Y. 396.

In *Osborne & Co. v. Campbell*, 6 Lanc. Law Rev. 206, an action was brought against the defendant on the following contract endorsed on the back of a note given by S. G. Welliver to the plaintiff.

"For value received I or we hereby guarantee the payment of the within note at maturity and at all times thereafter, and waive demand, protest and notice of nonpayment thereof. (*Signed*) W. A. Campbell."

RICE, P. J., observes: "Though the word guarantee is used, yet as the guaranty is to pay 'when due' or '*at maturity*' the undertaking obviously has reference to the liquidation of the note at the time specified, and not to the solvency of the maker."

Maturity in a Will.—In *Executors of Conduct v. King*, 13 N. J. E. 380, the chancellor observes: "The term maturity is not synonymous with legal majority. As used by the testator, it may well be held to import maturity of mind and character, the combined result of age and education."

"Pay Bonds at Maturity."—As commonly understood, the word "*maturity*," in its application to bonds and other similar instruments, applies to the time fixed for their payment, which is the termination of the period they have to run. A provision in a charter that the grants thereby made are upon the condition that the company "shall pay said bonds at maturity," while it implies an obligation to pay both principal and interest when the bonds shall become due, does not imply an obligation to pay the interest as it semi-annually accrues. *United States v. Union Pacific Railroad Co.*, 91 U. S. 72.

"After Maturity."—Where a promissory note payable on a certain day bears interest "*after maturity*," interest should be computed from the day

MAY—(See also INTERPRETATION; STATUTES; WILLS)—

1. Definition.—Is permitted to; has liberty to.¹ The word "may" in a statute is sometimes used in a mandatory, and sometimes in a directory and permissive sense. It has always been construed "must" or "shall" whenever it can be seen that the legislative intent was to impose a duty and not simply a privilege or discretionary power,² and where the public is interested and the public or third persons have a claim *de jure*, to have the power exercised.³ But it is only where it is necessary to give effect to the clear policy and intention of the legislature that it can be construed in a mandatory sense, and where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary.⁴

In contracts, deeds, wills and other private writings the construction of the word must depend upon the circumstances of each particular case, its relation to the context of the instrument in some cases being the test. While in others it may be interpreted solely by the intention of the party creating the instrument.⁵

fixed for payment, and not from the expiration of the days of grace. *Wheless v. Williams & Daniels*, 62 Miss. 369; *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 766; *Weems v. Ventress*, 14 La. An. 267.

The words "at maturity" refer to and include the whole day, unless specially and distinctly limited to a certain hour of the day. *Leigh v. Knickerbocker Life Ins. Co. of New York*, 26 La. An. 436.

Matured.—A judgment is matured (within meaning of 2 Ind. Rev. Stat., p. 62, § 51, requiring a set-off to be "matured") although the time of stay of execution has not expired. *Hays v. Boyer*, 59 Ind. 341.

1. *Bouv. L. Dict.*

2. *Thompson v. Lessee of Carroll*, 22 How. (U. S.) 434; *Mason v. Fearson*, 9 How. (U. S.) 248.

3. *Malcolm v. Rodgers*, 5 Cow. (N. Y.) 193.

4. *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 64.

5. *McIntyre v. McIntyre*, 23 W. N. C. (Pa.) 42.

"May."—Should be construed, in a statute, to mean "shall" wherever the rights of third persons or the public good requires. *Steines v. Franklin County*, 48 Mo. 167; *State v. Saline County Court*, 48 Mo. 390; *James v. Dexter*, 112 Ill. 489.

In construing statutes the word "may" will be considered as mandatory

only, for the purpose of sustaining or enforcing, but not for creating a right. *State v. Holt Co.*, 39 Mo. 521.

The words "may" and "shall" should be considered in the construction of the law as convertible terms. *Cooke v. Spears*, 2 Cal. 412.

Mandatory.—In the following cases the word "may" has been held to be mandatory:

Rex v. Barlow, Carth. 293, Salk. 609, "that church wardens may make a rate." See also *Rex v. Derby*, Skin. 370.

Blackwell's Case, 1 Vern. 152, that the chancellor may grant a commission of bankrupt.

Rex v. Hastings, 1 Dowl. & R. 148, that the mayor might for the future hereafter have and hold . . . a court of record.

Ticknor v. McClelland, 84 Ill. 471, that a chattel mortgage may be acknowledged before a justice of the peace of the town or district where the mortgagor resides.

State v. State Canvassers, 36 Wis. 498, that if any election returns shall be found to be so informal or incomplete that the board cannot canvass them, they may dispatch a messenger to the inspectors who made the returns, etc.

People v. Brooks, 1 Den. (N. Y.) 457, that affidavits may be taken before commissioners of deeds. See also *Caniff v. New York*, 4 E. D. Smith (N. Y.) 430.

Adriance v. Supervisors, 12 How. Pr. N. Y. 224, that supervisors may correct an erroneous assessment.

Randolph Co. v. Rolls, 18 Ill. 29, that all actions against any county may be prosecuted in the circuit court of that county. See also *Schuyler Co. v. Mercer Co.*, 9 Ill. 20.

St. Louis R. v. Teters, 68 Ill. 144, that a court may grant a continuance, if the absence of one of the attorneys is occasioned by his being a member of the legislature, and then in attendance on its sessions.

Gillinwater v. Mississippi R., 13 Ill. 3, that a certain number of corporators may present a petition to the legislature before they become incorporated. See also *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 64.

Chicago & A. R. v. Howard, 38 Ill. 414. Where one section of an act provides that a common informer "may" sue for a penalty, another that the State's attorney "may" sue, the latter has no exclusive right to bring suit.

Rockwell v. Clark, 44 Conn. 534, that when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried. See also *Rumsey v. Lake*, 55 How. Pr. (N. Y.) 339; *Van Cleve v. Rook*, 11 Vr. (N. J.) 25.

Mason v. Pearson, 9 How. (U. S.) 243, a provision, that a municipality may sell one lot for the taxes assessed on several, restricts them to selling only one if that will produce the amount. See also *Thompson v. Carroll*, 22 How. (U. S.) 434.

Walley's Case, 11 Nev. 260, that the court may, of its own motion, or on application, set apart for the use of the family of the deceased all personal property which is by law exempt from execution. See also *Balentine's Case*, 45 Cal. 696.

Stines v. Franklin Co., 48 Mo. 167, that an act concerning issuing bonds for roads, etc, provided that before any expenditures shall be made the county courts may, for the purpose of information, submit the amount of the proposed expenditures to the voters of the respective counties.

People v. Commissioners, 4 Neb. 150, that county commissioners may let contracts to the lowest responsible bidder.

Low v. Dunham. 61 Me. 566, that in proceedings to enforce a maritime lien,

the court may issue an order to sell the vessel.

Supervisors v. United States, 4 Wall. (U. S.) 435, that a board of supervisors may, if deemed advisable, levy a special tax.

Galena v. Amy, 5 Wall. (U. S.) 705, that a city council may, if it believe that the public good and the best interests of the city require it, levy a tax to pay its funded debt. See also *Cairo v. Campbell*, 116 305.

Phelps v. Hawley, 3 Lans. (N. Y.) 160; 52 N. Y. 23, that if a private bridge be destroyed and not rebuilt by the company within a certain time, it shall thereupon become a public bridge and may be maintained at the expense of the county. See also *Newport Bridge Case*, 2 El. & El. 377.

Scully v. Ackmeyer, 2 Cin. (Ohio) 296, that an assessment may be recovered in the name of the city.

Barnes v. Thompson, 2 Swan. (Tenn.) 313, that a mechanic's lien may be enforced by attachment.

Hines v. Lockport, 60 Barb. (N. Y.) 378, that a common council may make streets, sidewalks and repair them. See also *New York v. Furze*, 3 Hill (N. Y.) 612; *People v. Brooklyn*, 22 Barb. (N. Y.) 404.

State v. Buckles, 39 Ind. 272, that a State auditor may draw his warrant on the treasurer.

Blake v. Portsmouth R., 39 N. H. 435, that any corporation whose powers expire by limitation may continue to be a body corporate for three years thereafter, for the purpose of prosecuting and defending suits.

See also *Medbury v. Swan*, 46 N. Y. 202; *Baldwin v. New York*, 2 Keyes (N. Y.) 411; *Re Goddard's Estate*, 94 N. Y. 552; *People v. Livingston Co.*, 6 Hun (N. Y.) 574; *L. I. R. Co. v. Conklin*, 32 Barb. (N. Y.) 386; *N. Y. & E. R. Co. v. Coburn*, 6 How. Pr. (N. Y.) 224; *Grantman v. Hall*, 31 How. Pr. (N. Y.) 466; *Pumpelly v. Owego*, 45 How. Pr. (N. Y.) 238; *Waller v. Thomas*, 42 How. Pr. (N. Y.) 342; *People v. New York Co.*, 11 Abb. Pr. (N. Y.) 121; *Ex parte Chase*, 43 Ala. 311; *Horst v. Moses*, 48 Ala. 148; *Vason v. Augusta*, 38 Ga. 545; *Leavenworth & D. M. R. Co. v. Platte Co. Ct.*, 42 Mo. 175; *Van Wagoner v. Patterson Gas Light Co.*, 23 N. J. L. 297; *Kellogg v. Page*, 44 Vt. 361; *Fisher v. Clark*, 41 Barb. (N. Y.) 332; *People v. Otsego Co.*, 51 N. Y. 401; *Ex parte Banks*, 28 Ala. 28; *Rock Island Co. v.*

United States, 71 U. S. 435; Ralston v. Crittenden, 13 Fed. Rep. 508; Kennedy v. Sacramento, 19 Fed. Rep. 580; Schuyler Co. v. Mercer Co., 9 Ill. 20; Kane v. Footh, 70 Ill. 587; Jones v. Statesville, 97 N. Car. 86; Whitten v. State, 61 Miss. 718; Wright v. State, 5 Port. (Ind.) 290; State v. McGimpsey, 60 N. Car. 337; Leighton v. Maury, 76 Va. 870; *Ex parte* Lester, 77 Va. 673; Railroad Co. v. Royalston, 58 Vt. 234; Railroad Co. v. Mowatt, 35 Ohio St. 288; Spaulding v. Lees, 4 Mo. App. 351; Mitchell v. Pike, 17 Hun (N. Y.) 142; Reid v. Brambridge, 1 South. (N. J.) 351; Carhart v. Miller, 2 South. (N. J.) 573; Hagadon v. Roux, 72 N. Y. 583; Lyon v. Rice, 41 Conn. 245; Gilinwater v. Railroad Co., 13 Ill. 3; Blake v. Portsmouth etc. R. Co., 39 N. H. 435; People v. Brooks, 1 Den. (N. Y.) 457; Appleton v. Warner, 51 Barb. (N. Y.) 270; State v. Board of Canvassers, 36 Wis. 498; Plank Road Co. v. Com., 10 How. Pr. (N. Y.) 237; Chetwood v. State Bank, 2 Halst. (N. J.) 32; Coopers v. Mayor, 55 Cal. 599; Bell v. Crane, L. R., 8 Q. B. 481; Bancroft v. Sawin, 3 N. E. Rep. 307; Johnston v. Pate, 95 N. Car. 68; Welsh v. Solenberger, 8 S. E. Rep. 92; Beau v. Simmons, 9 Gratt. (Va.) 389; James v. Dexter, 112 Ill. 489; Pacific R. Co. v. Reynolds, 8 Kan. 623; Beach v. Woodhill, Pet. C. C. (U. S.) 2; Lyon v. Rice, 41 Conn. 245; Estate of Ballentine, 45 Cal. 696; Quinn v. Wallace, 6 Whart. (Pa.) 452; Thompson v. Carroll, 22 How. (U. S.) 422; People v. Supervisors, 51 N. Y. 401; People v. Com., 4 Neb. 150; Seiple v. Borough of Elizabeth, 27 N. J. L. 407; Phelps v. Fadden, 125 Mass. 200; State v. Laughlin, 73 Mo. 443; *Ex parte* Whittington, 34 Ark. 394; Coopers v. Mayor, 55 Cal. 599; Rains v. Herring, 68 Tex. 468; Silvey v. United States, 7 Ct. Cl. 334; Hill v. Barge, 12 Ala. 692; Smith v. King, 14 Oreg. 10; City of Indianapolis v. McAvoy, 86 Ind. 587; Wormwood v. City of Waltham, 4 N. E. Rep. 194; *Ex parte* Simonton, 9 Port. (Ala.) 393; *Ex parte* Banks, 28 Ala.) 28; People v. Otsego Co., 51 N. Y. 401; Nave v. Nave, 7 Ind. 122; Newburgh etc. Turnpike Co. v. Miller, 5 Johns. Ch. 124; People v. New York Co., 11 Abb. Pr. (N. Y.) 114; Com. v. Marshall, 3 W. N. C. (Pa.) 182; Norwegian Street, 81 Pa. St. 349; Knox v. Lee, 79 U. S. 457; Monmouth v. Leeds, 76 Me. 28; People v. Supervisors, 68 N. Y. 119; State v. Neuner, 49 Conn. 233; Com. v. Smith, 111 Mass. 497; Mc-

Intosh v. H. & St. J. R. Co., 26 Mo. App. 377; Kohn v. Hinshaw, 20 Pac. Rep. (Oreg.) 629; Johnston v. Pate, 95 N. Car. 68.

Under the statute (Gen. Stat., tit. 19, ch. 5, § 11. *Connecticut*), which provides that "where any married woman shall carry on any business and any right of action shall accrue to her therefrom, she *may* sue upon the same as if she were unmarried," a suit can be brought only in her name. Rockwell v. Clark, 44 Conn. 534; Rumsey v. Lake, 55 How. Pr. (N. Y.) 339.

When, by statute, "a mortgage *may* be acknowledged before a justice of the peace of the town or district where the mortgagor resides," the word "*may*" is imperative and the district, in the statute, means election district. Ticknor v. McClelland, 84 Ill. 476.

The expression in section 123 of the Probate act (*Nevada*) "may set apart for the use of the family of the deceased," must be construed as imperative and mandatory as if it had read *shall* set apart. Estate of David Walley, 11 Nev. 260.

The words "*may pay*" in an insurance contract held to be "*liable to pay*." Fame Ins. Co.'s Appeal, 83 Pa. St. 397.

Directory.—In the following cases the word "*may*" has been held directory:

Bank's Case, 28 Ala. 28, that the trial of any person charged with an indictable offence may be removed to another county, on the application of the defendant, duly supported by affidavit. See also Kelly v. State, 52 Ala. 366.

Cross v. Pearson, 17 Ind. 612, that in a justice's court all matters of defence, except, etc., may be given in evidence without plea.

Reed v. Bainbridge, 1 South. (N. J.) 357, that an assignee of bonds, etc., may maintain an action of debt thereon in his own name. See also Carhart v. Miller, 2 South. (N. J.) 575.

Chetwood v. State Bank, 2 Halst. (N. J.) 32, that a plaintiff may assign as many breaches as he shall see fit. See also Shaeffer v. Jack, 14 S. & R. (Pa.) 429.

Central R. v. Ingram, 20 Kan. 66, that a demand (of damages for killing stock on a railroad) may be made of any ticket agent or station agent of such railway company. See also Union Trust Co. v. Kendall, 20 Kan. 515; State v. Han. & St. Jos. R. Co., 51 Mo. 532, that suit may be commenced by

serving the summons on any director, etc., of a corporation.

Mitchell v. Duncan, 7 Fla. 13, that on a proceeding to set aside a defective execution, and bond and affidavit given, execution may issue against the party making the affidavit and his sureties.

State v. Holt Co., 39 Mo. 521, that a court, if satisfied that an applicant is a person of good character, may grant him a tavern licence.

School District v. Sterricker, 86 Ill. 595, that the certificate of a school teacher may be in the form following (setting out a form). See also *Davidson v. Gill*, 1 East 64; *Crosby v. School District*, 35 Vt. 623; *Apgar v. Trustees*, 5 Vr. (N.J.) 311.

Kane v. Footh, 70 Ill. 587, that the court may, at the request of either party, require the jury to render a special verdict.

Fowler v. Perkins, 77 Ill. 271, that appeals in certain cases may be taken to the supreme court, does not repeal a prior statute allowing appeals in such cases to the circuit court. See also *Hogan v. Devlin*, 3 Daly (N. Y.) 184; *Webb v. Robbins*, 77 Ala. 180; *Lewis v. State*, 3 Head (Tenn.) 127, that on a jury's recommending a defendant in a capital case to mercy, the court may commute the punishment from death to imprisonment for life.

Com. v. Gable, 7 S. & R. (Pa.) 423, that in indictments for involuntary manslaughter the attorney general may, by leave of the court, waive the felony and proceed as for a misdemeanor.

Com. v. Haines, 107 Mass. 194, that penalties for an offence may be recovered before any court of competent jurisdiction does not exclude an indictment for the same offence in the superior court. See also *Hirschfelder v. State*, 18 Ala. 112; *Barnawell v. Threadgill*, 5 Ired. Eq. (N.C.) 86; *McKoin v. Cooley*, 3 Humph. (Tenn.) 559; *Sifford v. Beatty*, 12 Ohio St. 189, that in an action against a sheriff for the recovery of property taken under execution and replevied by the plaintiff, the court may, upon application of the defendant in execution, permit him to be substituted as defendant.

Cooke v. State Bank, 50 Barb. (N. Y.) 339, that suits against any national bank may be had in any court of the United States held within the district where such bank is established, or in any state court in such district, does not exclude a suit in a state court

against such bank located in another State.

Lovell v. Wheaton, 11 Minn. 92, that an award may be returned to any term of court held during the time limited by the submission. See, however, as to time in general, *Birdsong v. Brooks*, 7 Ga. 88; *Stevenson v. Lawrence*, 11 Am. Law Reg. 409; *Free Press Asso. v. Nichols*, 45 Vt. 7; *Burlingame v. Burlingame*, 18 Wis. 285; *Bowman v. Blyth*, 7 E. & B. 26-45.

Kelly v. Morse, 3 Neb. 224, that the court may require actual notice to be given to either party, where it appears necessary and proper before acting on an award of arbitrators. See also *Cole v. Green*, 6 M. & G. 872; *Corliss v. Corliss*, 8 Vt. 373.

Caldwell v. State, 34 Ga. 10, that of two or more defendants jointly indicted for any offence, any one defendant may be tried separately.

Bauseneer v. Mace, 18 Ind. 27, that public sales of lands may be in parcels so that the whole amount may be realized. See also *Cunningham v. Cassidy*, 17 N. Y. 276.

Darby v. Condit, 1 Duer (N. Y.) 599, that the court may, in its discretion, require security for costs of an executor.

Allen v. Wells, 22 Ind. 118, that the court, where a cause is transferred to a higher court because the title of land is involved, may tax all costs made in the former court. See also *MacDougall v. Patterson*, 11 C. B. 755; *Jones v. Harrison*, 6 Exch. 328; *Crake v. Powell*, 2 El. & Bl. 210.

Buffalo Plank Road v. Commissioners, 10 How. Pr. (N. Y.) 237, that every person liable to do highway labor, living or owning property on the line of any plank road, may, by application in writing, be assessed his proportion of the assessment for the labor on such highway.

Bell v. Crane, L. R., 8 Q. B. 481, that every authority having power to impose rates may exempt a building used as a Sunday or ragged school from any rate.

As to who may be assessed, *Curtis v. Richland*, 56 Mich. 478; *McMaster v. Lomax*, 2 Myl. & K. 32, that the court may issue an attachment for contempt, for want of an answer, "if they shall so think fit."

Cutter v. Howard, 9 Wis. 309, that the court may remove an executor for certain specified causes (although one of the causes exists).

Kelly v. Milwaukee, 18 Wis. 83, that

a common council may pass ordinances for abating nuisances, etc., as they shall deem expedient. See also *Goodrich v. Chicago*, 20 Ill. 445.

Ridley v. Ridley, 24 Miss. 648, that in attachments against nonresidents, the court may order notice of the attachment to be published in a newspaper of the State. See also *Cory v. Lewis*, 2 South. (N. J.) 846; *State v. Click*, 2 Ala. 26.

Nave v. Nave, 7 Ind. 122, that in divorce suits, witnesses may be examined orally in open court.

State v. Sweetser, 53 Me. 438, that an indictment may be found and tried in the county where the offender resides or where he is apprehended.

Dean v. White, 5 Iowa 266, that a corporation having an office in any county may be sued in that county.

Malcom v. Rogers, 5 Cow. (N. Y.) 188, that heirs shall or may recover in one writ or action, as heirs of the deceased person.

New York & E. R. v. Coburn, 6 How. Pr. (N. Y.) 223, that on an appeal from an award of damages for lands condemned by commissioners, the court may direct a new appraisal.

Striker v. Kelly, 7 Hill (N. Y.) 9, that a resolution may not be passed by a common council without calling the ayes and noes. See also *McKeene v. Weller*, 11 Cal. 57; *St. Louis v. Foster*, 52 Mo. 513.

Williams v. People, 24 N. Y. 405, that for certain stealings the offender may be punished as for grand larceny.

When Word "May" Is Permissive.—The word "may," as used in *G. L.*, ch. 136, § 9 (*New Hampshire*), which provides that on a petition for an account against a mortgagee, an issue of fact "may be determined by a jury," is to be taken in a permissive and not in a mandatory sense. *Proctor v. Green*, 59 N. H. 350; *State ex rel. School Directors v. Police Jury*, 40 La. An. 756.

The word "may" has also been held to be used in a permissive sense in the following cases: *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96; *DeBevoort v. Welsh*, 7 B. & C. 278; *Com. v. Haynes*, 107 Mass. 196; *State v. Holt County Court*, 39 Mo. 521; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Fowler v. Perkins*, 77 Ill. 271; *State v. Sweetser*, 53 Me. 438; *Devine's Case*, 11 Abb. Pr. (N. Y.) 90; *Medberry v. Swan*, 46 N. Y. 200; *Williams v. People*, 24 N. Y. 405; *People v. Henderson*, 21 Pac. Rep. 146; *The Mary N.*

Hogan, 17 Fed. Rep. 814; *Littlejohn v. Regents of Wisconsin University*, 37 N. W. Rep. 346; *The Shelbourne*, 30 Fed. Rep. 52; *Cutler v. Howard*, 9 Wis. 309; *Phillips v. Fadden*, 125 Mass. 199; *Steins v. Franklin Co.*, 48 Mo. 167.

When the charter for a log driving company provides that "the company may drive all logs and other timber" in a certain stream, the word may is to be construed as permissive and not imperative. But when the company accepts the privilege thus conferred of driving "all the logs," etc., it assumes a duty commensurate with the privilege conferred. By this acceptance it has the exclusive right to drive all the logs, and the duty to drive results. *Weymouth v. Penobscot Log Driving Company*, 71 Me. 29.

"May leave the same to her children" in a will; *held*, the word "may" is precatory only and not obligatory. *McIntyre v. McIntyre*, 23 W. N. C. (Pa.) 42.

As against the government the word "*shall*" when used in statutes is to be construed as "*may*" unless a contrary intention is manifest. *Railroad Co. v. Hecht*, 95 U. S. 168.

The word "*shall*" in an act will not be construed "*may*" unless it is absolutely necessary to prevent irreparable mischief. *City Sewage Utilization Co. v. Davis*, 8 Phila. (Pa.) 625.

The expression "the children which I may have," which is represented as not importing future children only, but referring also to those already born, admits either a prospective or retrospective sense, or both, as it is used indefinitely or with a definite meaning. A man speaking of such estate as he "*may purchase*" certainly means, in future; if of such as he may have purchased at the time of his death, he means both past and future. *Wilkinson v. Adam*, 1 Ves. & B. *442.

"May Exempt."—Under 32 & 33 Vict., ch. 40, § 1, which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate; the rating authority have a discretion whether they will or will not exempt such a building. *Bell v. Crane*, L. R., 8 Q. B. 481.

"May" Confers a Power.—The word "may" in the thirteenth section of the County Courts Extension act, 13 & 14 Vict., ch. 61, which provides that in certain cases the court, or a judge at chambers, may by rule or order direct that

the plaintiff shall recover his costs, is not used to give a *discretion*, but to confer a *power* upon the court and judges; and the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises. *MacDougall v. Patterson*, 73 E. C. L. 755.

"May Receive."—A took B's notes for the use by B of a patent belonging to him, and agreed to credit on the notes "any amount he may receive from S for the use of said patent to this date, over \$480." He had at that time received from S on that account \$360, and soon after received \$540 more. *Held*, that the \$360 was not to be included in the calculation, the term "*may receive*" being properly applicable only to money thereafter received. *Greene v. Robinson*, 41 Conn. 470.

"May Advance."—The expression "*may advance*" in the written memorandum accompanying an equitable mortgage does not necessarily prevent the deposit from being a security for past advances. *Ex part Smith*, 2 Mont. D. & De G. 587.

"You May if You Please."—If A devise all her personal estate to B to be disposed of as B shall think fit, and add by parol, "you may, if you please, give £100 to my niece," B in a bill in the answer, to which the parol declaration is admitted, shall be decreed to pay the £100 to the niece. *Nab v. Nab*, 10 Mod. 404.

"May be."—The expression, in a statute, that "the county court in which any part of the route of the said railroad may be" may subscribe to the stock, is to be construed with reference to the situation of the subject matter. Used of a railroad already built, "may be" would be equivalent to "exist," "is built," "in operation," or the like. But referring to a road not yet built, not located or surveyed, nor organized, it must have a different meaning. *County of Calloway v. Foster*, 93 U. S. 573.

"May have" and "may have been" are presumably retrospective. *Heeney v. Brooklyn Benevolent Society*, 33 Barb. (N. Y.) 363.

"May Saw."—The agreement is to deliver all the merchantable spruce plank "*that they may saw*," etc. These words are not promissory in their nature, except so far as relates to the delivery of plank which they shall saw during the ensuing winter; nor do they import a promise or undertaking to saw

any particular or any quantity of merchantable spruce plank during the ensuing winter. *Wemple v. Stewart*, 22 Barb. (N. Y.) 159.

"May summon" the master of a vessel to show cause why process should not issue against the vessel, means shall be at liberty, is permitted, to summon him. *The Shelbourne*, 30 Fed. Rep. 52.

"May be Made."—The covenant is to pay for "all the buildings" and improvements that *may be made* on said lands. It is not denied that this covenant is obligatory upon the plaintiff in this suit. The words *may be made on said lands*, may be understood as synonymous with "*may have been made, or shall then be and remain on said lands*." *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 582.

In *Phillips v. Fadden*, 125 Mass. 201, AMES, J., observes: "The language of the new statute (St. of 1876, ch. 17, *Massachusetts*) is permissive rather than imperative. It provides that the offender may be apprehended and that when he has recovered from his intoxication the officer *may* make a complaint against him for the crime of drunkenness. But this change in the law from *shall* to *may*, although it undoubtedly leaves it to the sound judgment and discretion of the officer to decide whether the case requires the arrest of the offender, was not intended to change the purpose of the arrest when made. The words 'shall' and 'may' are not unfrequently equivalent terms." See also *Worcester v. Scheisinger*, 16 Gray (Mass.) 166.

The phrase "may in any wise" is not understood as synonymous with the terms "by any possibility," or "under any circumstances." *Gregory v. Kanouse*, 6 Halst. (N. J.) 62.

In the Following Cases the Word "Shall" Has Been Construed to be Discretionary or Directory.—*New Castle Co. v. Bell*, 8 Blackf. (Ind.) 584; *Holland v. Osgood*, 8 Vt. 276; *People v. Holly*, 12 Wend. (N. Y.) 481; *Thompson v. Sergeant*, 15 Abb. Pr. (N. Y.) 452; *Johnson v. Williams*, 2 Tenn. 178; *Attorney General v. Baker*, 9 Rich. Eq. (S. Car.) 521; *York Railway v. Reg.*, 1 E. & B. 858; *Rex v. Leicester*, 9 D. & R. 772; *Reg. v. South Weald*, 5 B. & S. 391; *Caldow v. Pixell*, L. R., 2 C. P. D. 562; *Wheeler v. Chicago*, 24 Ill. 105; *Parish v. Elwell*, 46 Iowa 162; *Stevenson v. Lawrence*, 11 Am. Law Reg. 409; *City Sewage Co. v. Davis*, 8 Phila. (Pa.) 625; *People v. Supervisors*, 50 Cal. 561;

MAYHEM—(See also CRIMINAL LAW).

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I. DEFINITION.—Mayhem is the act of unlawfully and violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary.¹

II. MAIM—MAIMING.—The word "maim" is not, according to the better use, a synonym for mayhem, which is a particular sort of aggravated maim.² But, like mayhem, it implies a permanent injury,³ or crippling,⁴ certainly when employed in reference to cattle.⁵ And such appears to be its general legal meaning.⁶

III. AT COMMON LAW.—Mayhem at common law is such bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary, but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or foretooth, or castrating, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off of his ear or nose are not such at common law.⁷

Rodebaugh v. Sanks, 2 Watts (Pa.) 9; *Colt v. Eves*, 12 Conn. 243; *Com. v. Commissioners*, 5 Binn. (Pa.) 536; *Ludlow v. Ludlow*, 1 South. (N. J.) 394; *Cason v. Cason*, 31 Miss. 578; *Justices v. House*, 20 Ga. 328; *Catterall v. Sweetman*, 9 Jur. 591.

"It Shall and May be Lawful," Is Generally Mandatory.—*Gray v. Locke*, 3 Atk. 166; *Stamper v. Miller*, 3 Atk. 211; *Simonton's Case*, 9 Port. (Ala.) 390; *Traver v. Commissioners*, 17 Ala. 573; *Rex v. Eye*, 1 Barn. & Cress. 85; *Chapman v. Milvane*, 5 Exch. 61; *Mason v. Fearson*, 9 How. (U. S.) 237; *Davison v. Davison*, 2 Harr. (N. J.) 171. See, however, *Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Newburgh Co. v. Miller*, 5 Johns. Ch. (N. Y.) 112; *Seiple v. Elizabeth*, 3 Dutch. (N. J.) 407; *Rex v. Commissioners*, 2 Chit. 251; *Bridgeman's Case*, 1 Dr. & Sm. 164.

When Any Proceeding Is "Authorized."—*Kellogg v. State Treas.*, 44 Vt. 356; *People v. Supervisors*, 11 Abb. Pr. (N. Y.) 114; *Rogers v. Bowen*, 42 N. H.

102; *Milford v. Orono*, 50 Me. 529; *Veazie v. China*, 50 Me. 518; *Com. v. Pittsburgh*, 3 Am. Law Reg. 292; *Com. v. Johnson*, 2 Binn. (Pa.) 275; *Gould v. Hayes*, 19 Ala. 462; *Reg. v. Commissioners*, 14 Ad. & El., N. S. 459; *State v. Harris*, 17 Ohio St. 608; *Angle v. Runyon*, 9 Vr. (N. J.) 403; *Harris v. Supervisors*, 52 Cal. 554. And see also *Potter's Dwaris* on Stat. 222, note 29.

1. *Bouv. L. Dict.*; *Reg. v. Hagan*, 8 C. & P. 167.

2. *Bishop* on Stat. Crimes, § 316, and authorities cited; *Com. v. Newell*, 7 Mass. 245, 247.

3. *State v. Briley*, 8 Port. (Ala.) 472.

4. *Turman v. State*, 4 Tex. App. 586.

5. 1 *Car. & K.* 539; *Baker v. State*, 4 Ark. 56.

6. *State v. Briley*, 8 Port. (Ala.) 472, where the same meaning was given to the word "disabling" in the statute.

7. 1 *East P. C.* 393; 1 *Hawk. P. C.* (Curw. ed.), p. 107, § 1; *Reg. v. Hagan*, 8 *Car. & P.* 167; 3 *Inst.* 62; 118 *Staundf.*

All maims are said to be felony; because anciently the offender had judgment of the loss of the same member which he had occasioned to the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been afterwards considered more in the nature of an aggravated trespass. Lord Coke accordingly classes it as an offence "under all felonies deserving death, and above all other inferior offences."¹

By the common law also, if a person maim himself, as for example, to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned.²

In order to found an indictment or appeal of mayhem, at com-

38b; 2 Hawk., ch. 23, § 16; 3 Bla. Com. 121; 4 Bla. Com. 205.

In Bishop on Crim. Law, vol. 2, § 1001, note 2, a quotation from Pulton (*De Pace Regis* 1609, fol. 15, §§ 58 and 59), one of the earlier authorities, is as follows:

What Acts Are Mayhem.—"If a man do put out the eye, or cut off the hand, or foot, or any joynt of the hand or foot of another, it is maihem, though it be done by chaunce-meddly. (But if one man of malice pretended [prepensd?] do cut but the tongue, or put out the eyes of any of the King's subjects, it is felony.) And if one man doe crush the mouth or head of another, or break out his foreteeth, it is maihem, for with them he may defend himself in battaile; but to break his hinder teeth, or to cut off his nose or ears, whereby he looseth his hearing, is no maihem, but a deformitie, or blemish of his bodie, and no weakening of his strength. It is a maihem to pull any bone out of a man's hand, or cut off any finger of a man's hand, or to breake any of them so that they become shrunk up, it is maihem. To cut off the cheeke or jaw bone of any person, or so to crush or breake any of them that the same person is the lesse able to take his meat or drinke, is a maihem. If one person or more doe take another person by force, and put him in the stocks, or otherwise bind him fast, and after pour so much skalding hote oyle and vinegar, or hote melted lead, or other skalding liquor, upon any part of his bodie, and so continue it until it doth wast and consume the flesh of the same part and drie up and mortifie the vaynes and sinews of the same part, it is a maihem. If A doe strike at B, and the weapon wherewith he striketh, breaking or falling

out of his hand by the force of the blow, doth put out the eyes of D, this shall be adjudged a maihem, for that A hath an intention at the first to doe some hurt in striking at B. The greatness or smallness of the wound in some of the cases aforesaid doth make the difference, whether it be a maihem or not."

Mr. Bishop then further quotes from Pulton, showing the distinction between mayhem as a felony or misdemeanor, the indictable crime, and mayhem as a civil tort and for which damages in money might be demanded: "Now, if the reader will read on, in Pulton, beyond the place whence the above passages are extracted, he will see that the mayhem of which this author is particularly treating is such as was punishable by the old and now obsolete process of appeal of mayhem; and, says (Jacob L. Dict., tit. Appeal): "Appeal of mayhem is the accusing one that hath maimed another; but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages." Pulton, however, fol. 16, after saying that "An appeale of maihem is in effect but an action of trespass, wherein the plaintiffe shall recover damages according to the qualitie and quantitie of the offense," adds, "and the defendant shall be imprisoned." But as showing that the appeal is pretty purely a civil action, he mentions, fol. 17, that a plea of release of all demands, by the plaintiff, will avail the defendant in bar.

1. 1 East P. C. 393; also 1 Hawk., ch. 44, § 3; 2 Hawk., ch. 23, § 18; 4 Bla. Com. 205.

2. 1 Hawk. P. C. (Curw. ed.), p. 108, § 4.

mon law, the act must have been done maliciously; though it matters not how sudden the occasion.¹

It seems there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject.² For supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals.³ It does not appear to have been anywhere supposed that there can be accessories after the fact in mayhem.⁴

IV. ENGLISH STATUTES.—The English statutes, as well as statutes in some of the United States, have greatly enlarged the scope of the offence of mayhem, which now includes all malicious injuries disabling to the person⁵.

1. 1 East P. C. 394.

2. 1 Russell on Crimes 719.

Lord Hale states there are no accessories before in mayhem, but that they are in the same degree as principals. (1 Hale 613.) Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. (2 Hawk. P. C., ch. 29, § 5). In 1 East P. C., ch. 7, § 7, p. 401, there is a learned argument to show that the latter opinion proceeded on a mistake.

3. 1 Russell on Crimes 34.

4. 1 Hawk. P. C., ch. 55, § 13, and 2 Hawk. P. C., ch. 29, § 5; 1 East P. C., ch. 7, § 7, p. 401.

5. 1 Wharton Crim. Law, § 581.

English Statutes.—By statute 5, H. IV., ch. 5, to remedy a mischief which then prevailed of beating, wounding, imprisoning, or maiming persons, and after purposely "cutting their tongues or putting out their eyes" to prevent them from giving evidence against the perpetrators, it is enacted, that "in such cases the offenders that so cut tongues or put out the eyes of any, and that duly proved and found that such deed was done of malice prepensed, shall incur the pain of felony." That is, as Lord Coke explains it, if the act be done voluntarily and of set purpose, however sudden the occasion.

By stat. 37, H. VIII. ch. 6, if any person "maliciously, willingly, or unlawfully cut, or cause to be cut, off the ear or ears of any subject, otherwise than by authority of law, chance-medley, sudden affray, or adventure, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass, but shall forfeit £10

to the king for every such offence, in the name of a fine."

But the principal and most severe statute upon this subject is that of 22 and 23 Car. II, ch. 1, commonly called the "Coventry Act," from the circumstances of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament, in which he reflected on the profligate conduct of Charles II, in respect to his intercourse with actresses.

By 22 and 23 Car. II, ch. 1, it is enacted, "That if any person shall, on purpose and of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any of the manners before mentioned, such his majesty's subjects, that then and in every such case the person or persons so offending, their counsellors, aidors and abettors, knowing of and privy to the offence as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony without benefit of clergy."

But by 22 and 23 Car. II, ch. 1, § 2, it is provided, "That no attainder of such felony shall extend to corrupt the blood or forfeit the dower of the wife, or the lands, goods or chattels of the offender."

To bring an offender within the Coventry act there must be proof of a deliberate and premeditated design to do

a personal injury of the sort described, to another; and it must appear that the mischief was done in the manner described therein, that is, on purpose and of malice aforethought, and by lying in wait for that purpose.

Maiming or Disfiguring Within the Act.—In *Rex v. Carrol and King*, O. B. July, 1765, 1 M. S. Sum. 224, it was held that a slitting of the nose, whether a perpendicular or a transverse cut, was within the meaning of the act; and in *Coke and Woodburn*, 6 St. Tr. 212, 215, 223, the slitting of the nose which brought them within the act was a cut *across* the nose, which separated the flesh of it, and cut it quite through into the nostril. And there it was objected that the nose could not be said to be *slit*, because the edge of it was not cut through; but the LORD CHIEF JUSTICE KING overruled the objection. 1 East P. C. 396.

It is necessary to consider what shall be said to be a cutting under this last act. This is a question of fact on the evidence whether the wounding be a *cutting* or not, and it is immaterial with what instrument it is done, whether with an instrument made for cutting or not, so that in fact the wound be a "cut." This was decided in the case of one Harwood, who was convicted at the Old Bailey, January session, 1805. He had been detected in attempting to commit a felony, and in order to escape apprehension, he struck the prosecutor with an iron crow bar on the head. The surgeon in his evidence stated that a part of the bone of the skull was *cut* out like a piece of quill. The chief baron, who tried the prisoner, thought, as the implement was rather calculated for bruising, that it was doubtful whether it came within the meaning of the act; but the judges held the conviction was right.

So in a case tried before Mr. J. CHAMBRE at York Lent. Ass. 1806, the incisions were made with a claw of a hammer, but the surgeon stated they were *incisions*. The judges held the conviction right. But in a case of John Adams, who was tried at Old Bailey, January session, 1808, a blow on the head, given with an iron bar, and which had given a contused and not an incised wound; the judges held the case not within the act. 1 Hawk. P. C. 108.

Against Whom the Offence in General May be Committed.—It does not seem necessary that the malicious intention described should be directed against

any particular individual. If it be conceived against all persons who may happen to fall within the scope of the perpetrator's design, the particular mischief done to any one shall be connected with the general malignant intent, so as for the statute to attach upon the offenders. This is necessarily to be inferred from the case of *Rex v. Carrol* before stated, who was an entire stranger to the gentleman whom he assaulted, and who could not have been personally in his contemplation till the occasion occurred on the sudden. So if a blow be intended to maim one, and by accident maim another, the party is equally liable to be indicted for such maim. The statutes of H. IV, H. VIII, and Car. II are evidently directed to the maiming of others; but a person who even maims himself, or procures another to maim him, that he may have more color to beg, or disables himself to prevent being pressed for a soldier, is subject to fine and imprisonment at common law; and so is the party by whom it was effected at the other's desire.

Lying in Wait.—There must be proof of a deliberate design by lying in wait to commit the offence described in the act in order to bring the case within it. In general what shall be considered as a "lying in wait" on purpose to maim or disfigure must depend very much on the concomitant circumstances of each case. 1 East P. C. 397.

Intent.—Although a person be maimed or disfigured maliciously, yet the case will not fall within the statute unless the offender lie in wait for that purpose. Where the injury arose out of a sudden attack unconnected with any premeditated design against the person, it was held not to be within the statute. *Rex v. Tickner*, S. C. Leach 170. And the same line of construction has been adopted even where personal violence was intended, it being of a different and less atrocious sort, and with a different view. 1 East P. C. 399.

In *Rex v. Mackey and Arrigoni*, the commander of a press-gang maiming a man whom he casually met, and who resisted being impressed (being in truth no mariner), but against whom he appeared to have an antecedent grudge, is not a lying in wait within the statutes. But though the statute adds, "with intention to maim or disfigure" the party, yet if the intent were of a higher and more atrocious nature, namely, to murder him, and in that attempt the of-

V. AMERICAN LEGISLATION.—While our legislation is modeled on the English and based principally on the statutes 22 and 23 Car. II (A.D. 1670), commonly called the "Coventry Act," it is not uniform in all our States.¹ Under the Federal Crimes Act,² mayhem as punishable, and the particular made of committing the offence, is by stabbing, cutting, shooting or striking, or the particular weapon or instrument used, are not material.³ Nor is it necessary, where the injury is inflicted in a sudden conflict, that the design should have been formed previously, if the act is committed maliciously and on purpose, and in pursuance of a design formed during the conflict,⁴ with the apparent intent of mutilating or destroying any physical organ of the body.⁵

The New York statute⁶ covering the offence is, however, a departure from the rule here stated, and unless there is direct evi-

fender do not kill but only maim him, it is an offence within the act; for those additional words relating to the intent are merely auxiliary to the preceding words "on purpose and of malice aforethought" confining the crime to an intended violence. But if a corporal violence be intended, the more malignant the intention, the more clearly it falls within the malice described by the act. Besides, it is a known rule of law that if a man intend to commit one species of felony, and in the prosecution of that commit another, the law will connect his felonious intention with the felony actually committed, though different in species from that which he originally intended. 1 East P. C. 400. This is illustrated by *Rex v. Coke* and *Woodburn*, 6 St. Tr. 212.

1. *State v. Simmons*, 3 Ala. 497; *State v. Abram*, 10 Ala. 928; *State v. Briley*, 8 Port. (Ala.) 472; *State v. Absence*, 4 Port. (Ala.) 397; *Eskridge v. State*, 25 Ala. 30; *State v. Coleman*, 5 Port. (Ala.) 32; *Adams v. Barrett*, 5 Ga. 404; *Com. v. Newell*, 7 Mass. 245; *State v. Gerkin*, 1 Ired. (N. Car.) 121; *State v. Crawford*, 2 Dev. (N. Car.) 425; *State v. Mairs*, *Coxe* (N. J.) 453; *Scott v. Com.*, 6 S. & R. (Pa.) 224; *Chick v. State*, 7 Humph. (Tenn.) 161; *Com. v. Lester*, 2 Va. Cas. 198; *Moore v. State*, 4 Chand. (Wis.) 168; *United States v. Scroggins*, *Hempst.* (U. S.) 478; *State v. Bohannon*, 21 Mo. 490; *Foster v. People*, 50 N. Y. 598; *Henry v. State*, 18 Ohio 32; *Reg. v. Murphy*, 1 Crawf. & Dix C. C. 20; *Trimble v. Com.*, 2 Va. Cas. 143; *Davis v. State*, 22 Tex. App. 45.

Maiming by the Texas Penal Code art. 507, is defined as follows: "To

maim is to wilfully and maliciously cut off or otherwise deprive a person of the hand, finger, toe, foot, leg, nose or ear; to put out an eye, or in any way deprive the person of any other member of his body." *Davis v. State*, 22 Tex. App. 45.

2. Crimes Act 1790, § 13; *United States v. Scroggins*, *Hempst.* (U. S.) 475.

3. *United States v. Scroggins*, *Hempst.* (U. S.) 478, 480.

4. *State v. Simmons*, 3 Ala. 497; *State v. Gerkin*, 1 Ired. (N. Car.) 121; *U. S. v. Scroggins*, *Hempst.* (U. S.) 478; *State v. Ormond*, 1 Dev. & Batt. (N. Car.) 119; *State v. Hair*, 37 Minn. 351; *State v. Jones*, 70 Iowa 505; *Ridenour v. State*, 38 Ohio St. 272; *State v. Evans*, 1 Hayw (N. Car.) 325; *State v. Crawford*, 2 Dev. (N. Car.) 425; *State v. Skidmore*, 87 N. Car. 509; *State v. Bloedow*, 45 Wis. 279; *Hayden v. State*, 4 Blackf. (Ind.) 546; *Baker v. State*, 4 Ark. 56; *United States v. Gunter*, 5 Dak. 234; *United States v. Askins*, 4 Cranch C. Ct. 98; *Bowers v. State*, 24 Tex. App. 542; *Terrell v. State*, 86 Tenn. 523, reviewing statutes of Tennessee, North Carolina and Texas.

5. *Moore v. State*, 4 Chand. (Wis.) 168; *Davis v. State*, 22 Tex. App. 45; *Kitchens v. State*, 80 Ga. 810.

6. 2 Rev. Stat. 664, § 27, which reads as follows: "Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall cut out or disable the tongue, or put out an eye, or slit the lip or slit or destroy the nose, or cut off or disable any limb or member of another, on purpose, upon

dence of premeditation the case is not brought within the statute.¹

conviction thereof shall be punished," etc.

1. In *Godfrey v. People*, 63 N. Y. 207 (reversing *Godfrey v. People* reported in 5 Hun (N. Y.) 369), the evidence tended to show that the accused and the complainant had been playing cards together, and got into a quarrel over the game, which resulted in a fight. The parties closed and during the struggle the accused bit off a piece of complainant's ear. MILLER, J., in the opinion of the court observes: "A question is made by the prisoner's counsel whether, as the case stood upon the evidence, the prisoner could be convicted of the crime of mayhem. This question was presented upon the trial in the request and refusal to charge that he could not, and by an exception to that portion of the charge in which the judge charged the jury that if they found from the evidence, that the prisoner wilfully and intentionally seized the left ear of the complainant with his teeth at any time during the affray, with the intention of biting it off, and did wilfully and intentionally, and on purpose, bite it off, that, though the intention to bite off his ear originated or was first meditated, but an instant before he seized the ear, they would be authorized to find that he bit the ear off, from '*premeditated*' design, within the meaning of the statute.

"According to the statute there must be a premeditated design which must be shown by lying in wait for the purpose, or in some other manner. There was no evidence upon the trial to establish that the prisoner lay in wait for the complainant, or that, prior to the time of the commission of the alleged offence, he had contemplated or intended to do the act. The proof evinces that it was done upon the impulse of the moment, in an affray which originated unexpectedly, with no previous ill feeling, except what arose at the time, or apparent intention on the part of the prisoner or the prosecutor, to engage in any such altercation as produced the consequences which ensued. There was then no premeditated design evinced by lying in wait for such a purpose, within the meaning of the statute, and under the circumstances presented, it is certainly not clearly apparent how,

or in what form, such premeditated design is evinced in 'any other manner.' The last words are not very explicit, and somewhat general, but they cannot without a constrained construction be held to mean that they include cases of simple assault and battery where there is no direct proof of any intent or purpose which results unfortunately in the loss or disabling of some member of the body of the person assailed. There must be a design or intention existing, and a purpose to do this very act, and this must be the result of premeditation to bring it within the statute. The words cited must be construed in connection with and in reference to those which precede them in the same section; and when thus interpreted they evidently mean in any *like or similar manner*.

"There are numerous instances where full force and effect may be given to this language where a premeditated design has existed without lying in wait for that purpose, while it would not be applicable to cases where no such intention had been formed or proved. Take the case of a person who had determined and threatened to cut off an ear, put out an eye, or to disable some limb or member of the body of another and preparing himself with the necessary weapon for that purpose, should meet the individual against whom his animosity was directed, and commit the offence, or if, perchance, when seeing him at a distance, he should follow him, suddenly rush upon his victim and carry his intention into execution. These cases without referring to others which might be named, are sufficient to show how the language employed could be made effective, and have full operation.

"This interpretation of the language stated is also sanctioned by the last clause of the section which provides that the cutting off or disabling of any limb or member must be done 'on purpose.' If the offence was committed within the meaning of the statute, it must have been done 'on purpose,' as well as with a 'premeditated design.' There is no real ground for claiming that there was premeditation and a purpose existing at any time during the progress of the conflict when the passions of both parties were

VI. FELONY OR MISDEMEANOR.—Both East and Hawkins say that all maims are felony. That anciently castration was punished with death, and other maims with loss of member for member. But afterwards no maim was punished in any case with life or member but only with fine and imprisonment, which is considering it more in the nature of an aggravated trespass. In this country the common law offence of mayhem is not generally considered to be a felony but is punished as a misdemeanor, unless committed by castration, and then perhaps it is.¹

aroused, and there was no time or opportunity for reflection or deliberation. Such an assumption would be contrary to the natural inferences to be drawn from the circumstances and the situation of the parties at the time, and looking at them it cannot be fairly claimed that the prisoner intended to commit the offence of which he was convicted. An argument is made by the learned counsel for the prosecution, to the effect that the doctrine of instantaneous malice under the old law of murder is applicable, and that the definition of premeditation, as applied to such a case, may be invoked. I cannot concur in this view. In cases of homicide, where the offence is committed by means of weapons, or by the use of violence sufficient to produce death, such a rule might well be applied, because every circumstance tends to show that the result was intended. But this differs widely from a case of simple assault and battery, where there was a hand to hand fight, without any weapon which could be used to maim or disable, and every intention is against any such purpose.

"Another answer to this position is, that the statute of mayhem in England, as well as in this State, was evidently intended to provide for cases where there was an antecedent and secret purpose to commit the act, and not for casual and sudden affrays, where the act was done in the heat of the strife and with no direct evidence of any such intention." See also *Tully v. People*, 67 N. Y. 15.

1. 2 Bishop on Criminal Law, § 1008, citing *Com. v. Newell*, 7 Mass. 245; *Adams v. Barrett*, 5 Ga. 404; *Com. v. Lester*, 2 Va. Cas. 198; *State v. Absence*, 4 Port. (Ala.) 397.

In *Com. v. Newell*, 7 Mass. 245, PARSONS, C. J., in reviewing the subject at common law and under the statutes, observes: "By the ancient common law, *mayhem* was an

injury of a peculiar nature, constituting a specific offence the commission of which could be regularly averred by no circumlocution, without the aid of the barbarous verb *mahemiere*. It consisted in violently and unlawfully depriving another of the use of a member proper for his defence in fighting, and was punished by a forfeiture of member for member, in consequence of which forfeiture it was deemed a felony. If the sufferer sought this satisfaction, or rather revenge, his remedy was by an appeal of mayhem, and the sovereign punished this injury done to his subject by an indictment for a mayhem; and in both the appeal and indictment, the offence must be alleged to have been committed feloniously.

"A punishment of this description could have existed only in a rude state of civil society; and as civilization advanced, the punishment was disused, and the offender made satisfaction by paying pecuniary damages, and was punished by his sovereign by fine and imprisonment, in the same manner as in cases of trespass. So long ago was this punishment disused, that Staundford, remarking on the statute of 5 H. IV, ch. 5, which made the putting out of an eye felony, observes that before that statute it was not felony. He, however, subjoins a *quære*, and refers to Bracton.

"This was the state of the common law long before, and at the time when our ancestors emigrated to this country, bringing with them but a very small part of the common law, defining crimes and their punishment. Mayhem was therefore never deemed by them a felony, but only an aggravated trespass at common law; and as such the offender was answerable to the party injured in a civil action of trespass, and to the government upon an indictment for a misdemeanor; and no statute provision during the existence of the colonial and provisional charters, recog-

In several of the States, however, it is made a felony by statute.¹

nizes mayhem as a distinct offence from trespass or as constituting a specific felony. We are therefore obliged to consider mayhem as no felony by the common law adopted in this State.

"Since the revolution, the only legislative provisions relating to this offence, consider and punish it as a misdemeanor. If therefore the statute of 1804, ch. 123, has declared the maliciously cutting off an ear with intent to maim and disfigure a mayhem, we cannot thence infer that it is felony. The statute, however, has not made that declaration. It only enacts that if any person, with set purpose and aforethought malice, and with an intention to maim and disfigure, shall unlawfully cut off an ear of another, he and every person privy being present and aiding, or absent and having counseled or procured the commission, shall be punished by solitary imprisonment, and by confinement to hard labor. Here the word *maim* is used in the popular sense of *mutilitating*; and not as synonymous with the technical word *mayhem*. The cutting off the ear is not called a maim, but created an offence, when done with an intention to maim and disfigure, and punished as a misdemeanor; for a trespass may be committed with set purpose, and with malice aforethought.

"The fifth section of the statute provides that every man who shall assault another, with intent to maim and disfigure him, shall be punished as a felonious assaulter. But this expression is descriptive of the temper, disposition and character of the offender, and not of the legal nature of the offence. By the same statute, any person sending a challenge to fight a duel shall also be punished as a felonious assaulter; and very clearly the mere sending of the challenge is not even an assault. We are therefore satisfied that the offence described in the indictment (the breaking and entering a dwelling house with intent to cut off an ear of an inhabitant) is not a felony, either by our common law, or by any statute. The attorney general has argued that if the indictment is not a sufficient description of a felony, yet it may be supported as an indictment for a misdemeanor.

"There are one or two ancient cases in favor of this position, as Holmes' Case (Cro. Car. 376), and

Martin Lesser's Case (Cro. Jac. 497). But in a later case of *Rex v. Westbeer* (2 Str. 1133), the old cases were considered and overruled. The court, when the prisoner was discharged, observed that in the cases cited for the king, the judges appeared to be transported with zeal too far. Thus stands this question at common law. But our statute of 1805, ch. 88, in authorizing a conviction of part of an indictment for felony, restrains the conviction to cases, where the part, of which the prisoner is found guilty, constitutes of itself a felony. This provision seems to be a statute construction of the point, which leaves no doubt remaining."

In *Com. v. Lester*, 2 Va. Cas. 198, an indictment which charges that a prisoner feloniously did break the jaw bone of another with intent to maim, disfigure, disable or kill, and concludes against the form of the statute (1 Rev. Code of 1819, ch. 156, §§ 1 and 2, p. 582), is yet not a good indictment under the statute, because it does not aver that he did *disable* any limb or member, but only that he did *break* a bone with *intent to disable*, etc. If a prisoner be charged with *feloniously* breaking the jaw bone of another, *contra formum statute*, the indictment cannot be sustained as one for mayhem at common law; because a mayhem at common law, with one exception only, is not a felony. The words "felonious assaulter" in the statute do not make the technical offence of mayhem a felony. *State v. Danforth*, 3 Conn. 112; *Com. v. Newell*, 7 Mass. 245.

In *Foster v. People*, 1 Colo. 293, the court held that the effect of the proviso in section 43 of the Criminal Code, Rev. Stat. 202, is to reduce the crime in certain specified cases from a higher to a lower grade. A conviction for misdemeanor may be had upon an indictment for felony in case where the misdemeanor is included in the higher offence. An indictment for mayhem in which the fact and the intent are charged, is good for the principal crime, mentioned in section 43, Rev. Stat. 202, and also for the misdemeanor mentioned in the last clause of that section. See also *People v. Jackson*, 3 Hill (N. Y.) 92; *Stewart v. State*, 5 Ohio 241; *Benham v. State*, 1 Iowa 542; *Com. v. Blaney*, 133 Mass. 571.

1. *Canada v. Com.*, 22 Gratt. (Va.) 899;

VII. INTENT.—It is well settled that mayhem must be committed on purpose, unlawfully and with intent to maim, but when the act is once proved, the law will presume that it was committed on purpose and with intent to maim, until the evidence shows the contrary; such as that it was done for the necessary self defence of the party against some great bodily harm attempted by the person maimed, and that there was no other means of preventing the mischief or other circumstances of a like kind, for unless this can be proved, the excuse that it was a sudden and unexpected

Hardy *v. Com.*, 17 Gratt. (Va.) 592; State *v. Thompson*, 30 Mo. 470.

In Canada *v. Com.*, 22 Gratt. (Va.) 899, C is indicted for feloniously and maliciously cutting, striking, wounding, etc., H, with intent to maim, disfigure, disable and kill. The indictment charges that C made an assault upon H, and feloniously and maliciously, etc. The jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the indictment; but guilty of an assault and battery as charged in the indictment, and assess his fine at \$500." *Held*, 1st. This is an acquittal of the prisoner of the felony charged, whether of the "malicious" or "unlawful" cutting, etc., with intent to maim, etc.; and it is a conviction for the misdemeanor of assault and battery. MONCURE, J., observes in this connection: "The offence of assault and battery, which is a mere misdemeanor is substantially charged in the indictment in this case, the acts which constitute it being part of the felony therein charged. If the accused had been convicted of the felony, then the misdemeanor would have been merged in the felony. But if the accused was acquitted of the felony, it was competent for the jury to convict him of the misdemeanor, to wit: Of the assault and battery substantially charged in the indictment." 2nd. Though the indictment only used the word "malicious," the jury might have found the prisoner guilty of the "unlawful" cutting, etc., with intent, etc. 3rd. Though the indictment is for a felony, the assault and battery being charged in it, the prisoner may be acquitted of the felony, and convicted of the misdemeanor; and the jury may assess a pecuniary fine upon him, but not imprisonment. 4th. Upon such a conviction the court may sentence the prisoner to be imprisoned in the county jail, in addition to the pecuniary fine.

In State *v. Thompson*, 30 Mo. 470,

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an indictment charging that the defendant on, etc., at, etc., did then and there feloniously assault one J. D. with a certain handle of a hoe, a deadly weapon, by feloniously assaulting and striking him, the said J. D., then and there feloniously to maim, wound and disfigure, contrary, etc., was held to be a good indictment under R. C. 1855, p. 567, § 38, entitled an act concerning crimes and punishments. SCOTT, J., in the opinion of the court, observes: "The thirty-eighth section of the act concerning crimes and punishments, punishes all assaults made with intent to kill, or to commit any robbery, rape, burglary, manslaughter, or other felony. This indictment charges the defendant with having made a felonious assault with an intent feloniously to maim, wound and disfigure. A felonious maiming is a felony. The defendant is then charged with an assault with intent to commit a felony, and the indictment is within the words of the law. Whether the offence laid in the indictment is a common assault and battery not indictable, would be a question arising on the trial on the evidence. It is sufficient that the charge is made a felony; whether it is or not will be determined by the evidence. The weapon used in making the assault is alleged to be a dangerous one. See also State *v. Brown*, 60 Mo. 141; Molette *v. State*, 49 Ala. 18; Com. *v. Reed*, 3 Am. Law 140; Scott *v. Com.*, 6 S. & R. (Pa.) 224.

In Molette *v. State*, 49 Ala. 18, PETERS, J., observes: "The offence of mayhem is a felony under the Revised Code, § 3541, and the biting off an ear, if done maliciously, intentionally and unlawfully, is mayhem."

In Com. *v. Reed*, 3 Am. Law J. 140, BUFFINGTON, J., observes: "Whether mayhem be felony or misdemeanor, it is properly charged as being done *feloniously*." See also Scott *v. Com.*, 6 S. & R. (Pa.) 224.

affray will not constitute a defence;¹ nor will the consent of a party, to the injury being inflicted upon himself, excuse him from

1. *State v. Simmons*, 3 Ala. 497; *State v. Gerkin*, 1 Ired. (N. Car.) 121; *State v. Danforth*, 3 Conn. 112; *State v. Evans*, 1 Hayw. (N. Car.) 325; *State v. Crawford*, 2 Dev. (N. Car.) 425.

In *State v. Evans*, 1 Hayw. (N. Car.) 325, the court held that the act once proved to be committed the law will presume it done intentionally.

Biting Off Finger.—The law requiring the act of biting off the finger to be done on purpose, unlawfully and with intent to maim, when the act itself is proved, the law will presume it was done on purpose and with intent to maim, as it actually was a maim, till the evidence sheweth the contrary; such as that it was done by accident, or done in such a manner as was not likely to be attended with that effect; or that it was done for the necessary self defence of the party against some great bodily harm attempted by the person maimed, and that there was no other means of preventing the mischief, or other circumstances of the like kind. If a sudden rencounter shall be deemed sufficient to excuse the party maiming from the penalties of this branch of the act, it will be of very little avail, for then in every sudden affray, the one party may bite off the nose, fingers, etc., of the other and excuse himself by saying it was done in the heat of passion upon a sudden affray. See also *State v. Skidmore*, 87 N. Car. 509; *Terrell v. State*, 86 Tenn. 523; *Davis v. State*, 22 Tex. App. 45; *Bowers v. State*, 24 Tex. App. 542; *State v. Hair*, 37 Minn. 351; *Eskridge v. State*, 25 Ala. 30.

In *State v. Gerkin*, 1 Ired. (N. Car.) 121, in an indictment under the forty-eighth section of the thirty-fourth chapter of the Revised Statutes, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. It is not necessary under this statute to prove malice aforethought or a preconceived intention to commit the maim.

Not Necessary that the Whole Ear Should be Bitten Off.—To constitute a maim, under this statute by biting off an ear, it is not necessary that the whole ear should be bitten off; it is

sufficient if a part only is taken off, provided it is enough to alter and impair the natural personal appearance and to ordinary observation to render the person less comely. See also in this last connection, *State v. Abram*, 10 Ala. 928.

In *State v. Skidmore*, 87 N. Car. 509, upon a trial for an indictment for maim, it appeared that while the parties were engaged in fighting the defendant bit off a part of one of prosecutor's ears and the judge charged it was incumbent on defendant to satisfy the jury that the act was done in self defence. It was also held that it was not error to refuse to charge that if the severance of the ear while in defendant's teeth resulted from the violent manner in which the parties were separated, it would not be a maim done "on purpose with intent to disfigure," for this the law presumes when the act is proved. See also *State v. Norton*, 82 N. Car. 628; *Wright v. State*, 9 Yerg. (Tenn.) 342; *Worley v. State*, 11 Humph. (Tenn.) 172; *Young v. State*, 11 Humph. (Tenn.) 200.

In *State v. Hair*, 37 Minn. 351, in a prosecution for maiming under section 177 of the Penal Code, the court held that the injury must be wilfully inflicted "with the intent to injure, disfigure or disable;" but the "intent" is to be presumed from the act of maiming, unless the contrary appears. The "intent" referred to in the statute may be defined to be the purpose at the time to do, without lawful authority or necessity, that which the statute forbids; and the words "intent to injure" refer to injuries of the same class specified in the statute, or such as might reasonably be expected to be dangerous, or result in serious bodily harm.

In *State v. Jones*, 70 Iowa 505, on an indictment for disfiguring the person of another in the midst of an altercation, held that the court properly instructed the jury that a specific intent on the part of the defendant to disfigure was an essential element of the crime, but that such intent might be inferred or presumed if he did the act deliberately and the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act, but that they ought to consider all the circumstances of the transaction in determining whether the specific intent existed in his mind at the time, or

punishment. He will, on the contrary, be guilty of the crime in the same degree and manner, with the party who inflicted the injury.¹

While the "intent" under the New York statute must amount to an antecedent and secret purpose to commit the act and not a doing of the act in a sudden and unlooked for affray with no evidence of premeditation,² yet in other States it has been held that it is not necessary that the specific intent should exist previous to the conflict if the act is committed maliciously and on purpose, in pursuance of a design formed during the conflict.³

VIII. WILFUL AND MALICIOUS.—To constitute the offence of mayhem, the act must be done both wilfully and maliciously. A *wilful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification.

A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act, intentionally done without legal justification or excuse.⁴

IX. INDICTMENT.—While at common law an indictment for mayhem must not only charge the facts which constitute the injury but must also charge, as a conclusion from the facts averred, that the party was "maimed," it is not necessary in an indictment under a statute which describes a particular act, or acts, as a crime of a particular grade, after charging the acts, to state the legal conclusion that they amount to the crime of the grade declared, for such is the conclusion of the law on the facts alleged.⁵ In some

whether he did the act deliberately. In such case, the court properly refused to instruct the jury that, as an intent to disfigure was an essential element of the crime, they would not be warranted in convicting unless there was other evidence of such intent than the mere presumption which might arise from the doing of the act in the manner in which it was done. See also *Ridenour v. State*, 38 Ohio St. 272.

1. 1 East P. C. 396; 1 Hawk. P. C. 108; *Champer v. State*, 14 Ohio St. 437; *State v. Beck*, 1 Hill (S. Car.) 363; *Barholt v. Wright*, 45 Ohio St. 177; *Shay v. Thompson*, 39 Wis. 540; *Galbraith v. Fleming*, 60 Mich. 403.

2. *Foster v. People*, 50 N. Y. 598; *Godfrey v. People*, 63 N. Y. 207; *Burke v. People*, 4 Hun (N. Y.) 481; *Tully v. People*, 67 N. Y. 15. See also *Molette v. State*, 49 Ala. 18; *Slattery v. State*, 41 Tex. 619.

3. *State v. Simmons*, 3 Ala. 497; *State v. Hair*, 37 Minn. 351; *State v. Jones*, 70 Iowa 505; *Ridenour v. State*, 38 Ohio St. 272; *State v. Gerkin*, 1

Ired. (N. Car.) 121; *State v. Evans*, 1 Hayw. (N. Car.) 325; *State v. Crawford*, 2 Dev. (N. Car.) 425; *State v. Skidmore*, 87 N. Car. 509; *State v. Bloedow*, 45 Wis. 279; *Hayden v. State*, 4 Blackf. (Ind.) 546; *Baker v. State*, 4 Ark. 56; *United States v. Gunter*, 5 Dak. 234. Where the court held "that under Rev. Stat. U. S., section 5348, prescribing the punishment of one who shall maliciously put out the eye, etc., of another, with intent to maim and disfigure, a premeditated intent and design on the part of defendant need not be shown."

See generally CRIMINAL LAW, vol. 4, p. 681.

4. *Bowers v. State*, 24 Tex. App. 542; *Wright v. State*, 9 Yerg. (Tenn.) 342; *State v. Hair*, 37 Minn. 351; *State v. Gerkin*, 1 Ired. (N. Car.) 121; *Molette v. State*, 49 Ala. 18; *Worley v. State*, 11 Humph. (Tenn.) 172.

5. *Guest v. State*, 19 Ark. 405; *Anderson v. State*, 5 Ark. 444; *Absence v. State*, 4 Porter (Ala.) 397; *Chick v. State*, 7 Humph. (Tenn.) 161; *Benham*

States the indictment need not charge that the act was done feloniously,¹ but must charge that the offence was committed on purpose as well as unlawfully.²

In general it may be said, that in an indictment for mayhem, whether or not it be absolutely necessary to employ the exact words of the statute, it is well settled, that the offence as to facts and circumstances must be brought within the provisions and limitations of the statute creating it either by the use of the terms employed in the act, or others clearly and necessarily equivalent.³

X. CONVICTION OF LESSER OFFENCE.—On an indictment for mayhem, there might be a conviction of any lesser offence (*e. g.*, assault and battery) which the indictment includes.⁴

XI. JOINDER OF OFFENCES.—Offences of the same character, and subject to the same punishment, though differing in degree may be united in the same indictment and the prisoner tried on both at the same time and convicted of one and not of the other.⁵

v. State, 1 Iowa 542; *Rifle-maker v. State*, 25 Ohio St. 395; *Ridenour v. State*, 38 Ohio St. 272; *Kitchens v. State*, 80 Ga. 810.

In *Angel v. Com.*, 2 Va. Cas. 231, although the statute against unlawful shooting, etc., affixes a penalty when the act is done with intent to maim, disfigure, disable or kill (in the disjunctive), yet the indictment should charge the intents conjunctively. Although *all* of the intents be laid, yet proof of *either* supports the indictment.

In *Republica v. Reiker*, 3 Yeates (Pa.) 282, the court held an indictment on the first clause of the sixth section of the act of April 22nd, 1794, against maiming, leaving out the words "lying in wait," or on the second clause leaving out the word "voluntary," is defective.

1. *State v. Absence*, 4 Port. (Ala.) 397.

2. *State v. Ormond*, 1 Dev. & Batt. (N. Car.) 119; *State v. Green*, 7 Ired. (N. Car.) L. 39.

3. *Com. v. Clark*, 6 Grat. (Va.) 675; *Com. v. Israel*, 4 Leigh (Va.) 675; *Roberts v. Com.*, 10 Leigh (Va.) 686; *Com. v. Lester*, 2 Va. Cas. 198; *Peas v. Com.*, 2 Gratt. (Va.) 629; *Com. v. Hamlett*, 3 Gratt. (Va.) 82; *Howell v. Com.*, 5 Gratt. (Va.) 664; *United States v. Gunter*, 5 Dak. 234.

Miscellaneous.—In *State v. Green*, 7 Ired. (N. Car.) L. 39, the court held that an indictment under the North Carolina statute (R. S., ch. 34, § 48) for maiming by biting off an ear need not state whether it was the right or left ear.

In *Angel v. Com.*, 2 Va. Cas. 231, an indictment under the Virginia statute

against mayhem charged a shooting with intent to maim, disfigure, disable and kill; while the statute used the disjunctive *or*, instead of the conjunctive as in the indictment. *Held*, that the indictment was good.

In *State v. Ailey*, 3 Heisk. (Tenn.) 8, the court held that an indictment for mayhem which charges that the defendant slit, cut off and bit off the ear of a person, is not bad for duplicity.

In *State v. Mairs, Cox* (N. J.) 453, it was held that an allegation that the nose of the prosecutor was bitten off is within a statute, so as to imply a cutting off of the nose.

In *State v. Vowels*, 4 Oreg. 324, it was held proper to designate as mayhem the maliciously and feloniously tearing off of an ear.

4. *Com. v. Blaney*, 133 Mass. 571; *State v. Bloedow*, 45 Wis. 279. See also *State v. White*, 45 Iowa 325; *State v. Connor*, 59 Iowa 357; *State v. Waters*, 39 Me. 54; *State v. Phinney*, 42 Me. 384; *State v. Butman*, 42 N. H. 490; *State v. Reed*, 40 Vt. 603; *Beckwith v. People*, 26 Ill. 500; *Wall v. State*, 23 Ind. 150; *State v. Thompson*, 30 Mo. 470; *Canada v. Com.*, 22 Gratt. (Va.) 899; *Cameron v. State*, 13 Ark. 712; *Guest v. State*, 19 Ark. 405; *Strawn v. State*, 14 Ark. 549; *Benham v. State*, 1 Iowa 542; *State v. Fisher*, 103 Ind. 530; *Mills v. State*, 52 Ind. 187; *Richie v. State*, 58 Ind. 355; *Powers v. State*, 87 Ind. 144, 145; *Behymer v. State*, 95 Ind. 140; *Barnett v. State*, 100 Ind. 171; *Hunter v. Com.*, 79 Pa. St. 503.

5. *Baker v. State*, 4 Ark. 56; *People v. Gates*, 13 Wend. (N. Y.) 312; *Peo-*

XII. RESPONSIBILITY OF CONSPIRATOR FOR THE ACTS OF HIS CO-CONSPIRATORS.—Upon this subject in connection with the crime of mayhem the rule as deduced from the authorities seems to be that each conspirator is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful acts specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to the common design.¹

MEANDER—(See also **METES AND BOUNDS**).

Meander means to follow a winding or flexuous course; and where in a deed one of the boundaries of the land conveyed is designated thus, viz.: "thence with the meander of the river," etc., it must mean a meandered line—a line which follows the sinuosities of the river, or, in other words, that the river is the boundary of the land claim between the points indicated.²

ple *v. Rynders*, 12 Wend. (N. Y.) 425, 430; *State v. Ailey*, 3 Heisk. (Tenn.) 8; *Whiteside v. State*, 4 Coldw. (Tenn.) 175, 182; *State v. Harris*, 11 Iowa 414; *McBride v. State*, 2 Eng. (Ark.) 374; *Benham v. State*, 1 Clarke (Iowa) 542. 397.

1. *Bowers v. State*, 24 Tex. App. 542; *Lamb v. People*, 96 Ill. 73; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 37; *Williams v. State*, 81 Ala. 1; 9 Crim. Law Mag. 480; *Kirby v. Stat.* 23 Tex. App. 13; *Spies v. People*, 122 Ill. 1; *State v. Absence*, 4 Port. (Ala.) 397.

2. *Turner v. Parker*, 14 Oreg. 340; *Schurmeier v. Railroad Co.*, 10 Minn. 100.

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